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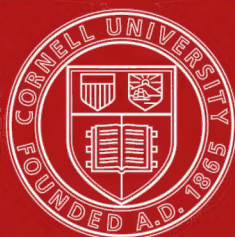
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Cases on private corporations : arranged



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CASES
ON
PRIVATE CORPORATIONS

ARRANGED FOR USE AS A TEXT-BOOK

BY
George Miller
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PROFESSOR OF LAW IN COLUMBIA COLLEGE

VOLUME I

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THE compiler is under great obligations to
Professor JEREMIAH SMITH and Professor JAMES BARR AMES,
of Harvard University, for their generous assistance in
placing their lists of cases on corporations at his service.

COLUMBIA COLLEGE, May, 1892.

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CASES ON PRIVATE CORPORATIONS.

PART FIRST.

THE BODY CORPORATE.

CHAPTER I.

NATURE OF A CORPORATION.

THOMAS *v.* DAKIN.

(22 *Wend.* 9. *Supreme Court of New York.* 1839.¹)

CHIEF JUSTICE NELSON : —

This is an action brought by the plaintiff, as president of the Bank of Central New York, an association formed under what is familiarly known as the General Banking Law, passed April 18, 1838, to recover several demands due the institution.

The defendant has demurred to the declaration, and urges the unconstitutionality of the law, by way of defence; and it is insisted, in his behalf: 1, That the associations formed under this law are corporations; and 2, That a general law authorizing the creation of these bodies is inconsistent with the ninth section of the seventh article of the Constitution. On the part of the plaintiffs, it is urged in reply: 1. That the associations are not corporations; 2. That if they be, the act authorizing them may be passed by a majority bill; and 3. If within the ninth section, still the law may be passed by two-thirds of the members elected.

I. Are these associations corporations? In order to determine this question, we must first ascertain the properties essential to constitute a corporate body, and compare them with those conferred upon the associations; for if they exist in common, or substantially correspond, the answer will be in the affirmative. A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term "corporation" in its creation is of itself unimportant, except as it will imply the possession of these. They may be expressly conferred, and then they denote this

¹ The statement of facts is omitted.

legal being as unerringly as if created in general terms. It has been well said by learned expounders, that a corporation aggregate is an artificial body of men, composed of divers individuals, the ligaments of which body are the franchises and liberties bestowed upon it, which bind and unite all into one, and in which consists the whole frame and essence of the corporation.

The "franchises and liberties," or, in more modern language, and as more strictly applicable to private corporations, the powers and faculties, which are usually specified as creating corporate existence, are: 1. The capacity of perpetual succession; 2. The power to sue and be sued, and to grant and receive, in its corporate name; 3. To purchase and hold real and personal estate; 4. To have a common seal; and 5. To make by-laws. These *indicia* were given by judges and elementary writers at a very early day; since which time the institutions have greatly multiplied, their practical operation and use have been thoroughly tested, and their peculiar and essential properties much better understood. Any one comprehending the scope and purpose of them, at this day, will not fail to perceive that some of the powers above specified are of trifling importance, while others are wholly unessential. For instance, the power to purchase and hold real estate is not otherwise essential than to afford a place of business; and the right to use a common seal, or to make by-laws, may be dispensed with altogether. For as to the one, it is now well settled that corporations may contract by resolution, or through agents, without seal; and as to the other, the power is unnecessary in all cases where the charter sufficiently provides for the government of the body. The distinguishing feature, far above all others, is the capacity conferred, by which a perpetual succession of different persons shall be regarded in the law as one and the same body, and may at all times act, in fulfilment of the objects of the association, as a single individual. In this way, a legal existence, a body corporate, an artificial being, is constituted, the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man. While the aggregate means and influence of all are wielded in effecting it, the operation is conducted with the simplicity and individuality of a natural person. In this consists the essence and great value of these institutions. Hence it is apparent that the only properties that can be regarded strictly as essential, are those which are indispensable to mould the different persons into this artificial being, and thereby enable it to act in the way above stated. When once constituted, this legal being created, the powers and faculties that may be conferred are various, — limited or enlarged, at the discretion of the Legislature, and will depend upon the nature and object of the institution, which is as competent as a natural person to receive and enjoy them. We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity: 1. To have perpetual succession un-

der a special name and in an artificial form; 2. To take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and 3. To receive and enjoy in common, grants of privileges and immunities.

We will now endeavor to ascertain with exactness, the powers and attributes conferred upon these associations by virtue of the statute. The first fourteen sections (1 to 14) prescribe the duties of the comptroller in furnishing notes for circulation, taking the required securities, etc. The 15th provides, that any number of persons may associate to establish offices of discount, deposit, and circulation. The 16th, that they shall make and file a certificate, specifying: 1. The name to be used in the business; 2. The place where the business shall be carried on; 3. The amount of capital stock, and number of shares into which divided; 4. The names of the shareholders; 5. The duration of the association. The 18th confers upon the persons thus associating, the most ample powers for carrying on banking operations, together with the right "to exercise such incidental powers as shall be necessary to carry on such business;" also to choose a president, vice-president, cashier, and such other officers and agents as may be necessary. By the 21st and 22d sections, contracts, notes, bills, etc., shall be signed by the president and cashier; and all suits, actions, etc., are to be brought in the name of, and also against the president for the time being; and not to abate by his death, resignation, or removal, but to be continued in the name of the successor. 24th section: The association may purchase and hold real estate, etc., the conveyance to be made to the president, or such other officer as shall be designated, who may sell and convey the same free from any claim against shareholders. 19th section: The shares of capital stock to be deemed personal property, transferable on the books of the association; and every person becoming a shareholder by such transfer, shall succeed to all the rights and liabilities of the prior holder. 23d section: No shareholder to be personally liable; and the association is not to be dissolved by the death or insanity of any shareholder.

1. Upon a perusal of these provisions, it will appear that the association acquires the power to raise and hold for common use any given amount of capital stock for banking purposes, which, when subscribed, is made personal property, and the several shares transferable the same and with like effect as in case of corporate stock; to assume a common name under which to manage all the affairs of the association; to choose all officers and agents that may be necessary for the purpose, and remove and appoint them at pleasure. It will hence be seen, that although the association may be composed of a number of different persons, holding an interest in the capital stock, its operations are so arranged that they do not appear in conducting its affairs; all are so bound together, so moulded into one, as to constitute but a single body, represented by a common name, or names

(the knot of the combination), and in which all the business of the institution is conducted by common agents. In this way it purchases and holds real and personal property, contracts obligations, discounts bills, notes, and other evidences of debt, receives deposits, buys gold and silver bullion, bills of exchange, etc., loans money, sues and is sued, etc. It is true, some portion of the business is conducted in the assumed name, and some in the name of the president for the time being; but this in no manner changes the character of the body. A corporation may have more than one name; it may have one in which to contract, grant, etc., and another in which to sue and be sued; so it may be known by two different names, and may sue and be sued in either; and the name of the president, his official name, or any other, will answer every purpose (2 Bacon's Abr. 5; 2 Salk. 451; 2 *id.* 257; Ld. Raym. 153, 680). The only material circumstance is a name, or names, of some kind, in which all the affairs of the company may be conducted. So much, and no more, is essential to give simplicity and effect to the operation. An artificial being is thus plainly created, capable of receiving all the ample powers and privileges conferred upon the associations, and of managing their diversified concerns in an individual capacity. All business is to be conducted in a common or proper name.

2. This artificial being possesses the powers of perpetual succession. Neither sale of shares, nor death of shareholders, affects it; if one should sell his interest or die, the purchaser or representative, by operation of law, immediately takes his place. § 19. Nor can the insanity of a member work a dissolution. *Id.* Officers and agents for conducting the business of the association are secured. In case of vacancy, by death or otherwise, the place may at once be filled. § 18. For the entire duration, therefore, of the association, and which may be without limit, § 16, sub. 5, the whole body of shareholders, though perpetually shifting, constitute the same uniform, artificial being which is to be engaged through the instrumentality of officers and agents in conducting the business of the concern, and no member is personally liable. § 23. Then, as to the powers conferred, without again specially recurring to them, it will be seen at once that the associations possess all that are deemed essential, according to the most approved authorities, to constitute a corporate body. They have a capacity: 1. To have perpetual succession under a common name and in an artificial form; 2. To take and grant property, contract obligations, to sue and be sued by its corporate name, in the same manner as an individual; 3. To receive grants of privileges and immunities, and to enjoy them in common. All these are expressly granted, and many more, besides the general sweeping clause, "to exercise such incidental powers as shall be necessary to carry on such business" (meaning the business of banking), under which even the seal and right to make by-laws are clearly embraced, if essential in conducting the affairs of the institution.

II. Assuming that the associations are to be regarded as corporate bodies, was it competent for the Legislature to enact the law by a majority bill? The solution of the question depends upon a construction of the ninth section of the seventh article of the constitution, which, leaving out what is not material, is as follows: "The assent of two-thirds of the members elected to each branch of the Legislature, shall be requisite to every bill 'creating, continuing, altering, or renewing any body politic or corporate.'" ¹

Upon the whole, I am of opinion, 1. That these associations are corporations; 2. That the Legislature possesses no power to pass a general law like the one under consideration, by a majority bill; and 3. That they may pass it by two-thirds of the members elected.

The plaintiff is, therefore, entitled to judgment on the demurrer, with leave to amend on the usual terms.²

Judgment for plaintiff.

WARNER v. BEERS.

BOLANDER v. STEVENS.

(23 Wend. 103. Court for the Correction of Errors of New York. 1840.)

IN the first above entitled cause the declaration commenced in the name of "Joseph D. Beers," described as "President of the North American Trust and Banking Company, an association doing business in the City of New York, under and by virtue of an act of the Legislature of the State of New York, entitled 'An act to authorize the business of banking,' passed April 18, 1838, who prosecutes for and on behalf of the said association;" and then was set forth in the usual form a count on a promissory note by the third indorsee against Warner and Ray as indorsers. The declaration also contained the common money counts, and the *insimul computassent*, alleging the debts to have arisen, and the promises to have been made to "the said association," and concluded with the words "to the damage of the said association of five hundred dollars; and therefore the said plaintiff as president as aforesaid, brings suit, etc."

The declaration in the second suit was like the preceding, except that it contained only the common money counts, and the count on the *insimul computassent*. To these declarations, demurrers were put in by the defendants respectively.³

¹ The rest of the opinion relating to this question is omitted.

² The opinions of COWEN and BRONSON, JJ., are omitted.

³ A part of the statement of the case is omitted.

The two demurrers were brought to argument before the Supreme Court at the January term, 1840, and judgment given in both cases for the plaintiffs. The court referred, for the reasons of the judgment, to the opinions delivered by Chief-Justice Nelson, Mr. Justice Bronson and Mr. Justice Cowen, in the case of *Thomas v. Dakin* (22 Wendell, 9 *et seq.*). Both cases were removed by writs of error to the Court for the Correction of Errors, and were brought on to argument on the 18th February, 1840.

After advisement the following opinions were delivered :¹

BY SENATOR VERPLANCK :—

The decision of these causes seems to me to depend wholly upon that of the question, whether or no associations with constitutions, powers, and incidents, similar to those authorized under the General Banking Law, are bodies corporate and politic; or, in other words, whether the General Banking Law of 1838 is void, because it was not passed with the expressed assent of two-thirds of all the members of the Legislature.

The Supreme Court think that they “must, on these records, presume the General Banking Law to have been passed by two-thirds of all the members of the Legislature.” Judge Cowen adds: “We must clearly do so until the fact is denied by plea. The requisite constitutional solemnities must always be presumed to have taken place until the contrary shall be clearly shown. Should the defendant withdraw his demurrer, and plead specially that the law in question did not receive the assent of two-thirds as required by the constitution, it will then be in order to pass upon the validity of such an objection.” Judge Bronson concurs more briefly to the same effect.

Now it appears to me that this point was rightly presented on the demurrers in these cases, so as to authorize and demand the decision of the court.²

The companies to be formed under it are called associations, a name synonymous with fellowships or partnerships. They are not treated in the law as bodies politic; those usual words creating corporations, so customary with us as to seem essential, are not found in the act. I think that no man can read the statute, without perceiving that the Legislature did not intend to create bodies corporate in the legal sense; and that if they have done so, it has been by the imperious operation of law controlling their clear intent. . . .

What then is the strict definition of the phrase “bodies politic and corporate”?

Definitions differ in their character according to the nature of the thing to be defined. Words denoting real substances existing in nature, or any of the ordinary acts of the mind, are all to be ex-

¹ The opinions of the PRESIDENT OF THE SENATE, the CHANCELLOR, and SENATOR ROOT, are omitted.

² The rest of the opinion relating to this point is omitted.

plained and defined by stating the facts and circumstances that usually accompany or follow such things or acts. The word is made intelligible only by a description, by the enumeration of the attributes or circumstances in which it agrees or differs with other things of qualities somewhat similar. Thus, a name conveying an idea generalized from many individuals is defined and explained by describing the qualities ordinarily found in such individuals. It is so in the definitions of natural objects, which are rather descriptions than definitions. It is often so in the definition of moral actions. But it is never so as to words or phrases denoting any artificial and purely technical conceptions: ideas framed by the mind itself, and not otherwise found in nature. Such words or ideas are susceptible of a strict definition. In the logical phrase, they are capable of an essential definition, comprehending the whole meaning essential to the thing being what it is; and this for the obvious reason, that the meaning of the word is man's own meaning, being the creation of his own mind, and he can state precisely all that is essential to it. It is otherwise with the works of God, which man can describe only as far as known to him. Every such definition must be but a description of qualities, and that necessarily imperfect, since every work of the Creator possesses innumerable qualities which no human description or definition can grasp.

Strict and essential definitions can generally be given of the terms of positive jurisprudence, and particularly so in the extremely technical and artificial system of the ancient English law. This is remarkably the case, for instance, in regard to our common-law terms of real estate, as fee, lease, warranty, grant, covenant, reversion, remainder, etc.; all of which are defined precisely and essentially, not explained by mere attributes. Bodies corporate belong to that system, and thence do we immediately derive them. What, then, is a body corporate? What is its necessary and essential meaning? "It is called a body corporate," says Lord Coke, "because the persons composing it are made into one body." "It is only *in abstracto*, and rests only in contemplation of law" (10 R. 50). So again he says (1 Inst. 202, 250), "Persons capable of purchasing are of two sorts, persons natural created of God, and persons created by the policy of man, as persons incorporated into a body politic." If, leaving the quaint scholastic teaching of the fathers of English law, we come to the clearer and directer sense of our own Marshall, we find the same prevailing idea. "A body corporate is an artificial being, invisible, intangible, existing only in contemplation of law. Being the creature of law, it possesses only the properties conferred upon it by its charter. Among the most important of these are immortality, and, if the expression may be allowed, individuality" (4 Wh. R. 636; 1 Peters, R. 46). Again: "It is precisely what the act of incorporation makes it, derives all its powers from that act, and is capable of exerting its faculties only in the manner which that act

authorizes." "Within the limits of the properties conferred by its charter, it can," says Blackstone, "do all acts as natural persons may." "In corporations," says Professor Woodeson, "individuals are invested by the law with a political character and personality, wholly distinct from their natural capacity." "A corporation," says Kyd on Corporations, 13, "is not a mere capacity, but a political person in which many capacities reside." Thus, then, the essential legal definition that covers the whole ground, and expresses the very essence of the being of a body corporate, is this: "It is an artificial legal person, a succession of individuals, or an aggregate body considered by the law as a single continuous person, limited to one peculiar mode of action, and having power only of the kind and degree prescribed by the law which confers them." Such is the established notion of our common law. Such, too, as far as I can trace it, is the doctrine of the modern civil law, as modified by the jurisprudence of the European continent. "Communities that are lawfully established (*i. e.*, corporations)," says Domat, one of the great teachers of the anti-revolutionary French Civil Law, "are in the place of persons, and their union, which renders common all their interest, makes them to be considered as one single person." Domat, Civil Law, Lib. I., tit. 15. To the same effect a somewhat older Italian civilian speaks, Oldradus De Ponte, as quoted by Sir Robert Sawyer, in his very able and learned argument in the case of the city of London (8 St. Tr. 1175). "*Licet non habent veram personam, habent personam fictione juris.*" So the older German jurisprudence, as founded on the Roman law, also held the idea of personality as essential to corporations. Heineccius, one of the most distinguished civilians of that school in the last century, in his instructive essay on the legal history of the corporate guilds or societies of trade so common in Germany, speaks of this personality as an attribute of all corporations. "*Universitates et contrahere possunt et delinquere, quippe quae moraliter unam representant personam.*" De Collegiis Opificum, in Germania, cap. 77, § 19. This doctrine of the modern civilians of France, Italy, and Germany, may be traced up even to the jurists of the Code and Pandects. "*Personæ vice fungitur municipium et decuria.*" Pan. 1, 22, de Fide Juss. I do not cite these civilians as direct authorities, but mainly to show how deeply and generally this pervading idea of legal personality and artificial individuality entered into and formed the characteristic of all corporate bodies, in those systems of law which might indirectly affect or govern our own, or tend to influence even the popular use of our legal terms.

So far was this principle of corporate personality carried in our old common law, that reasons were expressly assigned why a corporation could not be excommunicated or punished for a crime. "Because it has no soul," said Lord Coke, which, however ludicrously it may now sound, was but saying quaintly, and in the style of that day, what in modern times would be expressed by saying that a corpora-

tion, being an artificial and not a moral person, must be incapable of guilt. The very able argument in the celebrated historical case of the charter of London, in 1682, went a good deal into these refinements, and it was held on one side that a political person had a mind and reason, according to Lord Chief Justice Hobart, and that its reason was expressed by its by-laws; whilst the Attorney-General (whom Bishop Burnet has egregiously wronged in calling him "a hot, dull, man"), argued most acutely, as well as very learnedly, in support of the capacity of a corporation to incur political, if not moral, guilt and punishment.

All these, it is true, are refinements of technical reasoning, in a taste and fashion of thought which have passed away; but they prove conclusively how strong and undoubted was that legal principle of personality upon which these mere inferences and nice distinctions were founded.

In order to continue the existence of such an artificial person, perpetual succession is ordinarily necessary, though it is not strictly essential, for it may be confined to any given number of lives in being, holding in a sort of corporate joint tenancy, of which I think examples may be found. As a legal person, it has only the powers and properties specifically conferred upon it; and can possess and exercise no others, except such as are absolutely necessary to the exercise of the powers expressly given. This is the enactment of our Revised Statutes, which, as our revisers rightly said in their report on that title of the law, is "declaratory of a principle of law frequently recognized by our courts, and which it was deemed useful to confirm by legislative authority." To these are added certain legal incidents by the common law, also declared in our statute, and common to all corporations, as to sue and be sued, hold and convey real and personal property, to appoint officers for its services, and to make by-laws for the management of its affairs. To these more important rights, the law adds the external evidence of a name and a common seal. This last, though apparently a matter of form, is not without effect, any more than the legal consequences of seals to instruments in England and this State, so widely different from those of other legal systems, where the distinction between sealed and unsealed instruments is unknown. It is only through a common seal and name that any grant of lands, or covenant touching them, can be made by a corporation.

There are several very useful and beneficial accessory powers or attributes, very often accompanying corporate privileges, especially in moneyed corporations, which, in the existing state of our law, as modified by statutes, are more prominent in the public eye, and perhaps sometimes in the view of our courts and legislatures, than those which are essential to the being of a corporation. Such added powers, however valuable, are merely accessory. They do not in themselves alone confer a corporate character, and may be enjoyed by unincor-

porated individuals. Such a power is the transferability of shares, whereby investments may be made, without the owner losing the future control of his funds under changes of circumstances. Such, too, is the limited responsibility by which the stockholder, having once fairly paid up his share of the capital, is exempted from further personal liability. So, too, the convenience of holding real estate for the common purposes, exempt from the legal inconveniences of joint tenancy or tenancy in common. Again: there is the continuance of the joint property for the benefit and preservation of the common fund, indissoluble by the death or legal disability of any partner. Every one of these attributes or powers, though commonly falling in with our notions of a moneyed corporation, is quite unessential to the legality of a corporation, may be found where there is no pretence of a body corporate, nor will they make one if all were combined, without the presence of the essential quality of legal individuality. This distinction has been observed and marked by Mr. Kyd (Kyd on Corporations, 13), with logical acuteness and precision: "A corporation is a political person, capable, like a natural person, of enjoying a variety of franchises. It is to a franchise as the substance to its attribute. It is something to which many attributes belong, but it is itself something distinct from those attributes."

Thus, the transferability of shares is not essential to a corporation. For instance, it does not enter into the constitution of our chartered colleges, academies, hospitals, and other corporate institutions founded by public endowment, or private beneficence. It does not enter into the charters of incorporated scientific and literary societies. It does not even form a feature in our corporate societies for mutual benefit or charity, in the funds of which the members have a beneficial interest. On the other hand, such right of transfer may be incorporated into partnership articles, and become a fundamental condition of them. The general rule, in absence of any express stipulation, is indeed the reverse of this, and in practice it is comparatively rare amongst us. Hence, it has become common to consider such transferability as a clear indication of a corporate character. "We have seen," says Collyer on Partnership, 647, "that in common cases, a partner is precluded from assigning his interest to a stranger, so as to make that stranger a partner. To prevent this rule from affecting the stockholder of a trading company, there must be provision in the deed of settlement enabling each stockholder to assign or transfer his share." He then adds the limitations rendered necessary in England by the Bubble Act, which has no corresponding statute here, and the conclusion of the English decisions is, that by the common law shares may be made transferable absolutely. *King v. Webb* (14 East, 406); *Pratt v. Hutchinson* (15 id. 515); *Nichols v. Crosby* (2 Barn. & Cres. 814). See also other cases collected by Wordsworth on Joint Stock Companies. Again, the joint stock companies authorized by statutes in England are avowedly and confessedly not corporations; and there,

says Wordsworth on Joint Stock Companies, 183, "It is the object of all companies to render their shares as negotiable as possible, so that in fact the restrictions imposed by the deed of settlement upon the transfer of shares are generally very few, and seldom extend beyond requiring the transferor's name, etc., being registered in the books of the company." The language of two or three of the later acts of Parliament is specially worthy of attention on this subject. They declare, as strongly as words can declare legislative intention, that transferability of shares, and the consequent succession, can be authorized in common-law copartnerships without giving to such companies any corporate existence, or rendering them the less copartnerships in the strict legal sense of the term. In the statute of 6 Geo. IV. ch. 42, it is enacted, "That it shall be lawful for any member of any such society or copartnership, their respective executors, administrators, or assigns, to sell and transfer any share or shares, or portion or portions of, or the entire stock or interest which any such member may possess in such society or copartnership, and the property or funds thereof, subject to such regulations and restrictions as may be required by the constitution of such society or copartnership." This statute is entitled "An act for the better regulation of copartnerships of certain bankers in Ireland." The preamble and recitals, and all the sections, speak of these banking firms as mere copartnerships. This strongly marked and repeated recognition of them as such in the very sections authorizing that transferability and its consequent succession, which have been insisted on as infallible marks of corporate character, leave no doubt in my mind as to the intention and understanding of the British Parliament, that in authorizing associations with these and other powers similar to those granted by our banking law, they were not creating bodies politic or corporate.

But this is not all. Parliament has not left its meaning and intention to be a matter of inference. In 1838, another act was passed amendatory of the one just cited, and of another in relation to bankers in England, which gave similar powers. That amendatory statute, after reciting and referring to the titles of these prior acts, adds in the preamble, "And whereas it is expedient that the said act should be amended, so far as relates to the powers enabling any such copartnership, not being a body corporate, to sue any of its own members, and the powers enabling any member of any such copartnership, not being a body corporate, to sue the said copartnership. Be it therefore enacted, etc., that any person now being, or who hereafter may be, a member of any copartnership carrying on the business of banking under the provisions of the said recited acts, may commence and prosecute any action, etc."

There can be no reasonable doubt, that in these most deliberately considered and very technically drawn acts of Parliament, recognizing copartnerships as having transferable stock, and giving them the authority of suing in the name of their officers and other persons,

similar to those of the associations formed under our act, no bodies corporate were intended or supposed to be created.

But, on this head of transferability, we need not rely upon English authority alone. We have as strong authority in our own usages and decisions.

In the articles of the Merchants' Bank Association, before our restraining act, a similar transferability of shares was provided, and these articles have the authority of Alexander Hamilton for their validity. I shall have occasion to refer to them more fully hereafter.

So again, in the case of the Albany Exchange, before it received its present charter, the validity of the partnership or joint stock company for a public enterprise, with transferable shares, was expressly recognized. By the Court, Cowen, J. — "The objection taken on the argument that this association was illegal, as being in the nature of a corporation, issuing scrip and providing for a transfer of stock, is not well founded. The act of associating in this way is, we think, properly characterized by the exception taken at the trial. It constitutes a partnership valid, as being formed for the purposes of a lawful, honest enterprise." *Townsend v. Goewey* (19 Wendell, R. 427). The learned judge then refers to, and adopts the authority of Collyer on Partnerships, p. 624, and the cases he cites.

Again, this transferability may be found in many sorts of trusts. A well-known instance of this may be seen in the Tontine of New York, originally built for the purposes of a Merchants' Exchange. It is a trust of real estate, with transferable shares as personal property. It was originally settled by the most eminent counsel of this State, and its validity has been attested by nearly fifty years' experience, during which, above two hundred shares have passed through courts, — assignments, insolvencies, bankrupt commissions, distributions of estates, etc., — without their legal transferability having ever been impeached. See printed articles of the Tontine, N. Y. 1793.

In both of these last examples, as in other instances of trusts and partnerships, lands were held exempt by operation of law from the legal incidents of joint tenancy, or tenancy in common, and the estate continued for the common purposes. This has been noted as a mark of corporate character; yet most corporations are limited in the extent of its exercise, some are expressly excluded from the privilege, and very many exist legally without its actual exercise or enjoyment.

The non-dissolution by death or by legal disability is also noted in the opinion of the Supreme Court in these cases, as a mark of a corporate body. But that also may be found in the trusts just mentioned, and others of a similar nature, and it may be adopted as an article of ordinary partnership. It is the settled law of England that it may be stipulated that death shall not dissolve the partnership, and further, that the executors of the deceased shall become

partners. Collyer on Part., pp. 5, 648; *Pease v. Chamberlain* (2 Vesey R. 33); *Haggeman v. Spears* (7 Pick. R. 235); *Wrexham v. Huddleton* (1 Swanst. 514).

Again, a common name has been regarded as a corporate criterion. To this Lord Ellenborough gives a full answer in *Rex v. Webb*. "As to the fourth point, that the subscribers have presumed to act as if they were a body corporate, — how is this made out? It was urged that they assumed a common name, that they have a committee, etc. But are these the unequivocal evidence and characteristics of a corporation? How many unincorporated assurance companies and other descriptions of persons are there that use a common name, and have their committees, general meetings, and by-laws? Are these all illegal? or which of these particulars can be stated as being of itself the distinctive and peculiar criterion of a corporation?" Thence he infers, that "these subscribers have not acted peculiarly as a body corporate." *Rex v. Webb* (14 East's R. 406).

But, perhaps, in the general and popular understanding, the most familiar distinction between corporate bodies and common partnerships, or other joint undertakings, is the exemption of the associates from personal liability beyond the actual amount of their respective proportions of the capital. The regarding this very frequent and important incident of a corporation as an essential characteristic, seems not to be confined to popular opinion. Judge Cowen says, in the decision of the cases now before us: "Among other peculiar privileges conferred on these associations, and not enjoyed by natural persons, I allude to that of the exemption of members from personal liability for debt. This is mentioned by Angel and Ames in their treatise, as peculiar to a private corporation; they notice it as a striking characteristic between a corporation and a partnership." Yet our own statute of limited partnerships affords sufficient evidence that an alteration of the existing law may be made by statute, so as to exempt from personal liability beyond the stipulated share in the joint funds, for the debts of a firm, without the remotest thought of converting such firms into bodies corporate. Besides, the right of making a contract, whereby those who tender it stipulate not to be bound beyond the amount of some specific pledged fund, must be a natural right growing out of the very nature of contracts. If a company or association, or an individual, offers to contract to make certain payments only to the amount of certain specific funds, and others choose to accept that contract on those conditions, there can be nothing to prevent the validity of such a contract except some positive rule of law founded on policy or on arbitrary enactment. In the absence of such a restriction, it is and must be good. Such a limitation, then, must be binding on all who accept the conditions. The policy of our law and the usages of business have indeed rightly fixed the presumption the other way, so that the stipulation and the burden of proof of the limited indebtedness are thrown upon those who expect to be benefited

by them. This right has been substantially admitted by the highest tribunal in Great Britain, in the case of *Minnet v. Whinnery* (3 Brown's Parl. Cas. 323), and it was held to be good by Lord Ellenborough in *Alderson v. Clay* (1 Camp. 404). The doctrine has been received as settled law by one of the best elementary writers of the day, often cited by our own Supreme Court. "When a creditor," says Collyer on Partnership, 214, "has notice that by an arrangement between partners, one of them, though appearing to the world as a partner, shall not participate in the loss, and shall not be liable for it, the creditor will be bound by the arrangement."

The original articles of the Merchants' Bank, in the city of New York, as an unincorporated association with limited liability, as well as transferable shares, which were read in argument by Mr. Kent, have the great professional authority of Alexander Hamilton, who prepared them, and of the many eminent men who joined in them, and whose professional distinction gives to their approbation the character of a sort of judicial sanction; whilst the restraining act passed soon after proves, as was unanswerably argued, that the Legislature and its legal advisers considered such a voluntary association thus restraining its own liability, not as a violation of common law or natural right, but merely as contradicting the financial policy of the State.

A similar analysis of such of the customary accessory powers of specially chartered moneyed corporations as, from being most conducive to ends of profit or convenience, are ordinarily considered as the essential qualities constituting corporations, will show, that all such powers or incidents are merely convenient and desirable authorities or modes of action, added to and engrafted upon the creation of a body politic; not the legal attributes absolutely essential to a corporation, and denoting its existence as such.

Amongst us, as in England, bodies politic or corporate may exist where the ultimate personal liability is still retained. The personal liability is indeed suspended in such cases, and for a time merged in that of the artificial corporate person; but there may be an ulterior recourse to the corporators when the former fails. Many corporate banks in other States are so constituted, and with us some chartered companies for insurance, etc., some for an indefinite, others to a limited extent beyond the capital. Corporate bodies may exist also without transferability of the rights of the corporators; for a large majority of our literary and charitable, as well as all our municipal corporations are so. On the other hand, by our own common law as it would exist now, independently of statutory restrictions, associations might be formed and trusts created, having every one of the above enumerated characteristics which have been insisted upon as essential to a corporation, except that personality which I before stated as forming its strict and necessary essential legal definition. The present joint stock companies of England afford pregnant ex-

amples, showing how many of these attributes may be embodied in voluntary associations which are confessedly not corporations.

In fact the line may be very faint, and depending wholly upon the purely legal and technical character conferred, whether a joint stock association or a trust, freed by law from certain positive restraints imposed by our modern statutes, be a corporation or not. The Tontine trust, before mentioned, is managed by directors annually elected by stockholders; its real estate is held by trustees, continuing their trust from hand to hand during the lives of the original nominees and the survivors of them, with transferable shares, and wholly without personal liability. For the reasons already stated, the eminence of the counsel (the late R. Harrison) who prepared the trust, and the frequency with which its legal character must have passed in review before lawyers and courts, and always without objection, it may well be regarded as sanctioned judicially. It is a valid trust. Add to it a legislative charter, making the associates a body corporate and no more, what is then the effect? Simply to give a different technical character, an artificial individuality, in Chief Justice Marshall's phrase, a different mode of standing in courts.

Such was the actual history of the Albany Exchange. It was a joint stock company, formally decided to be valid (19 Wendell's R. 427). A year or two after (1837), it appears by our statute book to have been incorporated. But there is probably but little difference, besides the greater convenience of the corporate body, between the former organization and the present.

The trusts specially permitted by an act of last year (Statutes of 1839, chap. 174) for the benefit of that singular people called Shakers, were nothing more than exemptions from the recent restrictions of trusts. They were authorized to continue, enlarge, and manage their property, by trusts, as they had done before the change in that title of our law effected by the Revised Statutes. Had the law, in addition to this, made every Shaker's united society a body corporate, without otherwise varying the original trust, the only change would have been the conversion of a trust into an artificial legal person, with the same effect substantially as to the interests of those beneficially interested.

Our act for general religious incorporations regulates the incorporation of churches of all religious denominations (other than those provided for in the first and second sections) by trustees, who are to be a body corporate.

Those who have had occasion to look into the mode in which dissenting religious trusts are held in England, as I presume they were, in the same manner, in New York when a colony, will, I think, perceive that our statute adds little more than a convenient corporate character to powers elsewhere, and formerly here, exercised under trusts.

All these considerations lead me to the conviction, that for the purpose of constitutional interpretation, we must look to the strict legal

meaning of the phrase "body politic or corporate," and not to those circumstances or adjuncts, which amount only to descriptions of the manner in which such bodies are very frequently constituted when used for purposes of profit. If this be regarded as a very strict rule of interpretation, let it also be remembered, that it is applied where such strictness is most appropriate, in the interpretation of a provision, restraining the general sovereign power of the state expressing the public will through a majority of the people's representatives.

There is yet another rule of interpretation which it is proper to state before proceeding to examine whether the associations organized under the banking law are or are not corporations.

Corporate rights are well defined by Chancellor Kent and others to be "franchises or peculiar privileged grants," of the nature of incorporeal property. Such franchises, when they are granted for pecuniary or other purposes valuable to private interest, are of the nature of monopolies, and are always granted exclusively by the sovereign power, directly or indirectly. It is a well-known fact, admitted on all sides, that it was part of the policy and intent of our amended constitution to prevent by a constitutional and fixed limitation of the legislative authority, the influence of corruption or interest upon the Legislature, as well as the abuse of political favoritism, and the dangerous union of political with pecuniary power. The clause so designed, though so general in its terms as to include, even academies and village corporations, it is not doubted, referred in its policy wholly to the monopoly privileges of chartered capital, and especially to banks.

Here then, in my view, arises another branch of inquiry; and the two distinct objects of examination are these. 1st. Do these banking associations fall within the right legal definition of the words "bodies politic or corporate," as before explained and established? 2d. Do they come within the policy and intent of the framers of the Constitution or of the people who ratified it?

The most peculiar and the strictly essential characteristic of a corporate body, which makes it to be such, and not some other thing, in legal contemplation, is the merging of the individuals composing the aggregate body into one distinct, artificial individual existence. Now this is not found in the associations under the act. A corporation can sue and be sued only by its corporate name. It can act only according to the letter of the law creating it. "It derives all its powers from that act," says Chief Justice Marshall, "and is capable of exercising its faculties only in the manner which that act authorizes." It has no natural powers which, in its discretion, it may exercise or not. It can exercise none of those other powers, and possesses none of those other rights, which the individuals composing it could possess and exercise, were it a mere society or partnership. Not so as to these associations. By this act, suits on behalf of such associations may be brought in the name of the president. Persons having

claims against the company, may maintain their actions against the president. But there is no reason, except that of mere convenience, why the association may not also sue and be sued under their several real names, as other partners may. This reason of convenience, it is obvious, would not apply where the company was composed of a few persons, as if, for example, one of our great banking firms were to come under the law.

It was indeed argued, that the technical construction which gives to "may" the meaning of "must" or "shall," applies here. But that construction holds only when there is a previous duty, to which the statute adds some new power or authority, as in the case of a public officer; or where from other reasons it is manifest that (to use Judge Story's words) "the Legislature meant to impose an absolute duty, not to give a discretionary power:" otherwise, as he says, "the ordinary use of language must be presumed to be intended, unless it would defeat the provisions of the act" (1 Peters' R. 64). The ordinary popular discretionary sense of the word "may," is also the ordinary legal one. The other is the exception. In our Revised Statutes, the words "may" and "shall" are so used and distinguished. So they are in our annual legislation, as when it is said of a company, that it may hold real estate, may take a certain rate of tolls, may borrow money.

Moreover, here the right to sue and be sued as other partners, is a common-law right, and cannot be taken away by mere implication. "A statute made in the affirmative, without negative words," say the highest authorities, "does not take away the common law" (2 Inst. 200). See also Dwarrris on Statutes, 637, and the authorities there referred to.

To return: If the associations issue notes for circulation, they must first comply with the express conditions of the act as to the requisite security. So far as they deal with the public as bankers, they must, for the common security, comply with the requisition of the statute. But if such an association were a body corporate, it could do nothing more than the act permits, and that only in the manner the act prescribes. In the words of our Revised Statutes (declaratory, as the revisers state, of the common law), "No corporation shall possess or exercise any corporate powers (in addition to those expressly given in the act under which it is incorporated), except such as shall be necessary to the exercise of the powers enumerated and given." In the *per curiam* opinion of the Supreme Court of the United States (4 Peters' R. 169), it is said, that "a corporation is strictly limited to the exercise of powers specifically conferred, cannot be denied." But here, the associates by their articles establish and form their own constitution, as any other voluntary joint stock company may do. Nor can I discover any objection, other than such as the articles might present, or prudence dictate, why the association, whilst as bankers complying with the requisitions of the act, could not also

exercise their common legal rights as partners, in other commerce, waiving so far the advantages of exemption from personal liability. So, too, it seems that waiving the transferability of shares, the same associates might also trade as a limited partnership, with its president as the general partner, and the others, special partners, in any business coming within the statute on that subject. Some such union of banking with other collateral business might well take place, whenever such an association shall consist of a small but wealthy firm. An association under this act might then do what no corporation can do. The same association under the same articles might have one fund for its special banking purposes with a limited liability of its owners, and another for trade as general, or even as limited partners.

Again: these associations do not act by a corporate name and seal, but by another mode familiar to our law. They can contract through their president, as a limited partnership must through its general partner. They are authorized to sue and be sued through him; as Judge Cowen observes, "the power of the Legislature to give a right of action to one man in his own name for a debt due to another, has always been exercised from our earliest legal history, and it is now too late to call it in question." I refer to the several legislative and judicial authorities which he has collected in his opinion on these cases. They cannot hold real estate as a corporation does, or contract concerning it by their own name and common seal; but, like partnerships, they can have an equitable and beneficial interest in land. Collyer, 70, 75. Their president takes as a trustee, and the associates are but beneficiaries.

Similar interests in land are held in trust, as in the New York Tontine and other old unincorporated associations; and by the Shakers, on trusts established before the statute restraining trusts, and since by means of a private act, merely restoring the common law as respects them, by taking them out of the operation of the statute. Much such an interest in lands was also held by the Albany Exchange Company before its incorporation, in 1837, and the decision of our supreme court in 19 Wendell, 424, admits its validity.

How then are these associations to be regarded in legal contemplation?

I assent fully to the conclusive reasoning of the counsel, who chiefly pressed this part of the argument (Mr. Kent), that they are copartnerships relieved from the inhibitions of the restraining act, and thus allowed to carry on banking business under certain conditions. The policy of the State has prohibited its citizens from issuing paper for circulation as money, or from associating together for certain banking purposes (1 R. S. 711). It reserved those privileges for corporate banks. The act to authorize the business of banking repealed that prohibition *pro tanto*, as to all individuals or companies who would comply with its conditions. The associations in question are partnerships complying with those conditions, and thus exempted,

as any other citizens may be on the same terms, from the operation of a statutory restraint of general right, which is still binding on all who will not comply with those conditions. This is so far in close analogy to the law of special partnership, where exemption from the general liability imposed by the law is tendered to all who comply strictly with the provisions of the statute. The articles and certificate in this act correspond to the certificate setting forth the names of partners, amount of capital, time of termination, and nature of business required by the title of "Limited Partnerships" (1 R. S. 764), and with the articles which every such copartnership must have. The general partner there is authorized to transact business and contract for the rest; so, though with less authority, is the president here. The mode of suing and being sued is precisely the same in both cases.

These partnerships are permitted to do what it has been shown other partners may also do by voluntary act, in providing for the transferability of the shares of the stock, and also against dissolution by death or insolvency. If they choose to trade with a limited liability, always desirable when the shares are numerous, they may do so in a somewhat more commodious manner than in an ordinary limited partnership, though on the very same principles. This, too, has been shown might also be done on common-law principles by means of due notice (as in the instance of the old Merchants' Bank), without special legislation. If the associates think fit to waive this exemption, they may do so, and they are then a banking company, carrying on business precisely as any firm might do upon a simple repeal of the restraining act. Certain conditions are imposed to entitle them to the benefit of this conditional repeal. They can issue no paper unless it be secured in a certain way and duly attested by the comptroller. The very same conditions are imposed on every individual who thinks fit to engage in this business. They are allowed to purchase real estate and hold it for certain partnership uses. So may ordinary partners. *Coles v. Coles*, (15 Johns. R. 159; 2 Edw. Ch. R. 28). But the conveyance is to be made to the president, who has power to sell or assign the same free from any claim against any of the shareholders or persons claiming under them. This is rather a limitation than a grant of power. The associates are limited to their president, or some other officer named in their articles, instead of choosing such a trustee as they might please at the time; otherwise, it is with this slight restriction a mode of holding real estate familiar to the former law of trusts here, still used in England, and for many purposes yet allowed in this State. The president or other officer may receive a conveyance, and may sell or assign the lands so conveyed. Thus he holds the land in a trust, coupled with a power of disposition, as it would be called in England, or formerly here. This authority over the lands is, in the language of our Revised Statutes, "a power in trust," and the beneficial enjoyment of such a power is no peculiar

privilege. The association may sue and be sued, just as other partners may; but as this would frequently be of great public inconvenience, it is enacted, for the mutual benefit of the associates, and of those with whom they may litigate, that they may also sue and be sued in the name of their president. A mere innovation in the mode of pleading, as to certain classes of citizens, can hardly work any change in the permanent legal character of those to whom it applies. There are various English acts, within the last twenty years, expressly giving the same powers to officers or agents of partnerships in England and Ireland; a course of legislation approved by Lord Eldon, and still, in his view, leaving such companies mere partnerships (1 Russ. R. 460). It is in effect doing in this act what had already been done in the law of limited partnership, where it is enacted, that "suits in relation to the business of the partnership may be brought by or against the general partner, in the same manner as if there were no special partner" (1 R. S. 766, § 14).

Had there been a simple repeal of the restraining act, so that limited partnerships could carry on this business, there would have hardly been any necessity for the new provision. It is to be observed, that in both cases the statutes say may (not shall) sue and be sued, which is wholly diverse from the case of corporate bodies, which can only sue and be sued in their single corporate legal personality. These, then, are partnerships, or joint stock companies, limited as to personal responsibility, if they so elect, as they might be by the common law in one way, and by our limited partnership act in another. They may, if they deem it expedient, make their shares assignable and transferable to new partners, and their company indissoluble by death or legal disability of individuals, as other companies may also do. They may have a beneficial interest in lands, managed by a power, with the legal estate in a trustee. They may sue and be sued in the name of the head of the firm, as limited partners also may, and like them, are capable of suing and being sued in the same manner as ordinary partners. Finally they are released from the restriction of the restraining act on certain conditions being performed, and may then use their capital in banking, as all other firms might, were that law wholly repealed; but it does not appear that they are absolutely restricted to that one business and no other, as incorporated banks are and must be, unless specially authorized to transact other business.

If this view of their nature and character be correct, they differ entirely in contemplation of law from the legal corporate person, in which all individualities of its members are merged, so far as they act together in this body, which can perform only certain specific acts, sue or be sued but in one way, grant, convey, and covenant only in its own name and by its common seal.

There is again yet another wide difference, which to my mind strongly marks the broad distinction between these associations, in which partnership rights and liabilities are still retained, and corpo-

rate bodies, where such prior joint rights of the incorporators are absorbed in the individuality of the body which takes the place of the individuals who compose it. Corporations formed under an act illegally passed, or unconstitutional in itself, may be proceeded against by *quo warranto*, and on judgment the body is ousted and altogether excluded from its corporate rights, privileges, and franchises (2 R. S. 583). The effect of this, where an act is pronounced void, would be, that the corporation becomes extinct, is abrogated, has no longer an existence in law. Now let us suppose that this act may grant some corporate powers, as the chancellor has intimated. I do not myself find them. But we may suppose the transferability of shares, as insisted upon by our judges, to be a corporate power. An information in the nature of a *quo warranto* may be exhibited against any association formed under the banking law, and on judgment it is ousted of this or any other privilege, and excluded from it as a franchise. Be it so. What is the result? The association, debarred from this power, still remains a valid company. The exemptions from the restraining law must still be valid, for such a conditional exemption has nothing in common with any question of corporate right. It would still remain a voluntary joint stock company, carrying on a legitimate business under articles of partnership, and with limited liability (if the associates elect), very similar to other limited partnerships in trade. It would still have its common-law and statute partnership rights and powers, though inhibited from some one or two powers enumerated in this act. It would still be what its name purports, — a valid association. This criterion affords to my mind conclusive evidence of the wide difference between incorporated banks and banking associations, and I cannot but add that it also seems to me conclusive as to the validity of the act. If the Legislature have in any provision inadvertently stepped beyond their constitutional bounds, that provision may be void. The main provisions of the law are within the ordinary bounds and purposes of general legislation, and the associations formed under them are legal and valid, even should there be some power mentioned in the act from which the judgment of a court may rightfully exclude them. It therefore appears to me clear that the Legislature of 1838 have succeeded in their obvious and indeed avowed intention to authorize voluntary associations, not within the two-thirds restriction of the constitution, or of the legal doubts that might arise, if they were permitted to incorporate themselves under some general law.

Did they, however, succeed merely in evading the letter of the constitution, whilst they neglected its spirit? Or, in other words, do these associations, although not within the common-law meaning of the phrase “bodies corporate,” still fall within the policy and intent of the restriction?

If this were indeed the case, a court like this, organized expressly to qualify and regulate the decisions of inferior tribunals (which must

of necessity be governed by precedent and authority), by infusing into the law a larger spirit of equity and general principle, such a court might well deem it their duty to disregard the rigid legal interpretation of the language of the constitution, and to look only to its intent and ultimate object. We might feel it to be our duty to look mainly at the evils intended to be excluded, without much regarding the form in which they were expected to appear, or the technical definition of the words employed to denote them. The answer to this inquiry is obvious, and may therefore be brief. Neither the words of the constitutional restriction, which are very general, and not restricted to banking occupations, nor anything in the history of the times, or in the proceedings of the convention, or in the reason of the matter, indicate that this was intended to limit the extent or amount of banking business or capital; for, indeed, these matters could always be controlled by general laws. The restriction was not founded, so far as appears, on any considerations of political economy or any principles of currency, true or false. Its avowed and laudable object was the preservation of political morality, of legislative purity. It was ordained chiefly, primarily, and avowedly, for the purpose of abridging the power of pecuniary corruption, of self-interest, and of other evil influences upon the Legislature, exerted for procuring grants of privileges and franchises, valuable and objects of desire, because special. Auxiliary to this may have been the wish to lessen the claims and the strength of political favoritism, which it was a prominent object in the new constitution to diminish. By such a provision, a minority (it was hoped by some) might check a majority in conferring the privileged favors of the State upon political partisans or upon those who were already, or who were willing to become subservient to power. In this sense and intention of the constitution, the two-third clause might be thus paraphrased: "No bill creating, renewing, or enlarging any body having special privileges and valuable franchises shall become a law, unless with the assent of two-thirds of all the members of the Legislature." Now whatever may be the wisdom or the errors of the general design of the banking law in the estimate of enlightened political economy; whatever may be the merits or the defects of its details, I cannot conceive any law less in hostility to the design of the constitution in this regard, or in effect more conformable to its spirit. This law confers no special privileges or franchises. It opens to all persons, without inquiring whether they are friends or foes of the ruling powers, the business of banking and the issuing of paper currency. Conditions are imposed not to make partial or invidious distinctions, but to promote the safety and welfare of the community. Corruption and favoritism are not only excluded by it from our legislative halls, but they are not even permitted to approach its precincts. The act, instead of granting special privileges and valuable franchises to a chosen few, has but one simple purpose. It is that special privileges and franchises shall no longer exist.

I hold, therefore, that these associations under the banking law do not rightly fall within the true legal interpretation of the restraining clause of the constitution, and still less within its spirit and design. As I think, moreover, that it is our right and duty to look into and decide on the constitutionality of the law itself, I arrive at the singular conclusion of differing from the Supreme Court on every leading point of their decision, and yet of voting to affirm their judgment.

On the question being put, "Shall these judgments be reversed?" all the members of the court, with but a single exception (twenty-three being present), voted in the negative. Whereupon the judgments of the Supreme Court were affirmed. The court thereupon adopted the following resolutions:—

1. "Resolved, That the law entitled 'An act to authorize the business of banking,' passed April 18, 1838, is valid, and was constitutionally enacted, although it may not have received the assent of two-thirds of the members elected to each branch of the Legislature." This resolution was adopted by a vote of 23 to 1.

2. "Resolved, That the associations organized in conformity with the provisions of the act entitled, 'An act to authorize the business of banking,' passed April 1, 1838, are not bodies politic or corporate, within the spirit and meaning of the constitution." This resolution was adopted by a vote of 22 to 3.

THE CONSERVATORS OF THE RIVER TONE *v.* ASH.

(10 *Barn. & Cress.* 349. 1829.)

TRESPASS for entering the plaintiffs' wharfs, pens, pounds, bridges, locks, weirs, and closes covered with water, in the parish of North Cuny, and fixing and fastening to and upon the gates and posts of the plaintiffs there divers locks, staples, hinges, and bolts, and thereby damaging the same, and thereby and therewith shutting, locking, and fastening the said gates, and keeping them so shut for long spaces of time, and at other times unlocking and opening them, and ejecting the plaintiffs from their said premises, and keeping them so ejected for a long space of time, and during that time receiving tolls and duties belonging to them amounting to £3,000, and during all that time preventing the plaintiffs from using them as they would otherwise have done. Plea, first, not guilty. Secondly, that at the time of exhibiting the said bill there was not any such body politic or body corporate as the conservators of the river Tone, as by the said declaration was supposed. Thirdly, that at the time of exhibiting the said bill the said persons so suing as the conservators of the river

Tone were not a body politic or corporate, as by the said declaration was above supposed.¹

LITLEDALE, J. :—

I think the plaintiffs are entitled to the judgment of the Court. The first question is, whether the conservators of the river Tone are a corporation? Upon that it becomes material to consider in what way a corporation may be formed. Now, a corporation may exist, first, by common law, as a king, bishop, or parson; secondly, by authority of Parliament; thirdly, by charter; and, fourthly, by prescription. In this case the conservators of the river Tone claim to be a corporation by authority of Parliament. The question, then, is, Has the statute of William made them a corporation? To create a corporation by charter or act of Parliament it is not necessary that any particular form of words be used. It is sufficient if the intent to incorporate be evident. In the case of the *Sutton Hospital* (10 Coke, 28), which is the great case on corporations, it is laid down that the words, *incorporo, fundo, erigo*, are not, in law, requisite to create a corporation, but that other equivalent words are sufficient. None of these words are contained in this act of Parliament; and the question is, Whether the Legislature has used any equivalent words which show a manifest intention to incorporate? According to the case of *Marriott v. Mascall* (Anderson, 206), a corporation is a body politic, consisting of material bodies which, joined together, must have a name to do things which concern the corporation, or else it is no corporation; and in Rolle's Abridgment (*Corporation*, 512), citing the *Sutton Hospital* case, it is laid down that the name of incorporation is as a proper name, or a name of baptism. A name, therefore, is essential to a corporation. The act of Parliament in this case gives a name, viz. "The Conservators of the River Tone." Then, having a name, do these things which they are empowered to do by this act show that they were intended to be a corporation? The act begins by reciting that "J. Mallett, Esq., in pursuance of a commission under the great seal, in the reign of Charles the First, had, at a very great expense, made the river Tone navigable, in consideration whereof King Charles the Second granted to Mallett and his heirs the sole navigation of the river; and that the interest of Mallett had become vested in the thirty persons therein named." It then enacts, "that the said thirty persons, and their successors, shall be conservators of the river Tone, and shall have power to make and maintain the same navigable." It therefore provides that the conservators shall have a succession; and then, by a subsequent clause means are provided for filling up the number of conservators. The first of these clauses, therefore, shows a manifest intent that there should be a succession, and the second contains a provision whereby that succession may be rendered perpetual.

¹ The other pleas and the detailed statement of facts are omitted.

Then the conservators are to do certain things towards making and keeping the river Tone navigable. They are to cut a channel through the lands of others, and make wharfs; and as the doing of those things may be prejudicial to the inheritance of persons that have lands adjoining to the river, it is enacted that the conservators shall contract for the loss or damage which any of those persons shall receive by making the river navigable; and if any of the owners of the land and conservators cannot agree touching the value thereof, or if the title in possession, remainder, or reversion be in an infant, feme covert, or any other person unable in law to make a contract concerning any of the said lands, either for the present or so as to bind the inheritance and fee-simple of the same, a jury is to be summoned; and after the jury have assessed the value, and after payment of the money assessed, the conservators may enter on the land; and if the parties interested in the land do not appear, the jury may proceed in their absence to determine the value, and their determination shall be valid, and vest an estate in fee-simple in the conservators and their successors. They are, therefore, to take lands in succession, as a corporation would do, and not by inheritance as individuals. It then contains a provision for reimbursing the subscribers by tolls, and for lessening those tolls after they shall have been paid the principal advanced and interest; and after they shall have been fully reimbursed, the surplus tolls are to be employed for the use of the poor of the two parishes therein mentioned. It then enacts, that for the better preserving and keeping the river Tone navigable when made so, there shall always be conservators of the said river, and that the persons therein named shall be conservators, to continue during their lives; and that when the number shall be reduced to twenty, the survivors shall choose ten others to make up the number thirty, and they are enabled, by the name of "The Conservators of the River Tone, in the County of Somerset," to take and receive any gift, legacy, or grant of goods, chattels, money, or lands in fee, or for any other estate or term for the uses aforesaid. What can be more directly forming them into a corporation, without using the word "incorporate"? It has been held that if the king grant land to the men of D., *hæredibus et successoribus suis*, rendering rent, for anything touching this land they are a corporation, but for no other purpose. Rolle's Abr., tit. *Corporation*, 513, (F) pl. 15. There it is implied, from the word *successoribus*, that the king intended them to be a corporation. It is true, the rendering of rent is there stated to be essential. That may be to show that the king has not been deceived when he made the grant; but that reason does not apply to the case of a corporation created by act of Parliament. Besides, the obligation of the conservators to advance money for the purpose of making the river navigable, and to perform the other duties cast upon them, is equivalent to, and more onerous than, the obligation imposed on the men of Dale to pay rent. The act of Parliament, therefore,

contains provisions which show a manifest intent in the Legislature to make the Conservators of the River Tone a corporation; and if that be so, then they are a corporation for all the purposes of keeping the river Tone navigable, and all the incidents of a corporation will attach to them. The case of the *Sutton Hospital* (10 Coke, 28) shows that it is not necessary that a thing incident to a corporation should be conferred on it by express words in the charter which makes the corporation. One of the incidents to a corporation is, that it may sue and be sued in its corporate name. The several clauses of the act of Parliament which I have referred to are amply sufficient to show that the conservators are a corporation; and if they are, then, as incident to a corporation, they have a right to sue and are liable to be sued by their corporate name. Any doubt on that point (if there were any) is removed by the clause which gives a special power to a committee of five of the conservators to make contracts in writing under their hands and seals, and to the conservators the right to sue, and imposes on them the liability to be sued on such contracts by the name of the Conservators of the River Tone. Without such a provision they could only sue or be sued in respect of a contract entered into by the corporate body. The Legislature, therefore, by making this special provision, must have assumed that for all matters done by the corporate body (and not by the committee) they may sue or be sued in their corporate name. I am therefore of opinion that the plaintiffs are a corporation, and are entitled to sue as such for any breaches of contract or for any trespasses committed on their property.

Then, if that be so, the Conservators of the River Tone were in possession of property, and the defendants have committed a trespass on that property. They are, therefore, liable in this action, unless they can show that they were authorized to do the same by law.¹

Judgment for the plaintiffs.

LIVERPOOL INSURANCE COMPANY v. MASSACHUSETTS.

(77 U. S. 566. 1870.)

ERROR to the Supreme Judicial Court of Massachusetts; the case being this:—

A statute of the State just named imposes upon "each fire, marine, and fire and marine insurance company, incorporated or associated under the laws of any government or State other than one of the United States, a tax of 4 per cent. upon all premiums charged or received on contracts made in this Commonwealth for insurance of property." The same statute imposes a tax of but 2 per cent. upon such

¹ The rest of this opinion and the concurring opinions of BAYLEY and PARKE, JJ., are omitted.

premiums when the company is incorporated under the laws of any one of the United States other than Massachusetts; upon which premiums, where the company is incorporated by itself, it imposes but 1 per cent.; while no tax is imposed by the laws of the State upon business of insurances transacted by any natural persons citizens of the same.

With the enactment just mentioned on its statute-book, the State of Massachusetts, in 1868, filed a bill in its Supreme Judicial Court against the Liverpool and London Life and Fire Insurance Company (a company doing a large business in that State), to collect a tax of 4 per cent. on its premiums upon contracts made in Massachusetts for insurance of property, and to restrain the company from doing further business till the tax was paid. The company set up that it was not "incorporated" at all, but was an association, under the laws of Great Britain, of natural persons, some of whom were citizens and residents of the country just named, and some citizens and residents of the State of New York; formed for the purpose of conducting the business of insurance under certain deeds of settlement, and having the legal character of a partnership; that accordingly it could not be taxed as a "company incorporated under the laws of any government or State other than one of the United States;" while in so far as the discriminating tax of 4 per cent. was sought to be laid against it as a company associated simply and not incorporated, it violated, in regard to the members of the company who were subjects of Great Britain, a provision in the treaty of 1815, between that country and the United States, by which it is agreed that the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce; and, in regard to the citizens of New York, that provision in Section 2, Article 4 of the Federal Constitution, which secures to the citizens of each State all the privileges and immunities of citizens in the several States.¹

The Supreme Judicial Court of Massachusetts gave a decree against the company, and enjoined it from the further prosecution of its business till the taxes found to be due were paid.

The case was now brought to this court on the ground that in its application to the company, the statute of Massachusetts was in conflict with the provisions of the Constitution, which confers on Congress the right to regulate commerce with foreign nations and among the States, and with that which secures to the citizens of each State all the privileges and immunities of citizens in the several States.

MR. JUSTICE MILLER delivered the opinion of the court:—

The case of *Paul v. Virginia* (8 Wallace, 168), decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation of one State, having an agency by which it conducted that business in another State, was not engaged in commerce between the States.

¹ A part of the statement of facts is omitted.

It was also held in that case that a corporation was not a citizen within the meaning of that clause of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and that a corporation created by a State could exercise none of the functions or privileges conferred by its charter in any other State of the Union, except by the comity and consent of the latter.

These propositions dispose of the case before us, if plaintiff is a foreign corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

The institution now known as the Liverpool & London Life and Fire Insurance Company, doing an immense business in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

It will be seen by reference to the powers of the association, as organized under the deed of settlement, legalized and enlarged by the acts of Parliament, that it possesses many if not all the attributes generally found in corporations for pecuniary profit which are deemed essential to their corporate character.

1. It has a distinctive and artificial name by which it can make contracts.

2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

4. Its existence as an entity apart from the shareholders is recognized by the act of Parliament, which enables it to sue its shareholders and be sued by them.

The subject of the powers, duties, rights, and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half century, the importance of which can hardly be overestimated.

They have entered so extensively into the business of the country, the most important part of which is carried on by them as banking companies, railroad companies, express companies, telegraph companies, insurance companies, etc., and the demand for the use of corporate powers in combining the energy required to conduct these large operations is so imperative, that both by statute and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized, and enlarged, as to constitute a branch of jurisprudence with a code of its own, due mainly to very recent times. To attempt therefore, to de-

fine a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time.

Most of the States of the Union have general laws by which persons associating themselves together, as the shareholders in this company have done, become a corporation.

The banking business of the States of the Union is now conducted chiefly by corporations organized under a general law of Congress, and it is believed that in all the States the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under their general laws, or it would become so by such legislative ratification as is given by the acts of Parliament we have mentioned.

To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So also it is said that the fact that there is no provision either in the deed of settlement or the act of Parliament for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an act of Parliament which authorized suits in the name of the Liverpool & London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer.

If it can contract in the artificial name, and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation.

But whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation, or prevent the courts of another jurisdiction from inquiring into its true character whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations.

Among these, it would seem from the provisions of these acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association whose powers are

ascertained and its privileges conferred by law, is an incorporated body.

The question before us is whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that State on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

MR. JUSTICE BRADLEY. : —

Whilst I agree in the result which the court has reached, I differ from it on the question whether the company is a corporation. I think it one of those special partnerships which are called joint-stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid. But as it is a company associated under the laws of a foreign country, it comes within the scope of the Massachusetts statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the treaty of 1815 to prevent the States from imposing taxes or license laws upon either British corporations or joint-stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other States have chosen to take some of their shares.

Judgment affirmed.

THE QUEEN v. ARNAUD.

(16 L. J. n. s. C. L. 50. 1846.)

THE judgment of the Court was delivered by ¹

LORD DENMAN, C. J. : —

The object of the present mandamus is to compel the custom-house officers to register a vessel, the property of the Pacific Steam Navigation Company. The company is a corporation by charter of her present Majesty, for the purpose of providing vessels, and employing them in the Pacific Ocean. It is admitted by the defendants that the company, as a British corporation, might be owners of British-built vessels, and *prima facie* would be, as such corporation, entitled to register them, under the provisions of the

¹ The statement of facts is omitted.

8 & 9 Vict. c. 89, applicable to the registry of vessels by corporations. But it is said that some of the members of the corporation are not British subjects, but foreigners; and, consequently, that the vessel does not wholly belong to Her Majesty's subjects, as required by the 5th section of the act, and is within the prohibition contained in the 12th section of the act, against foreigners being entitled to be owners, in whole or in part, directly or indirectly, of any vessel requiring to be registered. Now, it appears to us that the British corporation is, as such, the sole owner of the ship, and a British subject within the meaning of the 5th section, as far as such a term can be applicable to a corporation, notwithstanding some foreigners may individually have shares in the company, and that such individual members of the corporation are not entitled, in whole or in part, directly or indirectly, to be owners of the vessel. The individual members of the corporation, no doubt, are interested in one sense in the property of the corporation, as they may derive individual benefit from its increase, or loss from its destruction; but in no legal sense are the individual members the owners. If all the individuals of the corporation were duly qualified British subjects, they could not register the vessel in their individual names as owners; but must register it as belonging wholly to the corporation as owner. The terms of the 23d section, with respect to the condition of the bond to be given upon obtaining the registry, as to foreigners purchasing or becoming entitled to any part or share of or interest in any ship or vessel, would appear to be applicable to a case of purchase or transfer of property in the vessel itself, as it provides that the certificate shall be delivered up "within seven days after such purchase or transfer of property in such ship," and does not, as it seems to us, bear materially on the present question. It was contended that the effect might be to defeat the object and policy of the navigation laws in this respect, inasmuch as the individual members of the British corporation might, either originally or by transfer, be all foreigners. Such does not appear to be contemplated or provided for by the act in question. If it be *casus omissus*, and evil consequences arise, they may be remedied by the interference of the Legislature, or possibly (though we do not wish to be understood as giving any opinion upon this point), by repealing the letters-patent, as improvidently giving powers operating to defeat the law and public policy, and, in future patents, by providing against the objection. But, as the case stands, it seems to us that the British corporation is, to all intents, the legal owner of the vessel, and entitled to the registry, and that we cannot notice any disqualification of an individual member, which might disable him, if owner, from registering the vessel in his own name. There will, therefore, be judgment for the prosecutors, and a peremptory mandamus.

Judgment for the Crown.

WILLIAMSON v. SMOOT.

(7 *Martin (La.)* 34. 1819.)

APPEAL from the court of the First District.

MATHEWS, J., delivered the opinion of the court:—

The plaintiffs having caused an attachment to be levied on the steamboat Alabama, the St. Stephens Steamboat Company intervened in their corporate capacity, and claimed her as their property. The intervening party are a body politic, created by an act of the Legislature of the territory of Alabama, the capital stock of which is divided into shares of a certain amount, and Smoot the defendant owns ten of them, subscribed for by him.

The questions to be decided are, 1. Is it proper for our courts of justice to recognize, in their judicial proceedings, the company as a corporate body? 2. Can the shares of stock of any individual stockholder be legally attached?

I. The propriety or legality of one sovereign State acknowledging and favoring the rights and privileges of political bodies of another State, are opposed on the ground of their being in violation of the sovereignty of that which recognizes the acts of incorporation of the other, and to the prejudice of the rights of its citizens. It does not appear to this court that these things will of necessity result, in every case, from such acknowledgment and recognition. When attempts directly opposed to the sovereign power of a State and the rights of its citizens are made by the political bodies of another, they certainly ought to be repelled, and so ought such, if made by corporations deriving their existence from the government under which they act. But as the present claim of the St. Stephens Steamboat Company is not of this nature, we are of opinion that they ought to be allowed to prosecute it in their corporate capacity.

II. The existence of the claimants being recognized as a body corporate, and it being admitted that the boat attached belongs to them as a part of their common stock, it is clear that Smoot does not possess such certain and distinct individual property in it as to make his interest attachable. The estate and rights of a corporation belong so completely to the body, that none of the individuals who compose it has any right of ownership in them, nor can dispose of any part of them (Civ. Code, 88, art. 11).

The court is of opinion that the district court erred in disallowing the claim of the company.

It is therefore ordered, adjudged, and decreed that the judgment be annulled, avoided, and reversed, and that the attachment of the plaintiff and appellant be quashed so far as it relates to the said steamboat the "Alabama," and that she be released therefrom.

TOMLINSON v. BRICKLAYERS' UNION.

807 *Ind.* 308. 1882.)

FROM the Superior Court of Marion County.

HOWK, J. : —

The only question presented for decision by the record of this cause and the error assigned thereon is this: Does the complaint of the appellants, the plaintiffs below, state facts sufficient to constitute a cause of action? In their complaint the appellants alleged, in substance, that on or about the 28th day of August, 1867, they and others formed a voluntary association, known as and named "The Bricklayers' Union of Indianapolis;" that the objects of the association were to unite all practical bricklayers so as to secure concert of action in whatever tended to their interests, and to afford pecuniary aid to the members thereof, when disabled from sickness, accident, or misfortune; that immediately upon the organization of the association a code of by-laws and constitution were adopted, fixing the amount of dues, fines, and assessments payable by each member of the association; that from 1867 to April, 1879, some five hundred or more members joined the association, among whom were the appellants, and each and all paid their money in dues, fines, and assessments, which money was placed in one general fund, until, in April, 1879, the same amounted to the sum of about eight thousand dollars, belonging to the said members as a joint and general fund for the benefit of each and all of them; that after the association had been duly incorporated the appellants and many others, for whose benefit the appellants sued, to the number of five hundred, made and adopted the by-laws and constitution governing the association; that since such organization, and before, the appellants each and all, and about four hundred others whose names could not be given, because they were in books of which the appellee had control, contributed different amounts, and the same were under the control of the association, in trust for the appellants and the other members of the association, in which they all had a general interest; that the association continued until about April, 1879, when a few of its members, twenty in number, without the knowledge, consent, or approval, or the legal right to do so, unlawfully, wrongfully, and secretly abandoned and pretended to dissolve the said corporation, and pretended to form a new association, to be known as "The Bricklayers' Union No. 1, of Indiana," the appellee, and as soon as the pretended new organization was formed they secretly, unlawfully, and wrongfully converted the said fund of the appellants and the other members of the old association to the use of the appellee, and the same was then in their or its possession; and the appellee, al-

though often requested, refused to pay the same to the appellants and the other members of the old association, and refused to allow the appellants and other members of the first organization to participate in the new organization, and refused them all rights of property therein, and claimed that the appellants, and those for whom they sued were not members thereof, and claimed the said fund as their own, and refused the appellants any and all benefits therefrom; that at the time of said conversion and pretended dissolution, and the formation of the pretended new organization, the appellants and many others, for whom they sued, were members in good standing of the old association; and that the defendants had also unlawfully converted all the lodge furniture and personal property, of the value of three hundred dollars, without right and wrongfully, to their own use, and then had possession thereof.

The appellants further alleged that the appellee had forfeited its charter and corporate rights, by refusing to allow them to participate in the new organization; and in this, that less than a quorum had pretended to transact business; and in this, that its president had allowed money to be drawn contrary to its constitution; and in this, that the recording secretary had failed to keep a correct record of the transactions of each meeting, and to make a quarterly report of such transactions, and to deliver to his successor the books, records, and property of the appellee; and in this, that its financial secretary had failed to discharge his duties and been allowed to continue in office; and in this, that its members were allowed to remain in good standing without paying dues, etc.; and in this, that its treasurer had failed to discharge his duties; and in this, that its trustees had converted the above described property of the old association to the exclusive use of appellee; and in this, that it had used the money for other and different purposes than that specified in its constitution; and in dissolving the Union, contrary to the terms of its constitution. Wherefore, etc.

We are of the opinion that the appellee's demurrer, for the want of facts, was correctly sustained to the appellants' complaint. Conceding all the facts stated in the complaint to be true as alleged, they constitute no cause of action in favor of the appellants and against the appellee. It will be seen that the wrongful conversion of the money and property of the first corporation is alleged to have been committed by its twenty seceding members, who were not made parties to this action. The complaint fails to show the appellee's liability for this wrongful conversion to the plaintiffs in this action. It is not alleged that the old corporation was dissolved in any legal manner, and it cannot be said, we think, that the secession of twenty members would or ought to work the dissolution of a corporation having five hundred members. If the old corporation is still a legal entity, and it must be presumed to be such, at least until the contrary is shown, the right of action for the wrongful conversion of

its money and property would be in such old corporation, and not in any of its members, however numerous they were; for the money and property of a corporation belong to it, and not to its individual members. It follows, therefore, that the complaint does not state a cause of action, in favor of the appellants, for the wrongful conversion of the money and property described therein.

It seems to us, also, that the allegations of the complaint in relation to the forfeiture of appellee's charter do not constitute a cause of action in favor of the appellants. If it were true that the appellee and its officers and members had violated every section of its by-laws and constitution, it is certain, we think, that such violations would not give the appellants any right of action or legal cause of complaint against the appellee; for it was not shown that the appellants were members of the appellee-corporation.

We have found no error in the record.

The judgment is affirmed, with costs.

WHEELOCK v. MOULTON.

(15 Vt. 519. 1843.

IN CHANCERY.

THIS was an appeal from a decree of the Court of Chancery, in favor of the orator, upon a bill of foreclosure, in which the orator alleged, that the defendants, Moulton and Hutchinson, on the 3d day of September, 1835, by deed, under their hand and seal, in which they described themselves as "sole proprietors and owners of all the shares of the Woodstock Manufacturing Company," conveyed to the orator "a certain piece of land, lying and being in Woodstock, in the County of Windsor, and State of Vermont, described as follows, viz.: it being two hundred shares, numbers as follows, — No. 1. to two hundred, inclusive, one hundred dollars each share, and being all the shares of said company in the capital stock of the manufacturing company established at Woodstock," etc. — to which deed there was a condition of defeasance upon the payment of a note of the same date, for the sum of \$14,000, executed by the said Moulton and Hutchinson to the orator; that the consideration for said note was paid to said Moulton and Hutchinson for, and the same went to the use of, the said company; that said company, though incorporated by statute, were not then organized, and had no officers appointed, but owned certain real estate (described), and claiming that the same was conveyed to the orator by said deed, and praying that said Moulton and Hutchinson, and said manufacturing company might be decreed to pay the amount due on said note, or be foreclosed, etc.

The defendants, Moulton and Hutchinson, did not make answer, and the bill, as to them, was taken as confessed. The manufacturing

company answered, alleging an organization of the company and appointment of officers, on the 28th of February, 1835, the division of the stock into two hundred shares, and a deed from the defendant, Moulton, to the company, of all the land mentioned in the bill, in part payment for shares; admitting the execution of the mortgage mentioned in the bill, but denying that it was intended as a conveyance of anything more than the said two hundred shares, which, it was admitted, were all the shares in the company stock; and denying that the consideration of the note was received for, or went to the use of, said company.

It was thereupon referred to a master to ascertain the amount due the orator, who reported the sum of \$2,695.81, which the court decreed should be paid by a certain time specified, or that, in default thereof, the defendants should be foreclosed, etc.

REDFIELD, J. : —

It is hardly necessary to say, that if the orators prevail here, it must be, as in all cases, *secundum allegata et probata*. This is a bill of foreclosure upon the land described, counting upon the deed, as a mortgage of the land, executed by the company. It is neither a bill to compel the company to assume the payment of the debt, as one contracted by their agents for their benefit, nor to compel them to perfect an imperfect conveyance; but merely a common bill of foreclosure, giving, as every pleader should do, the construction of the deed upon which the orator bases his claim.

To enable the orator to succeed in the present bill, he must make out, 1st, that the deed is, in legal effect, the proper deed of the corporation; and, 2d, that it was the intention of the instrument to convey the land belonging to the company, instead of the shares.

There is a prior question, which has been, to some extent, discussed, but, as it is in no sense decisive of the case, it is not deemed expedient to devote much time to the examination of it. It is the question, how far the debt is the proper debt of the corporation. It would seem to be, in terms, the debt of agents, contracted, no doubt, for the benefit of the company. In this state of the case there is nothing improbable either in the agents mortgaging their shares in the corporation, or in the corporation mortgaging their land and building as security.

I. Upon the question, how far the deed is, in terms, the deed of the corporation, it seems not a little difficult to argue the affirmative from the contract. The deed is signed by the names of Moulton and Hutchinson, with no addition whatever, and, in the body of the deed, they describe themselves as "proprietors and owners of all the shares of the Woodstock Manufacturing Company." When it is considered that a corporation is a mere abstraction, a mere existence in law, and can act only by its votes, through its agents, and that a power to convey land must be strictly followed, it is in vain to argue that this deed is, in terms, or in legal effect, the deed of the corporation.

It is well settled that, at common law, a corporation could only convey land by its corporate seal. 4 Kent's Com. 457. Real estate must always be conveyed according to the *lex loci*. And by the law of this State then in force, corporations could only convey their lands and real estate, by the deed of their president, reciting the vote of the corporation authorizing the conveyance. In order to bind the corporation, the deed must be theirs, expressly or by adoption. Angell & Ames, 109, 115, 168. The fact that the signers of this deed owned the whole of the shares will make no difference in regard to the necessity of a vote of the corporation in order to convey the land. The title to the land was in the corporation, not in the individual stockholders. The deed of one or of any number of the stockholders will not affect the title of the land. The shareholders are not tenants in common of the land. They have no title whatever to any of the property of the corporation. It is true that one who owned all the shares might control the corporation, and so he could if he owned a majority of the shares; but he could, in either case, do it only by a vote of the corporation, at a meeting held in strict accordance with the statutes of the corporation. This, in the present case, was not attempted. And the deed is what its terms import, — that of Moulton and Hutchinson, in their private capacity, as the owners of all the shares in the corporation, for the same reason that any man who professes to convey the title of land, or other property, does it as the owner of that property.

So strict is the law in regard to the conveyance of land by a power, that had these persons been authorized by the vote of the corporation to convey the land, this deed must have been wholly inoperative. *Wilkes v. Berk* (2 East, 142); *Roberts v. Button* (14 Vt. 195), and cases there cited.¹

In this state of the case a majority of the court think there is no good ground for sustaining the bill against the corporation.

The decree of the Chancellor is reversed, and the cause remanded to the Court of Chancery, with this mandate, that the bill be dismissed with costs as to the corporation, and that the orator be suffered to take such a decree against Moulton and Hutchinson, the other defendants, as may be consistent with the scope and prayer of his bill and as he may be advised by counsel.

¹ Part of the opinion relating to the construction of the deed is omitted.

BUTTON *v.* HOFFMAN.(61 *Wis.* 20. 1884.)

APPEAL from the Circuit Court for Jackson County.

The defendant appealed from a judgment in favor of the plaintiff.

ORTON, J. :—

This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer.

In his instructions to the jury the learned judge of the Circuit Court said : "I think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property belonged to a corporation known as "The Hayden & Smith Manufacturing Company," and that he purchased and became the sole owner of all the capital stock of said corporation. As the plaintiff in his testimony expressed it, "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company." There was no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says : "The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and become the owner of all the stock of the company, and thus became its sole owner."

From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity. Ang. & A. on Corp. §§ 40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. *Id.* § 557. The corporation is the trustee for the management of the property,

and the stockholders are the mere cestui que trusts. *Gray v. Portland Bank* (3 Mass. 365); *Eidman v. Bowman* (4 Am. Corp. Cas. 350). The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. Ang. & A. on Corp., § 191; *Pope v. Brandon* (2 Stewart (Ala.), 401); *Whitwell v. Warner* (20 Vt. 444). The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. *Bradley v. Holdsworth* (3 Mees. & W. 422); *Waltham Bank v. Waltham* (10 Met. 334); *Tippets v. Walker* (4 Mass. 595). The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation cannot divert it from such use, and a shareholder has no legal right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. Ang. & A. on Corp. §§ 160, 190, 557; *Hyatt v. Allen* (4 Am. Corp. Cas. 624). A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. *Wilde v. Jenkins* (4 Paige, 481). A legal distribution of the property after a dissolution of the corporation and settlement of its affairs, is the inception of any title of a stockholder to it, although he be the sole stockholder. Ang. & A. on Corp. § 779 a.

These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate its business, and defraud its creditors. The stockholders would be the owners of the property, and at the same time it would belong to the corporation. One stockholder owning the whole capital stock could, of course, do what several stockholders could lawfully do. It is said in *Utica v. Churchill* (33 N. Y. 161), "the interest of a stockholder is of a collateral nature, and is not the interest of an owner;" and in *Hyatt v. Allen* (*supra*), that "a shareholder in a corporation has no legal title to its property or profits until a division is made." In *Winona & St. P. R. R. Co. v. St. P. & S. C. R. R. Co.* (23 Minn. 359), it is held that the cor-

poration is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial interest in its rights, property, and immunities. In *Baldwin v. Canfield* (26 Minn. 43), it was held that the sole owner of the stock did not own the land of the corporation so as to convey the same. In *Bartlett v. Brickett* (14 Allen, 62), an action of replevin was brought by A., B., and C., as the "Trustees of the Ministerial Fund in the North Parish in Haverhill," which was the corporate name. In portions of the writ the plaintiffs were referred to as "the said trustees" and "the said plaintiffs." In the bond, "A., B., and C., trustees as aforesaid," became bound, and the officer, in his return, certified that he had taken a bond "from the within named A., B., and C.," and the property was receipted by "A., B., and C., plaintiffs." It was held that the action was not by the corporation, as it should have been, and judgment was rendered for the defendant. It is said in *Van Allen v. Assessors* (3 Wall. 584), "the corporation is the legal owner of all the property of the bank, both real and personal." In *Wilde v. Jenkins* (*supra*), where a copartnership bought all the properties and effects, together with the franchises, of a corporation, and elected themselves trustees of the corporation, it was held that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for their benefit. In *Mickles v. R. C. Bank* (11 Paige, 118), it was held that, although a corporation was deemed to have surrendered its charter for non-user, it was not dissolved, and would not be, until its dissolution was judicially declared, and that until then its property could be taken and sold by its judgment creditors. In *Bennett v. Am. Art Union* (5 Sandf. Super. Ct. 614), it was held that, "as a general rule, the whole title, legal and equitable (to its property), is vested in the corporation itself," and that the individual members have no other or greater interest in it than is expressly given to them by the charter, and the prayer of the complainant, as a shareholder in the Art Union, for an injunction against a certain disposition of its property, was denied because he had no interest in it. See, also, *Goodwin v. Hardy* (57 Me. 143).

It is true that none of the above cases are precisely parallel with the present case in facts, but they are sufficiently analogous to be authority upon the principle that the plaintiff, as the sole stockholder of the corporation, is not the legal owner of its property. He may have an equitable interest in it, but in this action he must show a legal title to the property in himself in order to recover, and he has shown that such title is in another person. *Timp v. Dockham* (32 Wis. 146); *Sensenbrenner v. Mathews* (48 Wis. 250). In analogy to the above principle it was held in *Murphy v. Hanrahan* (50 Wis. 485), that the sole heirs of an estate did not have such a legal title to a promissory note given to their father as would entitle them to sue the maker upon it, because the title to it was in the administrator,

and they could obtain the title only by administration and distribution according to law. The heirs in that case certainly had as much equitable interest in that note as this plaintiff has in the property in controversy.

The want of title to the property being fatal to the plaintiff's recovery in the action between the present parties, other alleged errors will not be considered.

By the Court. — The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

CHAPTER II.

CREATION AND CITIZENSHIP OF A CORPORATION.

FRANKLIN BRIDGE COMPANY *v.* WOOD.

(14 Ga. 80. 1853.)

ASSUMPSIT in Heard Superior Court.

The Franklin Bridge Company was incorporated under the Act of the Legislature of 1843, to prescribe the mode of incorporating companies for certain purposes, by an order of the Inferior Court of Heard County.

The company sued the defendant, Wood, for his subscription to their stock.

The defendant pleaded that the company was not legally incorporated; contending that the act of the Legislature, referred to, was unconstitutional and void.

Upon argument, the court held that the act aforesaid was unconstitutional, and nonsuited the plaintiffs.

To this decision plaintiff excepted.

By the Court, LUMPKIN, J., delivering the opinion:—

Is the Act of 1843 and that of 1845, amendatory thereof, pointing out the manner of creating certain corporations and defining their rights, privileges, and liabilities, unconstitutional?

By the first section of the Act of 1843, it is provided "That when the persons interested shall desire to have any church, camp-ground, manufacturing company, trading company, ice company, fire company, theatre company, or hotel company, bridge company, and ferry company, incorporated, they shall petition in writing the Superior or Inferior Court of the county where such association may have been formed, or may desire to transact business for that purpose, setting forth the object of their association, and the privilege they desire to exercise, together with the name and style by which they desire to be incorporated; and said court shall pass a rule or order, directing said petition to be entered of record on the minutes of said court."

Section 2 enacts "That when such rule or order is passed, and said petition is entered of record, the said companies or associations shall have power respectively, under and by the name designated in their petition, to have and use a common seal; to contract and be contracted with; to sue and be sued; to answer and be answered unto in any court of law or equity; to appoint such officers as they may

deem necessary; and to make such rules and regulations as they may think proper for their own government; not contrary to the laws of this State; but shall make no contracts or purchase or hold any property of any kind, except such as may be absolutely necessary to carry into effect the object of their incorporation. Nothing herein contained shall be so construed as to confer banking or insurance privileges on any company or association herein enumerated; and the individual members of such manufacturing, trading, theatre, ice, and hotel companies, shall be bound for the punctual payment of all the contracts of said companies, as in case of partnership."

The third section declares that "No company or association shall be incorporated under this act, for a longer period than fourteen years; but the same may be renewed whenever necessary, according to the provisions of the first section of this act."

The fourth section confers upon the Superior and Inferior Courts respectively, the power to change the names of individuals.

Section fifth. "For entering any of said petitions and orders, and furnishing a certified copy thereof, the clerk shall be entitled to a fee of five dollars; except in cases of applications by individuals for the change of names, — in which case, the clerk of said court shall be entitled to the fee of one dollar. And that such certified copy shall be evidence of the matters therein stated in any court of law and equity in this State." *Cobb's Digest*, 542, 543.

By the Act of 1845 the provisions of the Act of 1843 are extended to all associations and companies whatever, except banks and insurance companies; and the individual members of all such incorporations are made personally liable for all the contracts of said associations or companies. *Ibid.*

The argument against the validity of the charter of the Franklin Bridge Company, created under these statutes, is this: —

1. That in England, corporations are created and exist by prescription, by Royal Charter, and by Act of Parliament. With us they are created by authority of the Legislature, and not otherwise. That to establish a corporation is to enact a law; and that no power but the legislative body can do this.

2. That legislative power is vested under our Constitution, in the General Assembly, to consist of a Senate and House of Representatives, to be elected at stated periods by the citizens of the respective counties.

3. And that the General Assembly is bound to exercise the power of making laws thus conferred upon them by the people in the primordial compact, in the mode therein prescribed, and in none other; and that a law made in any other mode is unconstitutional and void. That the Legislature is but the agent of their constituents; and that they cannot transfer authority delegated to them to any other body, corporate or otherwise, — not even to the Judiciary, a co-ordinate department of the government, unless expressly empowered by the

Constitution to do so. That to do this would be to violate one of the fundamental axioms of jurisprudence as well as of political science, namely, *delegata potestas non potest delegari*. That to do this would not only be to disregard the constitutional inhibition which is binding upon the representative, but by shifting responsibility introduce innovations upon our system, which would result in the overthrow and ultimate destruction of our political fabric.

The constitutional inquiry thus presented is an exceedingly grave one. It reaches far beyond the case made in the bill of exceptions, and extends to the whole range of topics which fall under legislative cognizance. In the view we take however of the statutes before us, no such proposition as that which has been discussed is presented for our adjudication. And we rejoice that it is so, not only on account of the delicacy of the task, in pronouncing an act of Legislature unconstitutional and void, — one which is never justifiable unless the case is clear and free from doubt; and even then one might almost be forgiven for shrinking from the performance of a duty which would be productive of such incalculable mischief and confusion. Bridges have been built at a heavy expense; manufacturing and innumerable other associations have been formed in Georgia, and are in full operation, under charters incorporated under this law. And in view of the consequences any court might hesitate, unless the repugnance between the statute and the Constitution was so palpable as to admit of no doubt, and produce a settled conviction of their incompatibility with each other.

4. It was formerly asserted that in England the act of incorporation must be the immediate act of the king himself, and that he could not grant a license to another to create a corporation. 10 Reports, 27. But Messrs. Angell and Ames, in their Treatise on Corporations, state that the law has since been settled to the contrary; and that the king may not only grant a license to a subject to erect a particular corporation, but give a general power by charter to erect corporations indefinitely, on the principle that *qui facit per alium facit per se*; that the persons to whom the power is delegated of establishing corporations, are only an instrument in the hands of the government. 1 Kyd, 50; 1 Black. Com.; Ang. & Am. 63.

Before the revolution, charters of incorporation were granted by the proprietaries of Pennsylvania under a derivative authority from the Crown; and those charters have since been recognized as valid. 3 Wilson's Lectures, 409. A similar power has been delegated by the Legislature of Pennsylvania with regard to churches. 7 S. & R. 517. The acts of the instrument in these cases become the acts of the mover, under the familiar maxim above mentioned. See also 1 Missouri R. 5.

5. Our opinion is that no legislative power is delegated to the courts by the acts under consideration. There is simply a ministerial act to be performed, — no discretion is given to the courts. The

duty of passing the rule or order directing the petition of the corporators to be entered of record on the minutes of the court, setting forth to the public the object of the association and the privilege they desire to exercise, together with the name and style by which they are to be called and known, is made obligatory upon the courts; and should they refuse to discharge it, a mandamus would lie to coerce them. It is true the Legislature has seen fit to use the courts for the purpose of giving legal form to these companies. But it might have been done in any other way. Under the Free Banking Law of 1838, instead of petitioning the court, and having the order passed and entered upon its minutes, the certificate specifying the name of the association, its place of doing business, the amount of its capital stock, the names and residence of the shareholders, and the time for which the company was organized, is required merely to be proven and acknowledged, and recorded in the office of the clerk of the Superior Court, where any office of the association is established, and a copy filed with the Comptroller General. Cobb's Digest, 107, 108.

And so under the Act of 1847, authorizing the citizens of this State, and such others as they may associate with them, to prosecute the business of manufacturing with corporate powers and privileges. The persons who propose to embark in that branch of business are required to draw up a declaration specifying the objects of their association and the particular branch of business they intend carrying on, together with the name by which they will be known as a corporation, and the amount of capital to be employed by them; which declaration is required to be first recorded in the clerk's office of the Superior Court of the county where such corporation is located, and published once a week for two months in the two nearest Gazettes; which being done, it is declared that said association shall become a body corporate and politic, and known as such, without being specially pleaded, in all courts of law and equity in this State, to be governed by the provisions and be subject to the liabilities therein specified. Cobb's Digest, 439, 440.

In these two instances, and others which might be cited, the Legislature have dispensed with the action of the courts, or of any other agency, to carry out their enactments with regard to the various associations which have become the usual and favorite mode of conducting the industrial pursuits of the civilized world in modern times.

All these Statutes were complete as laws when they came from the hands of the Legislature, and did not depend for their force and efficacy upon the action or will of any other power. It is true that they could only take effect upon the happening of some event, such as filing the petition or declaration, and giving publicity to the purpose of the association in the mode prescribed by the act. But if this were a good reason for regarding these statutes as invalid, then how few corporations could abide the test! For it requires the acceptance of

the charter to create a corporate body; for the government cannot compel persons to become an incorporated body without their consent. And this consent, either express or implied, is generally subsequent in point of time to the creation of the charter. And yet, no charter that we are aware of has been adjudged invalid, because the law creating it and previously defining its powers, rights, capacities, and liabilities, did not take effect until the acceptance of the corporate body, or at least a majority of them, was signified.

The result therefore of our deliberation upon this case is, that the Acts of 1843 and 1845, vesting in all associations, except for banking and insurance, the power of self-incorporation, do not impugn the Constitution, and that the charter of the Franklin Bridge Company and all others created under them, and in conformity to their provisions, are legal and valid. With the policy of these Statutes we have nothing to do. The province of this and all other courts is *jus dicere*, not *jus dare*.

Judgment reversed.

RAILROAD COMPANY v. HARRIS.

(12 Wall. 65. 1870.)

MR. JUSTICE SWAYNE delivered the opinion of the court :¹—

This is a writ of error to the Supreme Court of the District of Columbia.

Harris sued the Baltimore and Ohio Railroad Company for injuries which he received by a collision. The declaration sets out that the company is a corporation established by law by the name of the Baltimore and Ohio Railroad Company, having a legal and recognized existence within the limits of the District of Columbia, and exercising there their corporate rights and privileges in the making of contracts and receiving freight and passengers for transportation upon their roads from the city of Washington to the Ohio river; that at the city of Washington, on the 23d of October, 1864, the plaintiff, wishing to be transported by the company over their roads to the Ohio river and towards the city of Columbus in the State of Ohio, for the sum of fifteen dollars, paid to the company, purchased of them a ticket for a seat and passage in their cars, to be transported along their roads from the city of Washington to the Ohio river and towards the city of Columbus; that in pursuance of this contract he took his seat in one of the cars of the company; that the company, in consideration of the money so paid, undertook and promised to transport him safely to the Ohio river; that the company managed their trains so negligently and carelessly that two trains, running in opposite directions, came in collision near Mannington, in the

¹ The statement of facts is omitted.

State of Virginia, whereby the plaintiff received the injuries complained of.

The company pleaded two pleas in abatement. (1) That the company was not an inhabitant of the District of Columbia when the writ was served. (2) That the company was not found in the District of Columbia when the writ was served.

To the first plea Harris replied, that the company was an inhabitant of the District of Columbia by virtue of certain acts of Congress, the dates and titles of which are set forth, and that they had accepted the provisions of those acts and constructed their roads under them, availing themselves of the privileges thus conferred, and doing business under them in the District of Columbia. To the second plea he replied that the company was found within the District of Columbia when the writ was served, and was within the jurisdiction of the court by virtue of the acts of Congress mentioned in the first replication.

The company demurred to these replications. The demurrers were overruled. The company thereupon filed the general issue of not guilty. The cause was tried by a jury and a verdict found for the plaintiff, upon which judgment was entered.

Upon the trial the counsel for the company prayed the court to instruct the jury that upon the evidence before them the plaintiff was not entitled to recover. The court refused to give this instruction, and the company excepted. Other exceptions appear by the record to have been taken, but they were not embodied in a bill of exceptions, and we cannot therefore consider them. The errors insisted upon here, at the first argument of the case, were:—

The overruling of the demurrers to the replications to the pleas in abatement.

The refusal of the court to give the instruction above set forth.

And that the declaration is fatally defective, wherefore the judgment should have been arrested, and must now be reversed.

When the case was first considered by this court in conference, it was found that while all the judges were of opinion that the judgment should be affirmed, there was a difference of opinion upon the question whether the acts of Congress and the statutes of Virginia relating to the company created a new and distinct corporation in the District of Columbia and in the State of Virginia respectively, or whether they were only enabling acts in respect to the corporation under the name of the "Baltimore and Ohio Railroad Company," as originally created by the State of Maryland. Subsequently the question was ordered to stand for reargument, and it has been reargued by the counsel on both sides. As the solution of this question must determine to a large extent the grounds upon which the judgment of the court is to be placed, it is necessary carefully to consider the subject.

The Baltimore and Ohio Railroad Company was incorporated by an act of the Legislature of Maryland, passed on the 28th of February,

1827. On the 8th of March following, the Legislature of Virginia passed an act whereby, after reciting the Maryland act, it was declared "that the same rights and privileges shall be, and are hereby, granted to the aforesaid company within the territory of Virginia, and the said company shall be subject to the same pains, penalties, and obligations as are imposed by said act; and the same rights, privileges, and immunities which are reserved to the State of Maryland or to the citizens thereof are hereby reserved to the State of Virginia and her citizens."

Several other statutes relating to the company were subsequently passed in Virginia, but they do not materially affect the question under consideration, and need not be more particularly adverted to. By an act of the Legislature of Maryland, of the 22d of February, 1831, the company was authorized to build a lateral road to the line of the District of Columbia. On the 2d of March, 1831, Congress passed an act which, after reciting, by a preamble, the original act of incorporation, enacted, "that the Baltimore and Ohio Railroad Company, incorporated by the said act of the General Assembly of the State of Maryland, shall be, and they are hereby, authorized to extend into and within the District of Columbia a lateral railroad. . . . And the said Baltimore and Ohio Railroad Company are hereby authorized to exercise the same powers, rights, and privileges, and shall be subject to the same restrictions, in the construction and extension of the said lateral road into and within the said District, as they may exercise or be subject to under or by virtue of the said act of incorporation in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, benefits, and immunities in the use of said road and in regard thereto as are provided in the said charter, except the right to construct any lateral road or roads in said District from said lateral road." A number of local regulations follow, which are not material to be considered. A supplementary act of the Legislature of Maryland, passed March 14, 1832, provided that the stock issued by the company to complete this lateral road "shall, united, form the capital upon which the net profits derived from the use of said road shall be apportioned," etc.

The act of Congress of February 26, 1834, and of March 3, 1835, are confined to matters of detail, and may be laid out of view.

When the case was reargued as directed by this court, the counsel for the company admitted that the acts of Congress in question were only enabling acts, and that they did not create a new corporation, but they insisted that the acts of Virginia were of a different character, and that they worked that result.

As regards the point under consideration we find no substantial difference. In both, the original Maryland act of incorporation is referred to, but neither expressly or by implication create a new corporation. The company was chartered to construct a road in Virginia

as well as in Maryland. The latter could not be done without the consent of Virginia. That consent was given upon the terms which she thought proper to prescribe. With a few exceptions, not material to the question before us, they were the same as to powers, privileges, obligations, restrictions, and liabilities as those contained in the original charter. The permission was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before. In its name, locality, capital stock, the election and power of its officers, in the mode of declaring dividends, and doing all its business, its unity was unchanged. Only the sphere of its operations was enlarged.

In what it does in Virginia the same principle is involved as in the transactions of the Georgia corporation in Alabama which came under the consideration of this court in *The Bank of Augusta v. Earle* (13 Peters, 558). The distinction is that here the assent of the foreign authority is express, while there it was implied. A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive, and do all other acts not *ultra vires* which a natural person could do. The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter. It cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly. *Lafayette Ins. Co. v. French* (18 Howard, 405). For the purposes of Federal jurisdiction it is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted. There is a presumption of law which is conclusive. *Louisville, Cincinnati & Charleston Railroad Co. v. Letson* (2 Howard, 497); *Marshall v. The Baltimore & Ohio Railroad Co.*, (16 Ib. 329); *Ohio & Mississippi Railroad Co. v. Wheeler* (1 Black, 297).

We see no reason why several States cannot, by competent legislation, unite in creating the same corporation or in combining several pre-existing corporations into a single one. The Philadelphia, Wilmington, and Baltimore Railroad Company is one of the latter description. In the case of that company against Maryland (10 Howard, 392), Chief Justice Taney, in delivering the opinion of this court, said: "The plaintiff in error is a corporation composed of several railroad companies, which had been previously chartered by the States of Maryland, Delaware, and Pennsylvania, and which, by corresponding laws of the respective States, were united together and form one corporation, under the name and style of The Philadelphia, Wilmington, and Baltimore Railroad Company. The road

of this corporation extends from Philadelphia to Baltimore." He gives the history of the legislation by which this result was produced. No question was raised on the subject, but the opinion assumes the valid existence of the corporation thus created. The case was brought into this court under the 25th section of the Judiciary Act of 1789. The jurisdictional effect of the existence of such a corporation, as regards the Federal courts, is the same as that of a co-partnership of individual citizens residing in different States. Nor do we see any reason why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quo ad hoc* any property within its territorial jurisdiction. That this may be done was distinctly held in *The Ohio and Mississippi Railroad Co. v. Wheeler* (1 Black, 297). It is well settled that corporations of one State may exercise their faculties in another, so far, and on such terms, and to such extent as may be permitted by the latter. *Blackstone Manufacturing Co. v. Inhabitants, &c.* (13 Gray, 489); *Bank of Augusta v. Earle* (13 Peters, 588). We hold that the case before us is within this latter category. The question is always one of legislative intent, and not of legislative power or legal possibility. So far as there is anything in the language of the court in the case of *The Ohio and Mississippi Railroad Co. v. Wheeler*, in conflict with what has been here said, it is intended to be restrained and qualified by this opinion. We will add, however, that as the case appears in the report, we think the judgment of the court was correctly given. It was the case of an Indiana railroad company licensed by Ohio, suing a citizen of Indiana in the Federal court of that State.

In *The Baltimore and Ohio Railroad Co. v. Gallahue's Administrator* (12 Grattan, 658), it was held by the Court of Appeals of Virginia that the company was suable in that State. In this we concur. We think this condition is clearly implied in the license, and that the company, by constructing its road there, assented to it. The authority of that case was recognized by the Court of Appeals of West Virginia, in *Goshorn v. The Supervisors* (1 West Virginia, 308), and in *The Baltimore and Ohio Railroad Co. v. The Supervisors et al.* (3 Id. 319). Here the question is whether the company was suable in the District of Columbia. In the case reported in Grattan, it was said: "It would be a startling proposition if in all such cases citizens of Virginia and others should be denied all remedy in her courts, for causes of action arising under contracts and acts entered into or done within her territory, and should be turned over to the courts and laws of a sister State to seek redress." The same considerations apply to the case before us. When this suit was commenced, if the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another

State. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that Congress intended that the important powers and privileges granted should be followed by such results.

But turning our attention from this view of the subject and looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought in all respects as if it had been an independent corporation of the same locality.

We will now consider, specifically, the several objections to the judgment, relied upon by the plaintiffs in error.

The pleas in abatement were bad. The demurrers reached back to the first error in the pleadings, and judgment was properly given against the party who committed it. If the replications were bad, bad replications were sufficient answers to bad pleas. But it is said the declaration was bad, and that the demurrers brought the defect in that pleading under review. The principle has no application where the defect is one of form and not of substance. *Aurora City v. West* (7 Wallace, 82).

The alleged defect in the declaration will be considered in connection with the error assigned relating to that subject. But if the court decided erroneously, the company waived the error by pleading over in bar. If it were desired to bring up the judgment upon the pleadings for examination by this court, the company should have stood by the demurrers. In the proper order of pleading, which is obligatory, a plea in bar waives all pleas, and the right to plead, in abatement. *Young v. Martin* (8 Wallace, 354); *Aurora City v. West* (7 Id. 92); *Clearwater v. Meredith* (1 Id. 42); 1 Chitty's Pleading, 440, 441.

The bill of exceptions which brought upon the record the refusal of the court to instruct the jury that the plaintiff was not entitled to recover, exhibits, among others, the following facts: Harris contracted, paid his money, and received his tickets at the city of Washington. The tickets consisted of three coupons, — one for his passage from Baltimore to Columbus, Ohio, another for his passage from Washington Junction to Baltimore, and the third for his passage from Washington City to Washington Junction. It is necessary to consider only the two last mentioned. They are both headed "Baltimore and Ohio Railroad," and signed "L. M. Cole, general ticket agent." Above the coupon first mentioned is this memorandum: "Responsibility for safety of person or loss of baggage on each portion of the route is confined to the proprietors of that portion alone." Each coupon has printed on its face the words "Conditioned as above." The coupon last mentioned gave Harris the right of passage over the lateral branch both in the District of Columbia

and in Maryland. The second coupon gave him the same right in respect to the main stem both in Maryland and in Virginia.

The instruction asked for assumed erroneously that there were two corporations under the same name, one of them in Virginia, and that the latter was liable and alone liable to the plaintiff. The attempted limitation of responsibility by the memoranda at the head and on the face of the coupons proceeded upon the same erroneous assumption as to the duality of the corporate ownership of the roads.

These views are sufficiently answered by what has been already said upon the subject. But if we concurred with the counsel for the plaintiff in error we should then hold that the agent who issued the coupons was the agent of both corporations; that the contract was a joint one; and that it involved a joint liability, unless the knowledge of the memoranda on the coupons and the assent of the plaintiff were clearly brought home to him. *Bissell v. Michigan S. & Northern Indiana Railroad Co.* (22 N. Y. 258); *Champion v. Bostwick* (18 Wendell, 175); *Cary v. Cleveland & Toledo Railroad Co.* (29 Barbour, 35); *Quimby v. Vanderbilt* (17 N. Y. 306); *Najac v. Boston & Lowell Railroad Co.* (7 Allen, 329); *The Great Western Railway Co. v. Blake* (7 Hurlstone & Norman, 987). In all such cases the burden of proof rests upon the carrier: *New Jersey Steam Nav. Co. v. The Merchants' Bank* (6 Howard, 388); *Brown v. Eastern Railroad Co.* (11 Cushing, 97); *Bean v. Green et al.* (8 Fairfield, 422); *Dorr v. The New Jersey Steam Nav. Co.* (4 Sandford, 136; s. c. 1 Kernan, 485). The bill of exceptions does not show that any testimony was given upon that subject. The court was asked to assume that the limitation on the face of coupons was itself conclusive, and to instruct the jury accordingly. But having held the unity of the corporation, of the proprietorship of the roads, and of the contract, it is needless further to consider the case in this aspect.

The instruction asked for was properly refused

The jurisdiction of the court was not governed by the 11th section of the Judiciary Act of 1789. It did not depend upon the citizenship of the parties. It was controlled by acts of Congress local to the district. A citizen of the district cannot sue in the Circuit Courts of a State. *Hepburn v. Ellzey* (2 Cranch, 445). If a corporation appear and defend in a foreign State it is bound by the judgment. *Angel & Ames on Corporations*, §§ 404, 405; *Flanders v. Aetna Ins. Co.* (3 Mason, 158); *Cook v. The Champlain Transportation Co.* (1 D  nio, 98). If the declaration were insufficient, the additional averments in the replications admitted by the demurrer to be true, cured the defect. *Lafayette Insurance Co. v. French* (18 Howard, 405).

Judgment affirmed.

MULLER v. DOWS.

(94 U. S. 444. 1876.)

APPEAL from the Circuit Court of the United States for the District of Iowa.

MR. JUSTICE STRONG delivered the opinion of the court:—

The decree made below is assailed here for several reasons. The first is, that the court had no jurisdiction of the suit, in consequence of the want of proper and necessary citizenship of the parties. This objection was not taken in the Circuit Court, but it is of such a nature, that, if well founded, it must be regarded as fatal to the decree. The bill avers that Dows and Winston, two of the complainants, are citizens and residents of the State of New York, and that Burnes, the other complainant, is a citizen and resident of the State of Missouri. The two original defendants, the Chicago and Southwestern Railway Company, and the Chicago, Rock Island, and Pacific Railroad Company, are averred to be citizens of the State of Iowa. Were this all that the pleadings exhibit of the citizenship of the parties, it would not be enough to give the Circuit Court jurisdiction of the case. In *The Lafayette Insurance Company v. French et al.* (18 How. 404), a similar averment was held to be insufficient, because it did not appear from it that the Lafayette Insurance Company was a corporation; or, if it was, that it did not appear by the law of what State it was made a corporation. It was therefore ruled, that, if the defective averment had not been otherwise supplied, the suit must have been dismissed. A corporation itself can be a citizen of no State in the sense in which the word "citizen" is used in the Constitution of the United States. A suit may be brought in the Federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation; and, for the purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the State which, by its laws, created the corporation. It is, therefore, necessary that it be made to appear that the artificial being was brought into existence by the law of some State other than that of which the adverse party is a citizen. Such an averment is usually made in the introduction, or in the stating part of the bill. It is always there made, if the bill is formally drafted. But if made anywhere in the pleadings, it is sufficient. In *The Lafayette Insurance Company v. French et al.* (*supra*), the defective averment of citizenship was held to have been supplied by the plaintiff's replication to the plea, which alleged that the defendants were a corporation created under the laws of Indiana, having its principal place of

business in that State. And, in the present case, we think the averment in the introduction of the bill, that the two defendant corporations were citizens of Iowa, which, if standing alone, would be insufficient to show jurisdiction in the Federal court, has been supplemented by other averments which satisfactorily show that the court had jurisdiction of the case. The bill in its stating part alleges that the Chicago and Southwestern Railway Company, of the State of Iowa, was organized by the adoption of articles of association in the manner provided by the laws of said State, and that, with all the powers, rights, and privileges granted and conferred on corporations by the then existing laws of the said State, it assumed to act. The articles of association are appended to the bill as an exhibit, and made part of it by proper reference. So are the articles of consolidation with a corporation of the same name of Missouri, in which the Chicago and Southwestern Railway Company in Iowa, is cited to be a body politic and corporate, organized and existing under and by virtue of the laws of the State of Iowa. The averments of the bill were generally admitted in the answers of both the defendant companies. But this is not all. Throughout the pleadings, the corporate existence under the laws of Iowa of both the companies is either admitted or asserted by all the original parties, and by the appellants, who were made parties after the suit had been some time in progress. The petition of the appellants to be made parties adopted another petition in which it was alleged that the Chicago, Rock Island, and Pacific Railroad Company was and is a corporation organized under and in pursuance of the laws of the States of Illinois and Iowa, and that the Chicago and Southwestern Railway Company was and is a corporation created under and by virtue of the laws of the States of Missouri and Iowa. Having been made parties, the appellants filed cross-bills against the present complainants and the two companies, in which they repeated the averments they had previously adopted; and the answer to the cross-bill made by all the defendants therein expressly admitted them. The record is thus seen to be full of showing that both the defendant corporations derived their existence as corporate bodies under the laws of Iowa, at least in part, and that they were corporations of that State.

Still, it is argued on behalf of the appellants that the Chicago and Southwestern Railway Company cannot claim to be a corporation created by the laws of Iowa, because it was formed by a consolidation of the Iowa Company with another of the same name, chartered by the laws of Missouri, the consolidation having been allowed by the statutes of each State. Hence, it is argued, the corporation was created by the laws of Iowa and of Missouri; and as Burnes, one of the plaintiffs, is a citizen of Missouri, it is inferred that the Circuit Court had no jurisdiction. We cannot assent to this inference. It is true the provisions of the statutes of Iowa, respecting railroad consolida-

tion of roads within the State with others outside of the State, were that any railroad company, organized under the laws of the State, or that might thus be organized, should have power to intersect, join, and unite their railroads constructed or to be constructed in the State, or in any adjoining State, at such point on the State line, or at any other point, as might be mutually agreed upon by said companies; and such railroads were authorized to "merge and consolidate the stock of the respective companies, making one joint-stock company of the railroads thus connected." The Missouri statutes contained similar provisions; and with these laws in force the consolidation of the Chicago and Southwestern railways was effected. The two companies became one. But in the State of Iowa that one was an Iowa corporation, existing under the laws of that State alone. The laws of Missouri had no operation in Iowa. It is, however, unnecessary to discuss this subject further. Doubt in regard to it is put at rest by the decision of this court in *Railway Company v. Whitton's Administrator* (13 Wall. 270). There a similar question arose. A suit was brought by a citizen of Illinois in the State of Wisconsin, and it became a question whether the Federal Circuit Court of the latter State could entertain jurisdiction. The company, sued at first in the State court, resisted an application to remove the case into the United States Circuit Court, on affidavits that it was a corporation created by and existing under the laws of the States of Illinois and Wisconsin and Michigan; that its line of railway was located, in part, in each of these States; that its entire line of railway was managed and controlled by the defendant as a single corporation; that all its powers and franchises were exercised, and its affairs managed and controlled, by one board of directors and officers; that its principal office and place of business was at the city of Chicago, in the State of Illinois, and that there was no office for the control or management of the general business and affairs of the corporation in Wisconsin. Nevertheless, the Circuit Court took jurisdiction of the case; and this court held correctly, remarking that "the defendant is a corporation, and as such a citizen of Wisconsin by the laws of that State. It is not there a corporation or citizen of any other State. Being there sued, it can only be brought into court as a citizen of that State, whatever its status or citizenship may be elsewhere." In view of this decision, it must be held that the objection to the jurisdiction of the Circuit Court of Iowa is unsustainable.

The next objection urged against the decree of the court below is, that it is void so far as it directed the usual foreclosure and sale of property not within the territorial jurisdiction of the court. A part of the Chicago and Southwestern Railway is in the State of Missouri, and the mortgage which the bill sought to have foreclosed covered that part, as well as the part in the State of Iowa. The court decreed a sale of the entire property covered by the mortgage, and directed the master, who was ordered to make the sale, to exe-

cute a good and sufficient deed or deeds to the purchaser. It also declared that after the sale both the defendant corporations and the complainants' trustees named in the mortgage, as well as all persons claiming under them or either of them, be barred and foreclosed from all interest, estate, right, claim, or equity of redemption of, in, and to the property; reserving, however, the rights of the holders of the bonds and coupons secured by the first mortgage, then remaining outstanding and unpaid. It directed that the two defendant corporations should surrender to the purchaser the property sold and conveyed, upon the execution, approval, and delivery of the master's deed; and that, as further assurance, the Chicago and Southwestern Railway Company should, on the approval and delivery of the master's deed, convey all the property therein described to the purchaser, by their good and sufficient deed.

If such a foreclosure and sale cannot be made of a railroad which crosses a State line and is within two States, when the entire line is subject to one mortgage, it is certainly to be regretted, and to hold that it cannot be would be disastrous, not only to the companies that own the road, but to the holders of bonds secured by the mortgage. Multitudes of bridges span navigable streams in the United States, streams that are boundaries of two States. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors? A vast number of railroads, partly in one State and partly in an adjoining State, forming continuous lines, have been constructed by consolidated companies, and mortgaged as entireties. It would be safe to say that more than one hundred millions of dollars have been invested on the faith of such mortgages. In many cases these investments are sufficiently insecure at the best. But if the railroad, under legal process, can be sold only in fragments; if, as in this case, where the mortgage is upon the whole line and includes the franchises of the corporation which made the mortgage, the decree of foreclosure and sale can reach only the part of the road which is within the State,—it is plain that the property must be comparatively worthless at the sale. A part of a railroad may be of little value when its ownership is severed from the ownership of another part. And the franchise of the company is not capable of division. In view of this, before we can set aside the decree which was made, it ought to be made clearly to appear beyond the power of the court. Without reference to the English chancery decisions where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity, sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. True, it cannot send its process into that other State, nor can it

deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants. In *McElrath v. The Pittsburg & Steubenville Railroad Co.* (55 Penn. St. 189), — a bill for foreclosure of a mortgage, — in which it appeared that a railroad company, whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit, being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the State of West Virginia as that in Pennsylvania. This case is directly in point, and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming the property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made.

The next objection urged by the appellants is, that the bill for a foreclosure and all the proceedings therein were collusive. It is said the suit was instituted by collusion between the trustees and the Rock Island and Southwestern Railroad Companies, for the purpose of destroying the lien of the Atchinson branch bondholders on the main line of the Southwestern Railway, and to enable the Rock Island company to obtain the title to the main line, discharged from any lien or claim on the part of such bondholders. After careful examination of the evidence, we have failed to find anything that justifies this objection. And certainly, if there was collusion in bringing and conducting the suit, the appellants have not been injured by it. They were permitted to come in as parties defendant, and they had full opportunity to assert their equities.

The fourth objection is general. It is, that, at the time of filing the bill, no right of foreclosure existed in favor of the complainant trustees for the benefit of the Chicago and Rock Island Railway Company, or, if such a right did exist, that it had been waived. In respect to this objection we have to remark, that unless the right to a foreclosure had been waived by the Rock Island Company, we discover no foundation for the assertion that there was no right of foreclosure when the suit was brought. That company had indorsed \$5,000,000 of the bonds of the Southwestern Company secured by the mortgage; and, in consequence of the indorsement, had paid coupons for interest of the bonds to a large amount. The mortgage stipulated that it might be foreclosed, in case of failure by the mortgagor to pay the interest; and it stipulated further, that in case the

Rock Island Company should, in consequence of its guaranty, pay any of the bonds or coupons, the mortgage might be foreclosed at their instance. The right to foreclose at the instance of the Rock Island company was expressly given. Was there any waiver of this right? We think not. It is said that the contract of July 27, 1871, coupled with the contract of Oct. 1, 1869, constituted a waiver. The contract first made preceded and contemplated the execution of the mortgage. It gave to the Rock Island Company the option of furnishing the equipment for the Southwestern road, or to lease and operate it on such terms as might be agreed upon. Manifestly, this was for an additional security to the guarantors of the bonds, and not for a substituted security. And the contract of July 27, 1871, made between the Rock Island Company and the Southwestern, merely provided that, with regard to the lease of the branch railroad proposed to be constructed by the latter to the Missouri River, opposite Atchinson, it should be used and operated by the Rock Island road in the same manner and on the same terms as the main line of the Southwestern. The meaning of this is, not that a lease existed, or should be taken, though one may have been contemplated, but that the branch road should be operated in the same manner and on the same terms as the main line might be. How this contract alone, or connected with the contract of Oct. 1, 1869, can be construed as a waiver of a right to sue for foreclosure of the mortgage on the main line, we are unable to comprehend. Nor can we see that the contract of Dec. 4, 1871, called a "lease contract," even if it be regarded as an executed and subsisting contract, can have such an effect. We have heretofore said that the agreement to give and take a lease, dependent on the option of the Rock Island Company, was intended as an additional security to that company for its indorsement of the bonds. If we are correct, a lease executed in pursuance of the agreement could be only cumulative security. Hence, it could be no waiver of the right to foreclose.

But, in fact, there was no lease, nor any agreement for a lease, that could be enforced specifically. The language of the agreement of Oct. 1, 1869, and that of the agreement of July 27, 1871, warrant no interpretation that makes them a lease in law, or in equity. The first, it is true, contemplated the possibility of a lease of the main line, if the terms could be agreed upon; and the latter provided that when such lease should be agreed upon, if ever, it should also embrace the branch line. But the terms never were agreed upon. On the thirtieth day of October, 1871, at a meeting of the executive committee of the Rock Island Company, Messrs. Scott and Riddle were appointed a sub-committee "to agree upon the basis of a contract for a running arrangement between the company and the Southwestern, with directions to report to the general committee when an arrangement should be agreed upon." On the fourth of December, 1871, a proposition was submitted by that sub-committee

to the officers of the Southwestern, and accepted by them. It was a proposition for a lease. But the sub-committee had no authority to agree for the Rock Island Company to take a lease, and when, afterwards, they reported their action to the general committee, that committee refused to confirm it. It is vain, therefore, to contend that there was a lease, or any agreement for a lease, that can be enforced. And, even if there was, there is no evidence that one of its terms was that the rent should be sufficient for the payment, and should be applied to the payment, of the Atchinson branch bonds.

It is next insisted on behalf of the appellants, that the Rock Island Company could not ask for a foreclosure of the mortgages until it had accounted for and applied the stock of the Southwestern Company to its indemnification for its guaranty, for which purpose it held such stock as security. The company did hold a large amount of that stock. Whether it held it as an indemnity for the liabilities it had assumed, we do not care to inquire. Assuming that it did, the fact is quite immaterial. It surely cannot be maintained that a surety who held several securities for his indemnity cannot use one of them because he has another to which he might resort.

The fifth particular in which the decree is alleged to have been erroneous is, that it denied the relief for which the appellants prayed in their cross-bill. That relief was the enforcement of what is called the lease contract of Dec. 4, 1871, or the enforcement of the contract of July 27, 1871, by a lease of the branch line, on terms and conditions to be derived from the contract of Oct. 1, 1869; that is to say, the rental to be paid by the Rock Island Company to be an amount sufficient to guarantee the principal, or at least the interest, of the Atchinson branch bonds. The answer to this is what we have heretofore said. There was no lease, nor any contract which bound the Rock Island Company to take a lease, much less to pay a rental sufficient to guarantee the principal or interest of the Atchinson branch bonds, or to apply the rent to the payment of that principal or interest.

The appellants also, in their cross-bill, prayed in the alternative that the bonds of the branch road, held by them, might be deemed to have been obtained under false and fraudulent pretences, and that the proceeds thereof were paid out by the Rock Island Company knowingly, fraudulently, and in violation of a trust assumed by them, and that the said company might be decreed to pay to them the par value of the same and interest.

We have sought in vain for any evidence that would justify a decree that the Rock Island Company obtained the bonds of the branch road by fraudulent pretences, or that it knowingly, fraudulently, and in violation of any trust assumed by it, paid out the proceeds of sale of the bonds. By the provisions of the branch mortgage the Rock Island Company was made the custodian of the bonds, with power and direction to pay them and their proceeds to the president or other

duly authorized agent of the Southwestern Company, in three contingencies: First, upon the delivery of an invoice of articles purchased, approved by the president; second, upon the presentation of monthly estimates by the engineer of the Southwestern of work done and materials furnished in the construction of the branch railway, approved in the same manner; and, third, on the certificate of the same engineer, approved in like manner, that the road had been completed and was in running order. If this constituted a trust, it was only that of a custodian. The Rock Island Company had no right to control the location of the branch road, or the cost of its construction. It was not its duty to supervise the contracts or direct the alignment. Such action would have been outside of its corporate power. If some persons who were its officers undertook to control the expenditure in such a manner as to secure a proper location and construction of the road (of which we discover no sufficient evidence), those persons may be responsible for their breach of duty, if there was any. But no such trust was assumed by the Rock Island Company. Certainly, then, there was no undertaking that the branch road should be fifty miles long; and, if it was imperfectly constructed, it appears that the Rock Island Company has expended upon its construction a very large sum of its own money, and has made it a first-class Western road. If, then, there was such a trust as is charged by the appellants, and a breach of it, full compensation has been made, and the appellants have all the security the trust was intended to give them; that is, a first mortgage upon a finished first-class road.

The last objection to the decree is, that the relief prayed for by the cross-bills of the two defendants railroad companies should not have been granted, for the following reasons: 1st, If the original suit fails for want of jurisdiction, so must the cross-bills. 2d, The cross-bills were nullities, because filed without leave of the court, and because not making the intervening bondholders parties. 3d, Because collusive. We have seen the court had jurisdiction of the original suit. The permission of the court to file the cross-bills must be presumed from its action upon them, and the intervening bondholders were not parties or necessary parties when the bills were filed. They became parties to the original bill, but they did not ask to be made parties to the cross-bills of the defendant corporations. That the cross-bills were collusive in their origin, purpose, and conduct, if such was the fact, which we do not perceive, is of no importance, since the appellants had an unobstructed opportunity to vindicate their rights. They might, if they had chosen, have become parties defendant to the cross-bills, and, if they had, they could not have resisted the relief given by the court.

The appellants are, no doubt, unfortunate. It may be that they purchased their bonds, expecting that the Rock Island Company would protect them, either by taking a lease of the branch road, or

by holding the purchase-money of the bonds and expending it for their security. But the expectation of a guaranty cannot be treated as a guaranty itself. *Decree affirmed.*

STOUT v. RAILROAD COMPANY.

(3 *McCrory*, 1. 1881.)

MCCRORY, CIRCUIT JUDGE: —

This case is before the court on a plea to the jurisdiction, which presents for consideration a question of importance in its application to this case, and probably to other cases in this district. The facts are agreed upon, and are as follows: —

Plaintiff, a citizen of Nebraska, sues the defendant, alleging that it is a citizen of Iowa, to recover damages for personal injuries sustained, as he alleges, at the town of Blair, Nebraska, on the twenty-seventh day of March, 1869, through the negligence of defendant in the management of a railroad then possessed and operated by it in Nebraska. The said defendant, the Sioux City & Pacific Railroad Company, was duly organized and incorporated under the laws of Iowa in 1864. Prior to the year 1870 it built a railroad in the State of Iowa, and also extended the same into and built a railroad in the State of Nebraska. On the twenty-first day of September, 1869, the defendant filed a true copy of its original articles of incorporation in the office of the secretary of state of the State of Nebraska. Defendant still owns and operates said line of railroad in the States of Iowa and Nebraska, and has had from the beginning its principal place of business at Cedar Rapids, Iowa. By an act of the General Assembly of Nebraska, approved February 12, 1869, it is provided: "That any railroad company heretofore organized under the laws of the States of Kansas, Missouri, or Iowa, is hereby authorized to extend and build its road into the State of Nebraska; and such railroad companies shall have and possess all the powers, franchises, and privileges, and be subject to the same liabilities, of railroad companies organized and incorporated under the laws of this State; provided, such non-resident company shall first file a true copy of its articles of incorporation with the secretary of state, and shall comply with the laws of Nebraska, as to filing and recording articles of incorporation, and in all things required by law relating to railroads and otherwise in this State; and such non-resident company shall keep an office in this State, in some county in this State, in which its road is, or is proposed to be; and shall be liable to civil process, to be sued and to sue, as provided by law." Gen. Statutes Neb. 1873, p. 203. By another act of said General Assembly, approved February 14, 1873, it is provided: "That any railroad company which has been organized under the laws of the State of Iowa,

Kansas, or Missouri, and which has heretofore extended its line of road in this State, or built any portion of its line of road in this State, and has filed a true copy of its original articles of incorporation in the office of the secretary of state of this State, is, from the time of filing said copy of its original articles of incorporation as aforesaid, hereby declared to be a legal corporation of this State, and entitled to all the rights, privileges, and franchises of railroad companies organized under and pursuant to the laws of the State of Nebraska." Ibid. 206.

The summons is returned served upon the defendant "by delivering to, and leaving with Frank Harriman, its managing agent in this State and district, a certified copy of this summons, with all the indorsements thereon; said service was made in Washington County, State and district of Nebraska." The declaration in this case was filed April 27, 1874, and the summons was served on the eleventh day of May in the same year.

Upon these facts the following questions arise, upon the consideration of the plea to the jurisdiction:—

First. Was the defendant a foreign corporation at the time the suit was commenced?

Second. And if so, was the defendant an inhabitant of, or found within, the district of Nebraska at the time of the service of process in this case?

The suit was commenced and process served in April and May, 1874, at which times both the acts above named were in force,—the latest one having been approved February 14, 1873. It is true that only the first of these acts was in force when the accident occurred which is the foundation of this suit, and inasmuch as I am of the opinion that the first act did not constitute the defendant a Nebraska corporation, it becomes necessary to consider whether it is the statute in force at the time of the accident, or that which is in force at the time of the service of process, that is to govern as to the forum. Upon this point I entertain no doubt. All questions of jurisdiction depending upon the citizenship of the parties must be determined by their citizenship at the time of the commencement of the suit. *Connolly et al. v. Taylor et al.* (2 Peters, 556).

This brings us to the question whether, by the last act above quoted (that of February 14, 1873), or by the two acts construed together, the defendant was created a corporation of the State of Nebraska. The fact is conceded that the defendant corporation was organized under the laws of Iowa, and built a railroad in that State, which was extended into and through a portion of the territory of the State of Nebraska, and that it has filed a true copy of the original articles of incorporation in the office of the secretary of state of the State of Nebraska. The Act of February 14, 1873, declares in plain terms that these facts shall constitute the defendant "a legal corporation of this State, and entitled to all the rights, privileges,

and franchises of railroad companies organized under, and pursuant to, the laws of the State of Nebraska." It is entirely competent for the State, by its legislation, to determine the mode of creating corporations within its limits; and, if it sees fit to declare that a foreign corporation may become a corporation of the State by building a railroad therein, and filing a copy of its articles of incorporation with the secretary of state, I have no doubt that compliance with these terms constitutes the foreign corporation a domestic corporation, with respect to all its transactions within such State. It follows that the Sioux City & Pacific Railroad Company was a Nebraska corporation from and after the passage of the Act of February 14, 1873, and, therefore, was such at the time of the commencement of this suit. Of course, if both plaintiff and defendant were citizens of Nebraska at the time of the commencement of this suit, then this court has no jurisdiction of the case, and the plea to the jurisdiction must be sustained. But counsel for plaintiff insists that there is a foreign corporation—a citizen of Iowa—whose corporate name is the Sioux City & Pacific Railroad Company; that it is this foreign corporation, and not the domestic corporation of the same name, that is sued; and that plaintiff should be permitted to make out, if he can, a case against the Iowa corporation by proof. His right to do this is clear enough, provided that corporation is in court, and subject to our jurisdiction. Whether it is in court or not depends upon the question whether, at the time of the commencement of this action, that corporation had an agent in Nebraska engaged in the management of its business upon whom service has been made. If the agent upon whom the service was made was the agent of the Nebraska corporation, it is not sufficient, for although the two corporations may be composed of the same persons, yet they are, in law, for the purposes of suing and being sued, separate and distinct. It is not impossible that the Iowa corporation might have kept an office and agents in Nebraska at the time this suit was commenced, but, upon the proofs adduced upon this hearing, I conclude that the person served was an agent of the Nebraska corporation, and not of the Iowa corporation. At all events, it has not been shown that he was the agent of the Iowa company in such a sense that service upon him in Nebraska would be a sufficient service upon that company. The Act of 1875, defining the jurisdiction of the circuit courts (18 Stat. 470), provides that "No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings," etc. It has been held that a corporation created by one State may consent to be sued in another, in consideration of its being permitted by law to exercise therein its corporate powers and privileges. *Railroad Co. v. Harris* (12 Wall. 65); *Ex parte Shollenberger* (96 U. S. 369); *Knott v. Insurance Co.* (2 Woods, 479).

But the Legislature of Nebraska, instead of providing that foreign railroad corporations may extend their roads into that State upon condition that they will consent to be sued there, has seen fit to provide that such corporations shall, by extending their lines of railroad into the State, and by filing copies of their articles of incorporation with the secretary of state, become domestic corporations, with all the powers and franchises of other State corporations. Such corporations therefore, being citizens of the State of Nebraska, — corporations of the State, — can be sued by citizens of Nebraska only in the State courts. It may be that plaintiff has a cause of action against the Iowa corporation, but it is not one that can be prosecuted in this court upon process served upon an agent engaged in the operation of the extended line of railroad within the State of Nebraska, and not shown to be an agent of the Iowa corporation. It is not pretended that there are two lines of railroad in Nebraska, one of which is operated by the Iowa corporation, and the other by the Nebraska corporation; but, on the contrary, it is conceded that the railroad in Nebraska is simply an extension of the Iowa road; and, upon the admitted facts, without more, we must conclude that the person upon whom service was made was employed in the operation of the line in Nebraska, and as the agent of the Nebraska corporation. The return of the marshal is not conclusive upon the defendant, and he may disprove it on the hearing of a plea to the jurisdiction. *Van Rensselaer v. Chadwick* (7 How. Pr. 297); *Litchfield v. Barnwell* (5 id. 341); *Wallis v. Lott* (15 id. 567).

If the plaintiff thinks that he can, by further proof, establish the fact that the person upon whom the service was made was the managing agent of the Iowa corporation, we will withhold final judgment until a further hearing can be had; but if he rests the case upon the proof as it now stands, the plea to the jurisdiction will be sustained.

There is a motion to dismiss the plea to the jurisdiction upon the ground that it has been waived by the filing of an answer. It appears that some time since the case upon the plea to jurisdiction was argued before Judge Dillon, and taken under advisement by him. Pending its consideration, the defendant left an answer with the clerk, indorsed "to be filed subject to the plea to the jurisdiction." I think it is within the discretion of the court to hold that the answer has not been filed, within the meaning of the rule invoked by plaintiff's counsel, and that defendant has not waived the plea to the jurisdiction.

The motion to dismiss the plea is overruled.

DUNDY, District Judge, concurs.

At the May term, 1881, the cause came on for further hearing upon the plea to the jurisdiction, and, upon further proof adduced in relation thereto, a further opinion was delivered as follows: —

MCCRARY, Circuit Judge: —

The evidence adduced upon the trial of the issue upon the plea in

abatement does not show that service in this case was made upon an agent of the Iowa corporation. It is true that the whole line is under one management; that the principal offices are in Iowa, and that the station agent upon whom service was made makes his reports to the general office at Cedar Rapids, Iowa.

The line through both States is operated by one management, one set of officers, one board of directors, one set of stockholders. This the Legislature of Nebraska is presumed to have known when it enacted the statute declaring that if an Iowa railroad company extends its line into this State and files its articles of incorporation, it "shall be a legal corporation of this State." Act of February 14, 1873; G. S. p. 206.

The plain effect of this statute is to constitute the Sioux City & Pacific Railroad Company, at least for jurisdiction purposes, a Nebraska corporation, in respect to all its transactions within this State, and the agents of the company conducting its business in Nebraska are the agents of the Nebraska corporation; otherwise the statute could have no effect whatever. If the officers and agents of this corporation engaged in the transaction of its business in Nebraska are to be regarded as the officers and agents of the Iowa corporation, it follows that the statute has made it a Nebraska corporation in name only, and not in fact or in law. The same natural persons may constitute two or more distinct corporations. A corporation in Nebraska must exist by virtue of the law of this State, and if that law constitutes the defendant a Nebraska corporation, it matters not that the law of Iowa also constitutes it a corporation of that State.

It is the right of each State in which a corporation transacts business to require it to become a corporation under and by virtue of its own laws. This right having been exercised by the State of Nebraska, in a statute plainly applicable to the defendant, we must hold it a domestic corporation, and not a foreign corporation subject to the jurisdiction of this court.

Judgment for the defendant upon the plea in abatement.

STATE v. DAWSON.

(16 Ind. 40. 1861.)

APPEAL from the Clark Circuit Court.

PERKINS, J.: —

Information against the defendants, charging that they are pretending to be a corporation, and to act as such, when they are not a corporation. It charges that in January, 1849, the Legislature of the State of Indiana enacted a special charter of incorporation, (which is set out at length) for a railroad from Fort Wayne, Indiana,

to Jeffersonville, to be called the Fort Wayne and Southern Railroad; that the persons named in the charter as directors did not accept said charter till June 2, 1852, when they did meet and accept the same, and organize under it. It is alleged that the defendants are assuming to act under said charter, never having organized under any other. The Court below sustained a demurrer to the information; thus holding the defendants to be a legal corporation.

The present Constitution of Indiana took effect on November 1, 1851. It contains these provisions:—

“All laws now in force and not inconsistent with this Constitution, shall remain in force, until they shall expire or be repealed.” Sched. (1 subsec.) of Const.

“Corporations, other than banking, shall not be created by special act, but may be formed under general laws.” Art. II., § 13.

“All acts of incorporation for municipal purposes shall continue in force under this Constitution, until such time as the General Assembly shall, in its discretion, modify or repeal the same.” Sched. *supra*, subsec. 4.

The charter for the Fort Wayne and Southern Railroad was not a charter for municipal purposes, and hence was not specially continued in existence. Art. II. § 13, above quoted, prohibits the creation of a corporation by special act or charter, that is, as we construe the prohibition, through, or by virtue of, such special act or charter, after November 1, 1851. The policy that induced the prohibition, as well as its literal import, demands this construction. It is necessary for us to ascertain, then, when the defendants, if ever, were created a corporation. The simple enactment of the charter for the corporation, by the Legislature, did not create the corporation. It required one act on the part of the persons named in the charter to do that, viz.: acceptance of the charter enacted.

Says Grant, in his work on Corporations, vide p. 13: “Nor can a charter be forced on any body of persons who do not choose to accept it.” And again, at page 18, he says, “The fundamental rule is this: No charter of incorporation is of any effect until it is accepted by a majority of the grantees, or persons who are to be the corporators under it. *Bagge's Case* (2 Brownl. & G. 100); s. c. 1 Roll. Rep. 224; *Dr. Askew's Case* (4 Burr. 2200); *Rutter v. Chapman* (8 M. & W. 25); per *Wilmot, J., Rex v. Vice-Chancellor of Cambridge* (3 Burr. 1661). This is analogous to the general rule that a man cannot be obliged to accept the grant or devise of an estate. *Townson v. Tickell* (3 B. & Ald. 31).” See, also, Ang. & Am. § 83, where it is said, if a charter is granted to those who did not apply for it, the grant is said to be *in fieri* till acceptance. We need not inquire whether this rule extends to municipal corporations in this country. As to what may constitute an acceptance we are not here called on to decide, as the information expressly shows that there was none in this case till June, 1852, which fact is admitted by the demurrer.

The grant of the charter in question, then, to those who had not applied for it, was but an offer, on the part of the State; a consent that the persons named in the charter might become a corporation, might be created such an artificial being, by accepting the charter offered. But an offer, till accepted, may be withdrawn. In this case, the offer made by the State, in 1849, was withdrawn by the State, November 1, 1851, by then declaring that no corporation, after that date, should be created except pursuant to regulations which she, in future, through her Legislature would prescribe.

This pretended corporation, then, was not created before November 1, 1851, and it could be created afterward only by the concurrent consent of the State and the corporators. But at that date, the Constitution prohibited both the State and corporators from giving consent to such a corporation, to wit: one coming into existence through a special charter; and hence necessarily prohibited the creation thereof. This decision accords with that of the Supreme Court of the United States in *Aspinwall v. Daviess County* (22 How., p. 364); where it was held that the new Constitution prohibited a subscription of stock to the Ohio and Mississippi Railroad Company, authorized by the charter of the corporation, granted under the former Constitution, and actually voted by the people of the county under that Constitution.

Whether, as a matter of fact, the charter in this case was accepted under the old Constitution, must be determined on a trial of the cause below.

Had the provision in our Constitution, like that on this subject in the Constitution of Ohio, ordained that the Legislature should "pass no special act conferring corporate powers," the restraint would clearly have been imposed alone upon future legislative action; but, in our Constitution, the restraint is plainly imposed upon the creation, the organization, of the corporation itself. See *The State v. Roosa* (11 O. St. R. 16.)

PER CURIAM. — The judgment is reversed, with costs. Cause remanded for further proceedings in accordance with this opinion.

NEWCOMB v. REED.

(12 Allen, 362. 1866.)

CONTRACT in which the plaintiff sought to charge the officers of the Boston Mechanical Bakery Company with a debt contracted in the name of the corporation, in consequence of their neglect to file certificates and statements of the condition of the corporation. At the trial in the Superior Court before Ames, J., without a jury, the judge found for the defendants upon facts which are stated in the opinion; and the plaintiff alleged exceptions.

HOAR, J. :—

The defence to this action rests wholly upon the assumption that the corporation, whose officers the plaintiff seeks to charge with a statute liability for its debts, never had a legal existence. The only defect suggested in the organization of the corporation is, that the call for the first meeting was signed by only one of the persons named in the act of incorporation, and not by a majority of them, as required by St. 1855, ch. 140.

The case of *Uteley v. Union Tool Company* (11 Gray, 139), is the authority on which the defendants chiefly rely. That case decided that in order to charge as stockholders of a manufacturing corporation, persons who have been summoned in an action against it under St. 1851, c. 315, the plaintiff must prove the legal existence of the corporation. The alleged corporation had no charter or act of incorporation from the Legislature, but was an association which had undertaken to assume corporate powers under a general act for the formation of joint-stock companies, St. 1851, c. 133. That statute authorized three or more persons who had entered into "articles of agreement in writing" for the transaction of certain kinds of business, to organize in a manner prescribed, and thereby to become a corporation; and the court were of opinion that written articles of agreement were essential to constitute a corporation, and that these articles must fix the amount of the capital stock, and set forth distinctly the purpose for which and the place in which the corporation was established. The court say: "There is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings are to rest, and is designed to take the place of a charter or act of incorporation, by which corporate rights and privileges are usually granted." And they add that "it is not a case of a defective organization under a charter or act of incorporation, nor of erroneous proceedings after the necessary steps were taken to the assumption of corporate powers, but there is an absolute want of proof that any corporation was ever called into being, which had the power of contracting debts or of rendering persons liable therefor as stockholders."

We think these reasons have no application to the case now before us. In this there was an act of incorporation from the Legislature. There is no question that the corporate powers which it conferred were assumed by the persons by whom it was intended that they should be enjoyed, so far as they chose to avail themselves of them. The organization was not strictly regular, but can hardly be considered even as defective.

And if the object of the statute is regarded, by which it is required that the first meeting shall be called by a majority of the persons named in the act of incorporation, it will be evident that it is directory merely, and only designed to secure the rights conferred by the

charter to those to whom it was granted, among themselves, by providing an orderly method of organization. Thus, if all the persons interested should come together without any notice or call whatever, and proceed to accept the charter, and do the other acts necessary to constitute the corporation, we cannot doubt that their action would be valid, and that neither the public nor any persons not belonging to the association, would have any interest to question their proceedings.

The purpose of the statute was probably to avoid such difficulties as were disclosed in the case of *Lechmere Bank v. Boynton* (11 Cush. 369), where two parties had attempted to organize separately under the same charter, each claiming to be the corporation.

There is nothing in the facts found and reported to show that all persons interested were not actually notified of the meeting for organization. On the contrary, it would seem that they were. No one has questioned the regularity of the proceedings, or claimed, as in *Lechmere Bank v. Boynton*, a right to organize in a different manner. The evidence was ample to show that the persons named in the act of incorporation with their associates, or at least all of them who desired to do so, have accepted the act, organized under it, issued stock, elected officers who have acted and served in that capacity, carried on business, contracted debts, and exercised all the functions of corporate existence. It is, therefore, too late to deny that the corporation ever had any legal existence, or for these officers to avoid the liabilities which the statutes of the Commonwealth impose.

The defendant, Brackett, who was treasurer in February, 1861, appears to have been liable with the directors under the provisions of Gen. Sts. c. 60, §§ 18, 20, 31.

Exceptions sustained.

MONTGOMERY v. FORBES.

(148 Mass. 249. 1889.)

CONTRACT to recover the price of goods sold and delivered.

At the trial in the Superior Court, before Dewey, J., the only question was whether the goods were sold to a corporation called the Forbes Woolen Mills, or to the defendant as doing business under that name. The plaintiffs introduced evidence tending to show that subsequently to May, 1885, they received an order for the goods by a letter, written upon paper with the printed heading, "Incorporated 1885. Forbes Woolen Mills. George E. Forbes, Treasurer," and signed, "Forbes Woolen Mills, by Geo. E. Forbes, Treasurer;" that they thereupon shipped the goods to the Forbes Woolen Mills and received in payment therefor three promissory notes, together equal to the price of the goods, signed "Forbes Woolen Mills, by Geo. E. Forbes, Treasurer;" that when they sold the goods and took the notes, they understood from their correspondence with the defendant,

as well as from information gained from a commercial agency, that the Forbes Woolen Mills were a corporation, and made all charges on their books against them as a corporation, and took the notes from the defendant as the notes of a corporation; and that after they sold the goods and received the notes they became satisfied there was no such corporation as the Forbes Woolen Mills; and contended that they were entitled to recover the price of the goods from the defendant personally.

The defendant contended that the Forbes Woolen Mills was a corporation, and testified that he purchased the goods as treasurer of the Forbes Woolen Mills, but admitted that they had not been paid for except by the notes, which themselves had not been paid; that in May, 1885, for the purpose of limiting his personal responsibility, and because the tax laws of New Hampshire were more favorable to corporations than the Massachusetts laws, he went to Nashua, New Hampshire, to form a corporation for the manufacture of woollen goods; that he employed an attorney-at-law of Nashua to incorporate the company in a legal and proper manner, under the laws of that State, and subsequently paid him for his services and disbursements in the premises; that he went to Nashua again, and with the attorney and three other persons, selected and secured by the attorney, signed and executed an agreement of association, which was dated May 6, 1885, and was duly recorded in the office of the Secretary of the State of New Hampshire on May 12, 1885, and in the office of the clerk of the City of Nashua, on May 13, 1885, and recited that the subscribers associated themselves for the purpose of forming a corporation, to be called the Forbes Woolen Mills, the amount of the capital stock to be twenty thousand dollars, divided into four hundred shares of fifty dollars each; and that the object of the corporation was to manufacture and sell woollen and other goods, and the places of business were Nashua in New Hampshire, and East Brookfield in Massachusetts.

The defendant further testified that, subsequently to the execution of the agreement of association, one or more meetings were held by the signers, at which he was elected president and treasurer of the corporation, and such other officers and directors were elected as were necessary under the laws of New Hampshire; that the attorney had been recommended to him as a reputable and reliable man and attorney, and he left everything in his hands, and supposed he did everything necessary and proper to establish the corporation in a legal manner; that records of the meetings were kept by the attorney, and that there was a stock-book and certificates of stock were issued; that all the stock was issued to the defendant, and that no other person was interested in it; that fifty per cent of the capital stock of the corporation was actually paid in by him in cash and supplies; that after the organization of the corporation he hired, as treasurer of the corporation, a mill in East Brookfield belonging to his mother, Roxanna Forbes, and himself, and began the manufacture of woollen

goods; that he purchased the necessary supplies, including those named in the plaintiff's account, and placed them under the direction of a superintendent, employed to supervise the manufacture of the goods; that there was no manufacturing done in Nashua, nor any other business except the holding of corporate meetings, and possibly the sale now and then of a bill of goods in the ordinary course of business; and that the principal place of business of the corporation was in East Brookfield; that he, as president and treasurer of the corporation, continued to manufacture woollen goods for about four months, and sent the goods to commission houses in New York to be sold; and that at the end of said four months he was unable to continue the business and gave it up, and no further business was done by him or by the corporation.

The following sections of chapter 152 of the General Laws of New Hampshire of 1878, were introduced in evidence:—

"Sect. 1. Any five or more persons of lawful age may, by written articles of agreement, associate together, for agricultural, educational, or charitable purposes, or for carrying on any lawful business, except banking and the construction and maintenance of a railroad; and when such articles have been executed and recorded in the office of the clerk of the town in which the principal business is to be carried on, and in that of the Secretary of State, they shall be a corporation, and such corporation, its officers and stockholders, shall have all the rights and powers, and be subject to all the duties and liabilities of similar corporations, their officers and stockholders, except so far as the same are limited or enlarged by this chapter.

"Sect. 2. The object for which the corporation is established, the place in which its business is to be carried on, and the amount of capital stock to be paid in, shall be distinctly set forth in its articles of agreement."

Upon this evidence the defendant asked the judge to rule that the plaintiffs were not entitled to recover, that the account in question had been paid by the notes of the Forbes Woolen Mills as a corporation, and that there was no evidence to authorize the jury to find for the plaintiffs.

The judge declined so to rule, and submitted the following questions to the jury: "1st. Did the Forbes Woolen Mills and the members of said alleged corporation, including said Forbes, at the time of its attempted organization, intend to carry on its business as a manufacturing corporation (other than holding meetings of its members and officers) in whole or in part in the city of Nashua, New Hampshire? 2d. Was there an attempt in good faith on the part of the defendant, Forbes, to organize the corporation of the Forbes Woolen Mills? 3d. Did said Forbes, at and prior to the time the goods in controversy were ordered, namely, at all times after May 12, 1885, during his dealings with the plaintiff, believe that the organization of said Forbes Woolen Mills was a valid corporation?"

The jury answered the first two questions in the negative, and the third in the affirmative.

The judge, being of the opinion that, upon the findings of the jury and the uncontradicted evidence in the case, the plaintiffs were entitled to recover, directed the jury to return a verdict for the plaintiffs, and reported the case for the determination of this court.

C. ALLEN, J.:—

The apparent corporation was not a corporation. The statute of New Hampshire requires five associates, and the articles of agreement must be recorded in the town in which the principal business is to be carried on, and the place in which the business is to be carried on must be distinctly stated in the articles; otherwise there is no corporation. The defendant's pretended associates were associates only in name; he alone was interested in the enterprise. The articles of agreement were recorded in Nashua, and stated that the business was to be carried on there; but it was not in fact carried on there, and was not intended to be. The defendant took all the shares of the capital stock, and paid in to himself as treasurer only fifty per cent of the amount thereof. This is not a case where there has been a defective organization of a corporation which has a legal existence under a valid charter. Here there was no corporation. It was just the same as if the defendant had done nothing at all in the way of establishing a corporation, but had conducted his business under the name of the Forbes Woolen Mills, calling it a corporation. The business was his personal business, which he transacted under that name. *Fuller v. Hooper* (3 Gray, 334, 341); *Bryant v. Eastman* (7 Cush. 111).

The jury found that he did not in good faith attempt to organize the corporation, but that he believed it to be a valid corporation. His belief, in view of the facts of the case, is immaterial. Under this state of things the defendant bought goods of the plaintiffs for his own sole benefit, adopting the name of the apparent corporation, which had no real existence, and which represented nobody but himself. He cannot escape responsibility for his purchases by the device of putting such a mere name between himself and the plaintiffs. The purchase was in substance by and for himself alone. The plaintiffs might have repudiated the transaction and maintained replevin if they had learned the facts in time. They may also treat the transaction as a sale to the defendant personally. *Fay v. Noble* (7 Cush. 188, 194); *Kelner v. Baxter* (L. R. 2 C. P. 174, 183, 185); 2 Kent. Com. (13th ed.) 630.

Since the notes represented nothing, the plaintiffs were at liberty to treat them as void, and recover on the original contract for goods sold. *Melledge v. Boston Iron Works Co.* (5 Cush. 158, 171).

Verdict to stand.

CHAPTER III.

POWERS AND LIABILITIES OF A CORPORATION.

IN RESPECT OF THE ACQUISITION AND CONVEYANCE OF REAL PROPERTY.NICOLL *v.* RAILROAD COMPANY.

(12 N. Y. 121. 1854.)

EJECTMENT commenced in the Supreme Court in February, 1847, and tried at the Orange County circuit, held by Mr. Justice Edwards in October, 1848. The jury found a special verdict, from which it appeared that on the first day of July, 1836, Nicholas A. Dederer, being the owner in fee simple of a farm situate in Blooming Grove, Orange county, executed to the Hudson and Delaware Railroad Company a deed, dated that day, whereby, in consideration of the benefits and advantages to him of the railroad proposed to be made by the company, and of one dollar to him paid by the company, he granted to such company the privilege of surveying and laying out by its agents and engineers, through his farm or tract of land, the route and site of its road; and also granted, bargained, sold, and conveyed unto the company and its successors, so much of the farm as might be selected and laid out by the company for the site of its railroad, six rods in width across the farm, provided always, and such grant was made upon the express condition that the company should construct its railroad within the time prescribed by the act incorporating the same. That subsequently and before the 27th of October, 1836, the company selected and laid out, for the site of its railroad through the farm, a strip of land six rods wide extending through the farm. That on the 1st of April, 1844, the farm formerly owned by Dederer, by virtue of sundry mesne conveyances became the property of the plaintiff in fee simple subject only to such right as the Hudson and Delaware Railroad Company then had to any portion thereof sufficient for the track of its road. That this company, on the 27th of October, 1836, commenced the construction of its railroad, but never completed or put in operation a double or single track or any part thereof. That in pursuance of an act of the Legislature, entitled an act authorizing the New York and Erie Railroad Company to construct a branch road, terminating at the village of Newburgh, passed

April 8, 1845, the Hudson and Delaware Railroad Company were authorized to, and on the 14th of September, 1846, did execute to the defendant, the New York and Erie Railroad Company, a deed, and thereby for a valuable consideration granted, bargained, sold, and conveyed to the defendant and its successors, the maps, charts, drafts, surveys, and other personal property of the Hudson and Delaware Company, and all its rights, privileges, immunities, and improvements, acquired under and by virtue of the original act of incorporation or of any act amending it, or in any other manner; and also all the grants, lands, and real estate acquired by or ceded or conveyed to the Hudson and Delaware Company, and all its right, title, and interest to the same, and particularly the right of way, granted by Dederer to the company and its successors, by the deed from him above mentioned. That when this suit was commenced on the 25th of February, 1847, the defendant had not completed or put in operation its branch road terminating at Newburgh, or any part of it, nor had it done so when the cause was tried. That on the 2d of December, 1846, the defendant entered upon the strip of land six rods wide, mentioned in the deed from Dederer and laid out by the Hudson and Delaware Company through his farm, as the site of its road, and ejected the plaintiff therefrom, and that the defendant was still in the possession thereof. The suit was brought to recover possession of this strip of land from the defendant.

The justice before whom this cause was tried ordered judgment upon the special verdict in favor of the plaintiff. The defendant appealed, and the Supreme Court, sitting in general term in the 3d district, reversed the judgment, and gave judgment in favor of the defendant. (See 12 Barb. 460.) The plaintiff appealed to this court.

PARKER, J. :—

The grant from Dederer to the Hudson and Delaware Railroad Company, bearing date the first day of July, 1836, was made to that company "and their successors." Under that grant, there can be no doubt the Hudson and Delaware Railroad Company took a fee. The words of perpetuity used would have been sufficient to describe a fee, even under the most strict requirements of the common law.

The company had ample power to purchase lands. It was a power incident at common law to all corporations, unless they were specially restrained by their charters or by statute. 2 Kent, 281; Co. Litt. 44 c. 300 b.; 1 Kyd on Corp., 76, 78, 108, 115; 3 Pick. 239. And in this case the power was expressly conferred by the 9th section of the charter (Sess. Laws of 1835, p. 113); and by the 16th section there were given to it the general powers conferred upon corporations (1 R. S. 731), one of which is that of holding, purchasing, and conveying such real estate as the purposes of the corporation may require. But if no words of perpetuity had been used, the grantor owning a fee, the company would have taken a fee, for the

statute is now imperative that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of the grant (1 R. S. 748, § 1).

But it is objected that because by the act of incorporation there was given to it only a term of existence of fifty years (Laws of 1835, p. 110, § 1), therefore the grant shall be deemed to have conveyed an estate for years, and not in fee. The unsoundness of that position is easily shown. It was never yet held that a grant of a fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. If it were so, a grant could never be made to an individual in fee, because in his earthly existence he is not immortal. Under such a rule a man could never buy a greater interest in a farm than a life estate. It would follow that all estates would be life estates except those held by perpetual corporations. The intent of parties, fully expressed in a deed, would avail nothing, but all grants would be measured by the mortality of the grantee. It is needless to follow out the proposition further to show its absurdity.

It is not to the parties to a grant, but to its terms, that we look to ascertain the character and extent of the estate conveyed. Such was the rule at common law, and is still by statute (1 R. S. 748, § 1). The change made by the statute favors the grantee where there are no express terms in the grant, by presuming the grantor intended to convey all his estate.

At common law it was only where there were no express terms defining the estate in the conveyance, that the term of legal existence of the grantee was deemed to be the measure of the interest intended to be conveyed. Thus, words of perpetuity, such as "heirs or successors," were necessary to convey a fee. A grant to an individual without such words conveyed only a life estate. For the same reason a grant without such words to a corporation aggregate (Viner's Ab., Estate, L. 3), or to a mayor or commonalty (ib. 3), conveyed a fee, because the grantees were perpetual. The grantee named in such case having a perpetual existence, the estate could not have been enlarged by words of succession.

But this is now changed by our Revised Statutes. Words of inheritance or succession are no longer necessary, and in their absence we look not to the terms of existence of the grantee to ascertain the estate, but to the amount of interest owned by the grantor at the time he conveyed. All his estate is deemed to have passed by the grant (1. R. S. 748, § 1).

All this is applicable only to cases where the grant is silent as to the extent of interest conveyed. Where that interest is expressly described, as in this case, the law never, either before or since our revision, did violence to the intent of the parties, by cutting down the estate agreed to be conveyed to the measure of the grantee's term of existence. It has long been one of the maxims of the law

that "no implication shall be allowed against an express estate limited by express words." Viner's *Ab. Implication*, A. 5; 1 Salk. 236.

It is erroneous to say that an estate in fee cannot be fully enjoyed by a natural person, or by a corporation of limited duration. It is an enjoyment of the fee to possess it and to have the full control of it, including the power of alienation, by which its full value may at once be realized.

It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient (5 Denio, 389). 2 Preston on Estates, 50. Kent says: "Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee for the purpose of enjoyment. On the dissolution of the corporation the reverter is to the original grantor or his heirs; but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter." 2 Kent, 282; 5 Denio, 389; 1 Comst. R. 509. Large sums of money are accordingly expended by railroad companies in erecting extensive station houses and depots, and by banking corporations in erecting banking houses, because, holding the land in fee, they may be able to reimburse themselves for the outlay by selling the fee before the termination of their corporate existence.¹

Upon the whole my conclusion in this case is that the Hudson and Delaware Railroad Company took from Dederer a fee upon condition subsequent; that at the time of the conveyance by Dederer to the plaintiff, there had been no forfeiture; and that Dederer had, at the time of such conveyance, no assignable interest in the premises.

The judgment of the Supreme Court should be affirmed.

Judgment accordingly.

PAGE v. HEINEBERG.

(40 Vt. 81. 1868.)

THIS was an action of ejectment. The case was referred and was heard on the report at the September Term, 1867, Pierpoint, C. J., presiding, and judgment was rendered *pro forma* for the plaintiff, to which the defendant excepted. The substance of the report, so far as it is material to the question decided, is stated in the opinion of the court.

J. French and E. J. Phelps, for the defendant.

Upon the discontinuance of the railroad, the land occupied by the track and depot grounds reverted to the original proprietors, Shaw, Catlin, and Wires.

¹ Part of this opinion and the concurring opinion of GARDINER, C. J., are omitted.

I. The railroad company were not authorized by their charter to acquire any greater estate in the land taken for the road-way, than the easement necessary for that purpose.

1. A corporation has no powers whatever except those conferred directly or impliedly by its act of incorporation. *Vt. & C. R. R. Co. v. Vt. C. R. R. Co.* (34 Vt. 47).

2. No powers will be implied except those necessary to carry out the object for which the corporation is created. *Ang. & Ames on Corp.* 256. And the charter will be strictly construed against them. *Rice v. R. Co.* (1 Black, U. S. Sup. Ct. 358).

3. No language will be found in the charter either conferring, or manifesting any intent to confer, the power of acquiring a vast real estate, extending for a hundred and fifty miles through the whole length of the State, and to be held by the corporation in fee, after the railroad should be discontinued. Acts of 1843, No. 53.

Such a power is not only wholly unnecessary to the construction and maintenance of the railroad, but is the last the Legislature could be reasonably expected to grant. The most obvious considerations of propriety and public policy forbid it. And especially where the purchase of the fee is to be obtained from the citizen, under the pressure produced by the taking of a perpetual easement in the land, by the right of eminent domain. *Hill v. Western Vt. R. R. Co.* (32 Vt. 68).

4. The deed of the landowner, therefore, though in terms conveying the fee, will be limited in its effect to the extent of the grantee's power to take.

5. Nor will the grantor be held estopped by his deed from asserting his claim to the reversion. There can be no estoppel against the law. Nor can a corporation acquire a power by estoppel, which their charter does not confer, and which public policy precludes. *Ang. & Ames on Corp.* 151, 152; 1 Redf. on Railways, p. 248.

II. Irrespective of the want of power in the corporation to take the fee of the land, the deed of the roadway will have a legal effect commensurate, and no more than commensurate with the public necessity.

On the one hand, no restriction or reservation it may contain inconsistent with the public requirement, will be allowed to stand. *Troy & Boston R. R. Co. v. Potter* (Sup. Ct., Nov. Gen. Term, 1867).

And on the other, any estate it may purport to convey, more than the public use and the purpose for which the land is taken require, will fail to pass.

The whole transaction will be taken together. The deed will be construed in view of the right conferred by the charter, the great object to be effected, the circumstances under which the grantor is compelled to part with his land, at least to the extent of the permanent easement, the plain considerations of public policy, and the right and justice of the case.

The power of eminent domain will not be allowed to be abused in its practical exercise. It will not be overlooked, that the distinction between the fee and a perpetual and exclusive easement in the land, is one not likely to be understood or appreciated by the citizen. That the contingency of the abandonment of the railroad, in which alone this distinction becomes of any importance, was not to be anticipated by any ordinary sagacity. And that the provisions of the charter which authorized the corporation to take the land without consent of the owner, but to litigate with him before commissioners and on appeal as to the price, amount to a practical compulsion upon him to execute a deed.

The reasoning and intimation of the court in the case of *Hill v. Western Vt. R. R. Co.* (*supra*), are virtually decisive of this question. See also 1 Redf. on Railways, 248, and notes; *U. S. v. Harris* (1 Sumner, 21, 2 Blatchford, 95).

The whole tenor and course of judicial decision in this State, on the subject of the conveyance of title for railway purposes, lead plainly to the construction for which we contend. All such conveyances have been uniformly construed with reference to their intent and purpose solely, and the requirement of the public interest. And the distinction has been observed throughout, that exists between the private contracts of individuals, and the exercise by the State through its chartered agents of the power of eminent domain.

Thus a railway mortgage, creating by its terms only a dry trust, has been construed as creating an active trust. *Sturges & Douglas v. Knapp et al.* (31 Vt. 1).

A deed of the fee of land for railway purposes, has been held to convey no attachable interest. *Hill v. Western Vt. R. R. Co.* (*supra*),

The title to land occupied for construction of a railroad by consent of the owner, but without deed or payment, has been held to pass irrevocably. *McAuley v. Western Vt. R. R. Co.* (33 Vt. 311); *Knapp & Briggs v. McAuley* (39 Vt. 275).

And express reservations in a conveyance of land for the same purposes, where inconsistent with the public use, have been held void. *Troy & Boston R. R. Co. v. Potter* (*supra*).

The decision of this question does not involve any consideration of the incidental power of the corporation to purchase such real estate, apart from their roadway, as may be necessary for the purposes of their business. That power need not be questioned.

W. C. French, for the plaintiff.

It is well settled that corporations may have a fee simple in lands for the purpose of alienation, unless restricted by their charters or by statute, when they have only a determinable fee for the purpose of enjoyment.

Chancellor Kent says: "On the dissolution of the corporation the reverter is to the original grantor and his heirs, but the grantor will be excluded by the alienation in fee, and in that way the corporation

may defeat the possibility of a reverter." 2 Kent's Com. 282; 2 Preston on Estates, 50; Angell & Ames on Corp. 164; *Nicoll v. N. Y. & Erie Co.* (12 Barb. 460); Same case (2 Kernan, 121, 127); *People v. Mauran* (5 Denio, 389).

When the corporation has taken the fee of the land, the abandonment of the use of the property for the purposes of the corporation does not revert the property in the original grantor or his heirs; not even when the title was taken by compulsory proceedings. *Heywood et al. v. Mayor of New York* (3 Seld. 314); *Rexford et al. v. Knight* (1 Kernan, 308); Gen. Stat. p. 222, § 31.

Judge Redfield's *dictum*, in his work on Railways, p. 126, § 3, that in some cases the reasoning of the courts would seem to imply that a railway, by a deed in fee-simple, acquires only a right of way, is not sustained by the authorities cited by him. *Dean v. Sullivan R. R.* (2 Foster, 316); *U. S. v. Harris* (1 Sumner, 21).

That Judge Redfield himself did not entertain any such view is shown by his subsequent opinion in *Hill v. Western Vt. R. R. Co.* (32 Vt. 74).

PROUT, J. :—

The only question which this case presents for consideration, is whether the Vermont Central Railroad Company acquired a title in fee to the premises described in the plaintiff's declaration, all other questions having been waived by the defendant's counsel on the argument. This company's title to the premises in question originated in a warranty deed from Salmon Wires, and in a warranty deed from Geo. B. Shaw and Henry W. Catlin, they, at the time of the delivery of those conveyances, having the title in fee thereto; and which are respectively dated February 9, A.D. 1850, and March 7, A.D. 1850. The defendant insists, that upon the discontinuance or abandonment of the railroad by the company, as it was originally located and used, the premises in controversy, which were occupied as a railroad track and depot for the uses and accommodation of said railroad company, reverted; but the plaintiff claims that the company under the deeds referred to, acquired an absolute and unconditional fee therein, and claims title by virtue of the levy of an execution against the company upon the premises in controversy. The case finds that previous to the levy of the execution, the company and those claiming under them had permanently abandoned for use, in connection with said railroad, the premises, and that the track and depot of said railroad had been located elsewhere. The deeds to the company are in common form; of Wires, *habendum*, "to said company and assigns forever;" of Shaw and Catlin, *habendum*, "to said company, their successors and assigns forever."

At common law corporations generally have the legal capacity to take a title in fee to real property, some of the cases holding that it is incident to every corporation. This has been long and well settled, unless in a case where a corporation purchases and undertakes to

hold real property for purposes wholly outside and foreign to the object of its creation, or unless restricted by its charter or by statute. In such a contingency, it may be that a stockholder, upon proper proceedings instituted for that purpose, might control the acts of the company in that respect, and as the facts and his legal rights as a stockholder might warrant. But, however that may be, the capacity to take a grant in fee exists, and, in England, is only restricted by the statutes of mortmain. These statutes have never been adopted in this State, so that the common-law right, incident to a corporation, is unlimited, with the qualification stated. In this State we have no general law or statute applicable to the question, except what is contained in chapter 28 of the General Statutes. The question submitted depends, then, mainly upon the provisions of the charter of the company, under whom the plaintiff claims title to the premises in controversy. That (Acts of 1843, 46, § 7) provides that the corporation may take the use and possession of land and real estate for the purposes therein expressed, either by proceedings in *invitum*, or by grant and donation, making a plain distinction between the modes provided for that purpose. As to the latter mode of acquiring land for corporate purposes, that is, to aid in the construction, maintenance, and accommodation of the road, its language is, "may take and hold all such grants and donations of land and real estate as may be made to the company." These are terms of the most comprehensive signification, both as to the object of the grant or donation, and the interest or estate the corporation may take, and when found in a conveyance they are descriptive of, and convey an estate in fee. 3 Kent, 10th Ed. 531. In this charter we think they have this comprehensive signification, and clothe the company with the power or capacity to take the entire estate; and that upon any reasonable construction they cannot be held to mean, under the conveyances in question, a determinable or shifting fee, dependent upon a discontinuance or abandonment of the road, or change of its location. 1 Wash. R. P. 13, 47; *Merritt v. Hulett* (2 Cowen, 497); *Vt. C. R. R. Co. v. Burlington* (28 Vt. 193); *Nicoll v. N. Y. & Erie R. R. Co.* (2 Ker. 121); *Ibid.* (12 Barb. 460).

We are confirmed in this view, as the terms found in the charter of the Vermont Central Railroad Company, upon which the question principally depends, have a defined legal signification. The statute (Rev. Stat. ch. 4, § 8), relating to the construction of statutes in force at the time of the charter of this company was granted, provided that "The word 'land' or 'lands,' and the words 'real estate,' shall be construed to include lands, tenements, and hereditaments, and all rights thereto, and all interests therein." This provision has ever since remained in force. It is then an interest or estate, such as the terms "land" or "real estate," which are found in the charter, mean, as defined by the statute, that the company is empowered to take by grant or donation, and that is an estate in fee. It is not to be presumed that

the Legislature used those words in the charter in any other sense than the one defined by that body, especially as nothing is found in its provisions evincing a different intention.

But were this a question of doubtful construction as to the capacity of the company to take by grant an estate in fee by force of the language of the charter, an inference of the legislative intent is derived from subsequent legislation. In 1849 the Legislature (Acts of 1849, no. 41, § 23) passed an act providing, that in the event the location of a railroad should be changed after the payment of land damages, when no portion of the land of the owner had been taken for the new location, then the land first taken should revert, and the company might recover back the amount paid as damages, deducting such damages therefor as had actually accrued in consequence of locating the road across the owner's land, but subject to the proviso, that the landowner might, if he chose, convey to the company the land first located upon, and in that event might retain the damages awarded him (Gen. Stat. ch. 28, § 31). The conveyance contemplated by this provision, and which the landowner may make if he chooses, and upon which his right to retain the damages awarded him is dependent, is a conveyance of the land in fee, as distinguished from a mere easement or determinable fee. This is manifest, as in the case contemplated by the act neither the lands nor any interest therein is required for the use or accommodation of the road by the company.

Judgment of the county court is affirmed.

WHITE v. HOWARD.

(38 Conn. 342. 1871.)

BILL IN EQUITY by the executors of the will of William Bostwick, praying for advice in the construction of the will, brought to the Superior Court in New Haven County, and reserved for advice on facts found by a committee. The material provisions of the will were as follows:—

After the payment of certain legacies amounting in the aggregate to \$8,500, including a legacy of \$1,000 to the Southern Aid Society, all the residue of the testator's estate, both real and personal, was devised and bequeathed to certain trustees named as joint tenants in fee-simple, as a trust fund to be applied for the benefit of the testator's daughter, Frances Howard Bostwick, during her life, but if the daughter should die leaving no husband or child or issue of any child surviving her, the trust fund was to be disposed of as follows: \$22,000 to certain legatees named, and then whatever remained of the trust property was to be divided between six societies, namely, the American Tract Society, the Southern Aid Society, the American

and Foreign Christian Union, the American Colonization Society, the Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, and the Board of Foreign Missions of the Presbyterian Church in the United States of America.

The will further provided that if any of the above-named six societies should not be incorporated, the estate given by the will to such society should be conveyed, transferred, and paid in fee-simple to the person who when the estate was to be transferred according to the provisions of the will should act as treasurer of such society, to be appropriated to the charitable purposes of said society, and under its direction.

The parties respondents were the six societies named, who claimed each one-sixth of the residue of the estate; the heirs-at-law of the testator who insisted upon the incapacity of those societies to take, and asserted their title to the residue; and the administrator and heirs-at-law of the daughter, Frances Howard Bostwick, who claimed that, the bequest to the societies failing, they, and not the heirs of William Bostwick, were entitled to the residue.

Frances Howard Bostwick died on the 30th of August, 1865, leaving neither husband nor children, having never been married.

FOSTER, J. :¹—

The American Tract Society and the Southern Aid Society are the only societies now remaining of the six to which the residuary estate was given, whose rights under this will remain to be considered. It is asserted that the American Tract Society can take neither real nor personal property under this will. That it cannot take real, because its charter of incorporation, granted by the State of New York, does not confer the power of taking by devise; that it cannot take personal, because the charter provides that the net income of said society arising from real and personal estate shall not exceed the sum of \$10,000 annually. This limit it is claimed has been reached and exceeded, and so the capacity of the society to take property is exhausted. This society was incorporated by a special act of the Legislature of the State of New York, passed May 26, 1841. The third section of its charter provides that the corporation shall possess the general powers, and be subject to the provisions contained in title 3d of chapter 18 of the first part of the Revised Statutes, so far as the same are applicable and have not been repealed. The title and chapter referred to enumerate the powers of corporations, and the clause which bears directly upon this subject reads thus: "to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter." This charter was amended by the Legislature of New York on the 31st of March, 1866, but as this was after the death both

¹ Part of the opinion is omitted.

of the testator and of his daughter, that amendment need not be particularly considered, as it cannot materially affect the question involved. Now it is manifest that this corporation has express power by its charter to hold, purchase, and convey real and personal estate for specified purposes and to a limited amount. There is no express power to take by devise, nor is the power so to take expressly prohibited. We suppose there could be no doubt that this corporation could take by devise in New York if the Statute of Wills of that State empowered corporations generally to take in that manner. The English Statute of Wills, passed in the time of Henry VIII, authorized every person having a sole estate in fee simple of any manors, etc., "to give, dispose, will, or devise to any person or persons except to bodies politic and corporate, by his last will and testament in writing, or otherwise by any acts lawfully executed in his lifetime, all his manors, etc., at his own will and pleasure, any law, statute, custom, or other thing theretofore had, made, or used to the contrary notwithstanding." Thus corporations, by express exception in these statutes, were not enabled to take lands directly by devise in England, and the Statute of Wills of the State of New York makes the same exception. By that statute it is enacted that all persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate by a last will and testament duly executed. "Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise" (3 N. Y. Rev. Sts. 138, 5th ed.). This corporation therefore, prior to the recent amendment of its charter, could not take by devise in New York, and such is the decision of their Supreme Court and Court of Appeals in this very case. And so it is earnestly contended that it cannot take by devise in Connecticut. We yield readily to the doctrine laid down in this connection in regard to corporations; indeed it is too thoroughly established to be doubted or questioned. That doctrine perhaps is nowhere better stated than in the case of *Head v. Providence Ins. Co.* (2 Cranch, 127), by the then illustrious head of the Supreme Court of the United States, the late Chief Justice Marshall. "It (a corporation) may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes." Now this corporation stands at the bar of this court claiming the right to take lands within our territory by devise. It is clothed with such powers as have been conferred by its charter. Those, a portion of them, as we have seen, are to hold, purchase, and convey real estate. It is not expressly authorized to take by devise, nor is it prohibited from so taking. Can it then take by devise? Not in New York, as we have seen. Therefore not in Connecticut, say the counsel for the heirs-at-law, for being a New York corporation, and by the law of

that State devoid of power to take by devise, no argument is needed to show its inability to take by devise in Connecticut. This conclusion is too hastily drawn. If the inability to take by devise arose out of a prohibitory clause in the charter, the conclusion would be legal and logical. But the inability does not so arise. There is no prohibition in the charter; the inability is created by the New York Statute of Wills, expressly excepting corporations from taking by devise. Now this corporation brings with it from New York its charter, but it does not bring with it the New York Statute of Wills, and cannot bring it to be recognized as law within this jurisdiction. There is an obvious distinction between an incapacity to take created by the statute of a State, which is local, and a prohibitory clause in the charter which everywhere cleaves to the corporation. The reasoning is fallacious, not recognizing this distinction. There being no prohibition in the charter, and the power to hold and convey real estate being expressly given, we must look to our own statutes and laws, and not to those of New York, to determine whether or not this corporation can take by devise in Connecticut.

The State of New York has partially adopted the policy of England in regard to devises to corporations, though the English statutes, usually called the Statutes of Mortmain, have not been re-enacted in that State. Those statutes began with Magna Charta, in 9 Henry III., and embrace a succession of acts down to and including 9 George II. They were intended to check the ecclesiastics of the Roman Church from absorbing in perpetuity, in dead clutch, all the lands of the kingdom, and so withdrawing them from public and feudal charges. Shelford on Mortmain, 2. By the statute of 43 Eliz. ch. 4, known as the Statute of Charitable Uses, lands may be devised to a corporation for a charitable use, and the Court of Chancery will support and enforce such devises. Whether a court of equity has power to execute and enforce such trusts, as charities, independent of any statute, is a question which has been much discussed, and very high authorities can be quoted both in favor and against the exercise of such a power. We think the later and better opinion to be in favor of an original and necessary jurisdiction in courts of equity as to devises in trust for charitable purposes, when the general object is sufficiently certain, and not contrary to any positive rule of law. It is unnecessary however to decide this question, for in this State we have no statutes of mortmain; no exception in our Statute of Wills prohibiting corporations from taking by devise; aliens resident in this State or in any of the United States, may purchase, hold, inherit, or transmit real estate, in as full and ample a manner as native-born citizens; their wives are entitled to dower; their children and other lineal descendants may inherit; and we have besides a statute, passed in our colonial days in 1702, in effect re-enacting the Statute of 43 Elizabeth, and containing indeed more liberal and comprehensive provisions to sustain devises of this description than are contained in

the 43 Elizabeth. That act provides that "all lands, tenements, or other estates, that have been or shall be given or granted by the General Assembly, or any town or particular person, for the maintenance of the ministry of the Gospel, or of schools of learning, or for the relief of the poor, or for any other public and charitable use, shall forever remain to the uses to which they have been or shall be given or granted, according to the true intent and meaning of the grantor, and to no other use whatever."

We therefore entertain no doubt that the American Tract Society can take by devise in this State. As to the other objection, that having an income greater in amount than is allowed by its charter it has exhausted its power to take, it suffices to say that no such fact is found by the very competent committee whose report is in the record.¹

The Superior Court is advised to pass a decree in this case in conformity with the rules here laid down.

In this opinion the other judges concurred.

LEAZURE v. HILLEGAS.

(7 *Sergeant & Rawle*, 313, 1821.)²

THE opinion of the Court was delivered by

TILGHMAN, C. J. : —

Frederick Hillegas, the plaintiff below (who is defendant in error), claimed the land in dispute under a warrant and survey to Thomas Holt, who conveyed to George Armstrong, who conveyed to William Heury, who conveyed to the Bank of North America, who conveyed to James Ross, who conveyed to the plaintiff. On the trial of the cause, several exceptions were taken to the opinion of the Court on points of evidence, on which exceptions this Court is now to decide.

1. The first exception was to a paper purporting to be the original survey, not returned to the office of the surveyor-general, but found among the papers of George Woods, deceased, formerly deputy surveyor of Bedford County, in the hands of Henry Woods, one of his executors. It was proved that the body of the writing, and the indorsement on this paper, were of the handwriting of several persons deceased, who had been deputy surveyors or assistants to the deputy surveyor of Bedford County; and upon this evidence, the Court permitted it to go to the jury. The Court have been very liberal in admitting evidence of this kind; so much so indeed, that I do not see how, without inconsistency, this paper could have been excluded. It

¹ The rest of the opinion is omitted.

² The statement of facts is omitted.

ought, to be sure, after the death of George Woods, to have been delivered by his executors to his successor in office. But it is very common for deputy surveyors to intermix their private with their official papers, and it would be unjust that a third person, who was obliged to have his survey made by the officer, should suffer by this kind of negligence. The material point to be ascertained was whether the survey was an official act; of that, the jury were to judge. The paper in question was not conclusive evidence of a survey, but I think the preliminary evidence justified the Court in permitting it to be laid before the jury.

2. The second objection was to the admission of an exemplification of a deed from William Henry and wife, to the President, Directors, and Company of the Bank of North America, certified by the recorder of deeds for the county of Huntingdon. This deed contained a conveyance of lands, lying in the county of Huntingdon, and also of the lands now in dispute, which lie in the county of Bedford. Evidence of this kind has been admitted by the Judges of this Court, at *Nisi Prius*, and was determined to be admissible, by the Circuit Court of the United States for the district of Pennsylvania, in the case of *McKeen v. Delancy's Lessee*, which was carried up to the Supreme Court of the United States, and affirmed on a writ of error (5 Cranch, 22). Indeed, I consider this exception as having been abandoned, and very properly, by the plaintiff in error, on the second argument of this cause. The deed was legally recorded in Huntingdon County, because it contained a conveyance of land in that county; and being legally recorded, its whole contents became legal evidence in every part of the State. But, although legal evidence, it does not follow that it would be preferred to a subsequent deed made to a purchaser without notice, for those lands which lie in Bedford County, which should be recorded in Bedford County. That is quite a different question, and I mention it, lest an improper inference should be drawn from the point now decided.

3. The third exception was, to the admission of the deed from the Bank of North America to James Ross, to which there were two objections, first, that there was no evidence of the seal of the corporation; and second, that the corporation was incapable of receiving a conveyance of land, otherwise than by mortgage, and therefore had no estate which could be conveyed. The first exception was good. A corporation is an imaginary being; a creature of law, which cannot act otherwise than as prescribed by law. Its deeds are authenticated by its common seal, but that seal must be proved. It is not one of those public matters of which individuals are bound to take notice. I do not mean that the affixing of the seal must be proved by a witness who was present and saw it done. But the seal itself, that is the impression, must be proved by some person who knows the device, motto, etc. No evidence of that kind was offered, and therefore the deed ought not to have been read to the jury. In sup-

port of this opinion, I refer to the case of *Jackson v. Pratt*, decided by the Supreme Court of New York (10 Johns. 381), and Peake's Law of Evidence, 48, note, and 72.

But the great points in this cause are the capacity of the bank to take the land conveyed by William Henry's deed, and afterwards to convey the same to James Ross. There is no doubt that a corporation must be governed by the charter from which it derives its existence. It can do no act nor take any estate contrary to its charter. If therefore it can be shown that the Bank of North America is forbidden by its charter either to take or to convey the land contained in William Henry's deed, the plaintiff's action cannot be supported. By the 3d section of the Act of Incorporation (17th of March, 1787, 2 Sm. L. 399), the bank is made capable "to have, hold, purchase, receive, possess, enjoy, and retain lands, rents, tenements, goods, chattels, and effects of whatsoever kind, nature, or quality, to the amount of two millions of dollars and no more, and also to sell, grant, etc., the same lands, etc. Provided nevertheless, that such lands and tenements, which the said corporation are hereby enabled to purchase and hold, shall only extend to such lot and lots of ground, and convenient buildings, and improvements thereon erected or to be erected, which they may find necessary and proper for carrying on the business of the said bank, and shall actually occupy for that purpose, and to such lands and tenements which are or may be *bona fide* mortgaged to them as securities for their debts." It is remarkable, that with regard to the holding of lands, the charter of this bank is more restricted than that of any other bank in the State, for all the others are enabled to hold, not only the lands which have been *bona fide* mortgaged to them by way of security for debts, but also those "which may be conveyed to them in satisfaction of debts previously contracted in the course of their business, or purchased at sales upon judgments which shall have been obtained for such debts." This difference of restriction must have arisen from the extreme jealousy of moneyed corporations which pervaded the mind of the Legislature when the Bank of North America was incorporated. It never could have been intended to place that bank on a worse footing than others, for it was the only one which risked its capital on a field altogether untried in America, and which had the merit of rendering essential service to the United States during the War of the Revolution. It would be improper therefore to carry the restriction by construction farther than the words of the law plainly import. The restriction is that the bank shall not purchase and hold. Purchasing and holding are very different things, and the consequences of each are very different. If the words had been that the bank should neither purchase nor hold, then it could have done neither one nor the other. But although purchasing and holding might have been thought dangerous, because of the power which it would have given the bank to bring too much land into mortmain, yet to purchase, subject to the statutes of

mortmain, which authorized the Commonwealth to appropriate the land to its own use, could be attempted with no danger. This construction would satisfy the jealous policy of the Legislature, preserve the community from the danger of too great a mass of real property held in mortmain, and at the same time put it in the power of the Commonwealth to act towards the bank as justice might seem to require. This is a consideration of no small importance; for when the directors of the bank accepted from William Henry a conveyance of his land at a fair price, in payment of a debt *bona fide* due, it would be hard to presume that they knew they were acting in violation of their charter. But granting that the restriction in the charter did not extend to the simple act of purchasing, it may be asked, whence did the corporation derive the right to purchase, and what would be the situation of land purchased without a capacity of holding? The answer is that a corporation has from its nature a right to purchase lands, though the charter contains no license to that purpose. And in this respect the statutes of mortmain have not altered the law, except in case of superstitious uses. But since those statutes, it is necessary, in order to enable a corporation to retain lands which it has purchased, to have a license for that purpose; otherwise, in England, the next lord of the fee may enter within a year after the alienation, and if he do not, then the next immediate lord, from time to time, has half a year to enter, and for default of all the mesne lords the king takes the land so aliened forever. That this is the law appears from the following authorities: 2 Black. Com. 268, 269; Co. Lit. 2; 6 Vin. Ab. 265 (G. pl. 2), id. 266, pl. 8; Jenk. Cent. 270; 3 Com. Dig. 399 (f. 10), id. 401 (f. 15); 1 Rol. Ab. 513, l. 35; 10 Co. 30. But in Pennsylvania, where there are no mesne lords, the right would accrue immediately to the Commonwealth. It has been objected, however, that according to the report of the Judges of this Court, made on the 14th December, 1808, in pursuance of an Act of Assembly requiring them to make a report of the English statutes which are in force in the Commonwealth, etc., it appears that all conveyances of land to a corporation without license are absolutely void. I will consider this objection. The Judges reported the following statutes of mortmain: "7 Ed. I. (Stat. 2); 13 Ed. I. ch. 32; 15 Rich. II. ch. 5, and 23 Hen. VIII. ch. 10, which are in part inapplicable to this country, and in part applicable and in force. They are so far in force that all conveyances by deed or will of lands, tenements, or hereditaments, made to a body corporate, are void, unless sanctioned by charter or Act of Assembly. So also are all such conveyances void made either to an individual or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a superstitious nature, and not calculated to promote objects of charity or utility." I have quoted the words of the report, and it is evident that the Judges could have no intent, nor had they power to make any addition to the statutes, or in any manner to alter them. Now, by reference to the statutes, it will appear that

in all of them, except the 23 Hen. VIII. ch. 10, the conveyance is not absolutely void, but the estate passes to the corporation, subject as before mentioned to the right of the several mesne lords, and, in their default, of the king, to enter and hold in fee. But by the statute of 23 Hen. VIII. ch. 10 (which has been determined to extend to superstitious uses only, see 2 Black. Com. 273, 1 Co. Rep. 24), uses and trusts made and contrived in favor of religious persons or any bodies corporate for more than twenty years, shall be utterly void. Now the meaning of the report of the Judges is that according to the statute cited by them, conveyances to superstitious uses are absolutely void, and conveyances to corporations, to uses not superstitious, are so far void that those corporations shall have no capacity to hold the estates for their own benefit, but subject to the right of the Commonwealth, who may appropriate them to its own use at pleasure; in other words, that such conveyances have no validity for the purpose of enabling the corporation to hold in mortmain. But to support the plaintiff's title, it must be shown that the corporation had power, not only to take by purchase, but to alien. In this respect, I consider a corporation in the situation of an alien, who has power to take, but not to hold. That an alien may take by purchase (though not by descent), has been settled from the earliest times. It is so laid down in Co. Lit. 2, and I believe has never been questioned. Neither has it been questioned that the land is subject to forfeiture, and may be seized for the king after office found. But it has been questioned what is the right of the alien before office found for the king. Without reference to English cases which leave the matter in doubt, we have the highest authority in our own country for saying that until some act done by the Commonwealth according to its own laws to vest the estate in itself, it remains in the alien, who may convey it to a purchaser, but he can convey no estate which is not defeasible by the Commonwealth. This principle was asserted by Judge Story, who delivered the opinion of the Supreme Court of the United States in the case of *Fairfax's Devisee v. Hunter's Lessee* (7 Cranch, 603), and this was the opinion of the Supreme Court of Massachusetts in the case of *Sheafe v. O'Neil* (1 Mass. Rep. 256), cited by Judge Story. It is reasonable in theory, and can have no ill effect in practice, that he who has a defeasible estate may convey a defeasible estate. Provided the right of the Commonwealth to defeat the estate granted by the alien remains entire, it is immaterial who holds the land until that right be prosecuted. Supposing, then, that the cases of the alien and the corporation be similar (and I see not how they can be distinguished), it follows that the deed from the Bank of North America to James Ross, conveyed a fee simple, defeasible by the Commonwealth. The counsel for the plaintiff did indeed contend that this deed might be considered as a mortgage, though on its face it appears to be an absolute conveyance. But this construction cannot be supported. In order to carry the intent of the grantor into effect, a deed intended to operate as one species of conveyance

may be construed to operate as another, provided it contain word sufficient. But it cannot be construed so as to destroy the intent of the parties, as would be the case by holding this deed to be a mortgage; for it was the clear intent of both parties to make an absolute sale and not a mortgage. When William Henry conveyed the lands mentioned in his deed, it was his intent that in consideration thereof the debt due from him to the bank should be extinguished, and the bank agreed to accept the conveyance in satisfaction of the debt. But supposing it to be a mortgage, the debt would be extinguished, and Henry would still remain responsible. I am clearly of opinion therefore that it was not a mortgage but an absolute conveyance.

4. The fourth and last exception in this cause was to the deed from James Ross by John Anderson his attorney, to the plaintiff. The objection was that the power of attorney was not produced, nor good reason shown for not producing it. The Court heard evidence on that point, and being of opinion that there was sufficient proof of the existence of the power and of its loss, suffered its contents to be proved by parol evidence. In matters of this kind, where the Court below goes into a preliminary inquiry before it decides upon the admissibility of written evidence, it must be a very strong case which would induce this Court to decide that there was error. Such a case is not presented on this record, and therefore without criticising the parol evidence I will only say that the fourth exception does not appear to me to be supported.

Upon the whole, I am of opinion that there was error in admitting the deed from the Bank of North America to James Ross without proof of the corporate seal, and that there is no other error in the record. The judgment is therefore to be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a venire facias de novo awarded.

HOUGH v. LAND COMPANY.

(73 Ill. 23. 1874.)

APPEAL from the Superior Court of Cook County.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court:—

This was a bill in equity, filed by the appellant against the appellee, in the court below, to set aside a conveyance of certain lands, to cancel the stock of appellee, issued to him in payment for the same, and to restrain appellee in the mean time from selling such stock, which had been pledged to it as collateral security for a loan made to appellant.

A demurrer was interposed to the bill, which the court below sustained, and dismissed the bill.

So far as the allegations of the bill are material to the questions requiring our consideration, they are as follows: Appellee claimed to be a corporation under the laws of this State, with power to borrow and lend money; to take lands and mortgages as security; to purchase lands and make improvements thereon by erecting buildings for the purpose of renting the same; to hold buildings and lots for the purpose of improving and renting the same, and to do a general loan business, and take lands, mortgages, and notes to secure the loans. Appellant, believing that appellee was possessed of the powers it claimed, and that it was authorized by its charter to buy land and issue its stock in payment therefor, and to loan money, etc., on the 24th day of May, 1873, contracted with it to sell and convey to it certain lands in Cook County, which are particularly described in the bill, in consideration that appellee would issue to him 365 shares of its stock, and would also loan him 80 per cent in money of the stock, and hold the stock as collateral security on the loan, — the loan to be for one year from that date, with interest at 10 per cent per annum till due, and 12 per cent per month after maturity, with power, on failure to pay, to sell, etc. The land was conveyed, the money loaned, and the stock issued, and pledged as collateral security, in conformity with the terms of the agreement.

Since the transaction occurred, appellant has been advised by counsel that appellee had no authority to take the land and issue the stock; that it professes to act under authority of "An act to incorporate the Land Improvement and Irrigation Company," approved March 1, 1867, and the change of name to the Cook County Land Company, by vote of its stockholders, on the 20th of July, 1872, at which time its capital stock was increased, in accordance with an act of the Legislature in regard to changing names and increasing stock of corporations, approved March 26, 1872; that the change of name and increase of stock was unauthorized and void, and all the authority appellee had by its charter was to purchase lands for the purpose of irrigation and improvement, for the raising of crops thereon, and the sale and disposal thereof, when so improved.

It is alleged that the power vested in appellee by its charter, which is made part of the bill, as an exhibit, was to examine, survey, and purchase lands and interest therein, watercourses or interests therein, for the purpose of irrigating the lands that might be so purchased, and facilitating crops in dry seasons, and to improve and cultivate such crops chiefly as require irrigation to produce the largest returns, and that appellee had no power to purchase and hold lands for any other purpose; that appellee had not purchased any lands for the purpose of irrigation or for any object contemplated by its charter, but that appellee had purchased a large quantity of land, worth above \$600,000, holds improved and unimproved city real estate, announces its intention to erect buildings on part of its vacant city property, and that it has been, since its organization, and now is, engaged in

purchasing lands, city lots, the improvement of said lots for the purpose of sale and rental, and in the purchase of tax certificates, and in loaning money on bonds and mortgages, etc.

Appellant insists that the purchase of the land and the loaning of the money and taking notes therefor, were contrary to positive statutes, and therefore void.

The act of March 1, 1867, under which appellee first became incorporated, by its first section, empowers "The Land Improvement and Irrigation Company to have, hold, possess, and enjoy, by themselves, successors, and assigns forever, lands, tenements, hereditaments, goods, chattels, choses in action, and effects of every kind, and the same to grant, sell, alien, invest, loan, and dispose of;" and the fourth section of that act is as follows:—

"The chief objects of this association shall be to examine, survey, and purchase lands or interests in lands, water-courses or interests therein, which are as near as may be adapted by nature to the use of water to irrigate the same, to facilitate the growth of crops in dry seasons, and to improve and cultivate the same for such crops chiefly as require irrigation to produce the largest returns." Private Laws of 1867, Vol. 2, p. 241.

Section 21 of the general incorporation law, approved March 26, 1872, under which appellee changed its name and increased its capital, contains this proviso: "And provided further, that any corporation other than corporations for manufacturing purposes, availing itself of or accepting the benefits of, or formed under this act (except the mere change of name), shall be subject to the general laws of this State now in force, or which may hereafter be passed, regulating corporations of like character." 2 Gross, 59.

One of the general laws then and still in force regulating corporations, provides that "no foreign or domestic corporation established or maintained in any way for the pecuniary profit of its stockholders, shall purchase or hold real estate in this State," except as provided for in that act. 2 Gross, 106, sect. 36.

Section 10 of that act authorizes corporations to "own, possess, and enjoy so much real and personal estate as shall be necessary for the transaction of their business," and "to sell and dispose of the same when not required for the uses of the corporation;" and it contains a proviso that "all real estate so acquired in satisfaction of any liability or indebtedness, unless the same may be necessary and suitable for the business of such corporation, shall be offered at public auction, at least once every year," etc.

In case any corporation shall fail to sell such lands, it is made the duty of the State's Attorney of the proper county to proceed against the corporation, by information to the end that such lands shall be decreed to be sold. 2 Gross, 103.

And the first section authorizes corporations to be formed in the manner by the act provided, for any lawful purpose except banking,

insurance, real estate, brokerage, the operation of railroads, and the business of loaning money. Conceding that, in determining appellee's powers, these several provisions must be construed together, and that appellant's construction, that appellee has authority only to examine, survey, and purchase lands or interest in lands, water-courses or interests therein, which are as near as may be adapted by nature to the use of water to irrigate the same, etc., is correct, does it follow that the title to lands conveyed to and held by it for other and different purposes is absolutely void, and may be so declared at the instance of the grantor seeking, for that cause alone, to repossess himself of the property?

The authorities cited in the brief for appellant—*Bank U. S. v. Owens* (2 Peters, 538-539), *Munsell v. Temple* (3 Giln. 93), *Cin. Mut., etc. v. Rosenthal* (55 Ill. 91), *Green v. Seymour* (3 Sandf. Ch. 292), *Smith v. Bromley* (Douglas, 696), and *Browning v. Morris* (Cowp. 790)—recognize the general doctrine that a contract prohibited by statute or against the manifest policy of the law, is void; and in *Carroll v. East St. Louis* (67 Ill. 568), also cited by appellant, the question before us was, whether a corporation, created in another State for the sole purpose of buying and selling lands, has power to purchase and hold title to lands in this State, and we held that it has not, because it would tend to create perpetuities, and is against the general policy of our legislation.

In a more recent case, *Starkweather v. The American Bible Society* (72 Ill. 50), the same doctrine was reasserted.

There seems to us, however, to be this important distinction between the principle recognized in these authorities and that applicable here. There, by reason of the express or implied prohibition of the law, the party is absolutely denied the power to acquire any rights through the particular contract. Here, there is power to purchase, receive conveyances, and hold title to lands, but it is prohibited that they shall be purchased and held for other than a prescribed purpose. In the one case, the principle affects the power of acquisition; in the other, it affects simply the use to which the acquisition shall be applied.

There can be no question of the right of a stockholder to the aid of a court of equity against a corporation, to prevent it from misapplying its capital, or from doing acts which would amount to a violation of its charter; but the frame and prayer of the bill in the present case do not contemplate such relief, and we do not conceive it could be granted without material amendment, to make which, leave should have been asked in the court below.

But appellee being authorized to purchase and hold lands, and appellant having sufficient capacity to convey, the title was obviously vested in appellee by the delivery of the deed, and the question whether appellee has, by its purchase and use of lands, exceeded the powers conferred by its charter, is one between the State and appellee, with

which appellant as a grantor simply has no concern. *Banks v. Poiteaux* (3 Randolph, 141); *Barrow N. and C. T. Co.* (9 Humphreys, 304); *Chambers v. St. Louis* (29 Mo. 576); *Attorney-General v. Tudor Ice Co.* (104 Mass. 239); *Whitman Mining Co. v. Baker* (3 Nevada, 391); *Hayward v. Davidson* (41 Ind. 212); Angell and Ames on Corp. sects. 152-153; Dillon on Munic. Corps. sects. 444; *Natoma W. and M. Co. v. Clarkin* (14 Cal. 544).

It is well observed by Field, J., in the case last above referred to, at p. 552: "It would lead to infinite embarrassments if in suits by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity." And this cannot be better illustrated than by reference to the fourth section of appellee's charter, before quoted. Precisely where would the line be drawn between those lands which are, in the language there employed, "as near as may be adapted by nature to the use of water to irrigate the same," and those which are not? If it were competent to inquire whether the land conveyed is such as is contemplated by the charter, this would have to be determined, and in every conveyance it would be material in determining whether title vested, or the deed was a nullity.

Our conclusion is, assuming appellant's construction of the several statutes affecting appellee's corporate powers to be correct (upon which we express no opinion), appellant may, as a stockholder, on a bill filed for that purpose, have relief in equity to restrain appellee from acting in excess or in violation of its corporate powers; and he may also, as a citizen of the State, cause steps to be taken in its name, for the same cause, to have judgment of forfeiture of its franchise; but he cannot, as a grantor of lands, urge such acts as a cause for decreeing his deed void, and a rescission of his contract.

Treated as a bill to rescind the contract on the ground of fraud, independently of the questions we have considered, the allegations are insufficient.

The decree is affirmed.

Decree affirmed.

MR. CHIEF JUSTICE WALKER:—

I am in favor of affirming, unless complainant should be required to refund the money he received from the company. I hold that the company exceeded their power in purchasing these lands, and that the company should be held to have taken no title by the purchase.

NATIONAL BANK v. MATTHEWS.

(98 U. S. 621. 1878.)

ERROR to the Supreme Court of the State of Missouri.

On the 1st of March, 1871, Hugh B. Logan and Elizabeth A. Matthews executed and delivered to Sterling Price & Co. their joint and several promissory note for the sum of \$15,000, payable to the order of that firm two years from date, with interest at the rate of ten per cent per annum. The payment of the note was secured by a deed of trust, executed by her, of certain real estate therein described, situate in the State of Missouri.

On the 13th of the same month, the note and deed of trust were assigned to the Union National Bank of St. Louis. Price & Co. failed to pay the loan at maturity. The bank directed the trustee named in the deed of trust to sell. Said Elizabeth thereupon filed this bill in the proper State court to enjoin the sale. The bank in its answer avers that it "accepted the said note and deed of trust as security for the sum of \$15,000, then and there advanced and loaned to said Sterling Price & Co. . . . on the security of said note and deed of trust." A perpetual injunction was decreed, upon the ground that the loan by the bank to Price & Co. was made upon real estate security; that it was forbidden by law; and that the deed of trust was, therefore, void. The decree was made upon the pleadings. No testimony was introduced upon either side. The bank removed the case to the Supreme Court of the State, where the decree was affirmed. The bank then sued out this writ of error.

Mr. Philip Phillips, for the plaintiff in error. This case does not fall within the limitations imposed by Rev. Stat., sect. 5137. No mortgage or conveyance of real estate was made to the bank. Price & Co. had only a lien which could be enforced in default of payment. This was all that they passed to the bank: *Potter v. McDowell* (43 Mo. 93); *Watson v. Hawkins* (60 id. 550); and it was a mere incident to the note, securing its payment to the holder thereof in good faith, although he was ignorant, at the time of taking it, of the existence of the lien. Had the mortgage not been delivered nor anything said about it, the bank, on failure of the maker to pay the note, would have been entitled to the lien: *Green v. Hart* (1 Johns. (N. Y.) 590); *Chappell v. Allen* (38 Mo. 213); and its right to assert it could not have been successfully resisted on the ground that to permit it to do so would authorize a violation of its charter.

The act, by authorizing loans to be made "on personal security," cannot be held as limiting the transaction to the personal undertaking of the parties to the note; and it would not be violated if the bank should require as collateral a deposit of bonds or of stocks,

either of States, municipalities, or incorporated companies. *Shoemaker v. National Bank* (2 Abb. (U. S.) 416); Schouler, Personal Property, pp. 87, 94; *Pittsburg Car Works v. Bank* (Thompson's Nat. Bank Cases, 315). In many of these instances the bonds or stocks are secured by real estate. This, however, does not change the character of the collateral, or make it other than personal security. See also *First National Bank of Fort Dodge v. Haire* (36 Iowa, 443), *Merchants' National Bank v. Mears* (Thompson's Nat. Bank Cases, 353).

The decision of the learned court below questions neither the right of the bank to recover the contents of the note by suing the parties thereto, nor the validity of the lien created by the mortgage. Here there are a *bona fide* subsisting debt, evidenced by the note, whereof the bank is the lawful holder, and a lien which Price & Co., before their attempted transfer of it, could have made available. It does now inure to their benefit, because they have assigned the note, and it cannot be enforced by the bank, as it was made void in its hands. Is the lien then vacated? It certainly is, for all practical purposes, if the extraordinary position taken below should be sustained here.

Can the defendant in error, by a strained construction, be permitted to make the objection and cancel a contract which the statute does not declare to be void? There is some contrariety of opinion upon this question, and the court is referred to some of the numerous cases which answer it in the negative. *Smith v. Sheely* (12 Wall. 360); *Gold Mining Company v. National Bank* (96 U. S. 640); *Silver Lake Bank v. North* (4 Johns. (N. Y.) Ch. 370). The decision in the last case is, that if the bank had passed "the exact line of its power, it would rather belong to the government to exact a forfeiture of the charter, than to the court in this collateral way to decide a question of misuser by setting aside a just and *bona fide* contract." The same doctrine is repeated in *Steam Navigation Company v. Wood* (17 Barb. (N. Y.) 380), and supported by the judgments of the courts of Massachusetts, Pennsylvania, and other States. Ang. & A. Corp., sect. 153.

Mr. J. A. Hunter, Mr. John W. Noble, and Mr. John C. Orrick, for the defendant in error. The deed of trust is in effect a mortgage with a power of sale thereto annexed. Although a third person is named as trustee, and vested with that power, the grantor has an equity of redemption, which may be judicially foreclosed and sold. The cestui que trust has a beneficial interest in the lands. *Kennett v. Plummer* (28 Mo. 142); *Chappell v. Allen* (38 id. 213); *Potter v. Stevens* (40 id. 229). In the absence of any statutory prohibition, the assignments would have vested that interest in the bank, but as the latter is permitted (Rev. Stat., sect. 5137) to "purchase" or "hold" real estate in certain specified cases,—of which this is not one,—and in "no other," the assignments passed no interest in the lands, and conferred no right to subject them to sale to pay the note.

The words "purchase" and "hold," where they occur in that section, are not confined to cases where the absolute title to the fee has been conveyed. The provision allowing the bank to take a mortgage, by way of security for debts previously contracted, would be superfluous, if the general prohibitory words did not forbid it to purchase such an interest in real property as a mortgage transfers. Looking at the mischief which the statute had in view, it is immaterial whether the mortgage is made directly to the bank, or is assigned to it. The interest acquired is in each case the same.

The preceding section allows the bank to loan money on personal security. This virtually prohibits loaning it on any other. *Expressio unius est exclusio alterius*.

The decided cases, without a dissent, affirm that all grants of corporate power are to be construed favorably to the public at large and most strongly against the corporation; that it has only the powers expressly given or necessarily implied; that the specification of certain powers prohibits by implication the exercise of other substantive powers, and that the intention of the lawmaker is to be gathered from the whole statute. Governed by these fundamental rules, it must be held that the transaction on the part of the bank was *ultra vires*, not allowed by, but in palpable violation of, the statute to which it owes its existence, and consequently void. The injunction was therefore properly awarded. *Fowler v. Scully* (72 Pa. St. 456); *Kansas Valley National Bank v. Rowell* (2 Dill. 371); *Ripley v. Harris* (3 Biss. 190); *Commonwealth Bank v. Clark* (4 Mo. 59); *Griffith v. Commonwealth Bank* (id. 255); *Bank of Lawrence v. Young* (37 id. 398); *Downing v. Ringer* (7 id. 585); *White v. Franklin Bank* (22 Pick. (Mass.) 181); *Brown v. Farkington* (3 Wall. 381); *Beasley v. Bignold* (5 Barn. & Ald. 335); *Forster v. Taylor* (id. 887); *Cope v. Rowlands* (2 Mee. & W. 149).

MR. JUSTICE SWAYNE, after stating the facts, delivered the opinion of the court:—

This case involves a question arising under the national banking law, which has not heretofore been passed upon by this court. We have considered it with the care due to its importance.

Our attention has been called to but a single point which requires consideration, and that is, whether the deed of trust can be enforced for the benefit of the bank.

The statutory provisions which bear upon the subject are as follows:—

"Sect. 5136." Every national banking association is authorized "to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security;

and by obtaining, issuing, and circulating notes according to the provisions of this title."

"Sect. 5137. A national banking association may purchase, hold, and convey real estate for the following purposes and for no others : First, such as may be necessary for its immediate accommodation in the transaction of its business. Second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years." Rev. Stat. 1999 ; 13 Stat. 99.

Here the bank never had any title, legal or equitable, to the real estate in question. It may acquire a title by purchasing at a sale under the deed of trust ; but that has not yet occurred, and never may.

Sect. 5137 has, therefore, no direct application to the case. It is only material as throwing light upon the point to be considered in the preceding section. Except for that purpose it may be laid out of view.

Sect. 5136 does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed. As the transaction is disclosed in the record, the loan was made upon the note as well as the deed of trust. *Non constat*, that the maker who executed the deed would not have been deemed abundantly sufficient without the further security. The deed, as a mortgage would have been, was an incident to the note, and a right to the benefit of the deed, whether mentioned or delivered or not, when the note was assigned, would have passed with the note to the transferee of the latter. The object of the restrictions was obviously three-fold. It was to keep the capital of the banks flowing in the daily channels of commerce ; to deter them from embarking in hazardous real-estate speculations ; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defence of *ultra vires*, if it can be made, does not address itself favorably to the mind of the Chancellor. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or meaning of the prohibitions relied upon by the counsel for the defendant in error.

In the *First National Bank of Fort Dodge v. Haire and Others* (36 Iowa, 443), the bank refused to discount a note for a firm, but

agreed that one of the partners might execute a note to the other, that the payee should indorse it, that the bank should discount it, and that the maker should indemnify the indorser by a bond and mortgage upon sufficient real estate executed for that purpose, with a stipulation that, in default of due payment of the note, the bond and mortgage should inure to the benefit of the bank. The arrangement was carried out. The note was not paid. The maker and indorser failed and became bankrupts. The bank filed a bill to foreclose. The same defence was set up as here. In disposing of this point, the Supreme Court of the State said: "Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors; and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this. *Silver Lake Bank v. North* (4 J. C. R. 370)."

But it is alleged by the learned counsel for the defendant in error that in the jurisprudence of Missouri a deed of trust is the same thing in effect as a direct mortgage, — with respect to a party entitled to the benefit of the security, — and authorities are cited in support of the proposition. The opinion of the Supreme Court of Missouri assumes that the loan was made upon real-estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.

In *Harris v. Runnels* (12 How. 79), this court said that "the statute must be examined as a whole, to find out whether or not the makers meant that a contract in contravention of it was to be void, so as not to be enforced in a court of justice." In that case, a note given for the purchase-money of slaves, taken into Mississippi contrary to a statute of the State, was held to be valid.

Where a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid; but the penalty attaches to the officer who did the prohibited act. *Milford v. Worcester* (7 Mass. 48); *Parton v. Hervey* (1 Gray (Mass.), 119); *King v. Birmingham* (8 Barn. & Cress. 29).

Where a bank is limited by its charter to a specified rate of inter-

est, but no penal consequence is denounced for taking more, it has been held that a contract for more is not wholly void. *The Planters' Bank v. Sharp et al.* (12 Miss. 75); *The Grand Gulf Bank v. Archer et al.* (16 id. 151); *Rock River Bank v. Sherwood* (10 Wis. 230).

The charter of a savings institution required that its funds should be "invested in, or loaned on, public stocks or private mortgages," etc. A loan was made and a note taken, secured by a pledge of worthless bank-stock. The borrower sought to enjoin the collection of the note upon the ground that the transaction was forbidden by the charter, and therefore void. The court held the borrower bound, and upon a counter-claim adjudged that he should pay the amount of the loan with interest. *Mott v. The United States Trust Co.* (19 Barb. (N. Y.) 568).

Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure v. Hillegas* (7 Serg. & R. (Pa.) 313); *Goundie v. Northampton Water Co.* (7 Pa. St. 233); *Runyon v. Coster* (14 Pet. 122); *The Banks v. Poitiaux* (3 Rand. (Va.) 136); *McIndoe v. The City of St. Louis* (10 Mo. 577). See also *Gold Mining Company v. National Bank* (96 U. S. 640).

The authority first cited is elaborate and exhaustive upon the subject. So an alien, forbidden by the local law to acquire real estate, may take and hold title until office found. *Fairfax's Devisee v. Hunter's Lessee* (7 Cranch, 604).

In *Silver Lake Bank v. North* (4 Johns. (N. Y.) Ch. 370), the bank was a Pennsylvania corporation, and had taken a mortgage upon real estate in New York. A bill of foreclosure was filed in the latter State. The answer set up as a defence, "that by the act of incorporation the plaintiffs were not authorized to take a mortgage except to secure a debt previously contracted in the course of its dealings; and here the money was lent after the bond and mortgage were executed." The analogy of this defence to the one we are considering is too obvious to need remark. Both present exactly the same question. Chancellor Kent said: "Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter, than for this court in this collateral way to decide a question of misuser, by setting aside a just and *bona fide* contract. . . . If the loan and mortgage were concurrent acts, and intended so to be, it was not a case within the reason and spirit of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations. A mortgage taken to secure a loan advanced *bona*

fide as a loan, in the course and according to the usage of banking operations, is not surely within the prohibition."

It is not denied that the loan here in question was within this category. This authority, if recognized as sound, is conclusive. See also *Baird v. The Bank of Washington* (11 Serg. & R. (Pa.) 411).

Sedgwick (Stat. and Const. Constr. 73), says: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

What is said in the text is fully sustained by the authorities cited.

We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defence whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress.

That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government.

The decree of the Supreme Court of Missouri will be reversed, and the cause remanded with directions to dismiss the bill; and it is

So ordered.

MR. JUSTICE MILLER, dissenting:—

I am of opinion that the National Banking Act makes void every mortgage or other conveyance of land as a security for money loaned by the bank at the time of the transaction, to whomsoever the conveyance may be made; that the bank is forbidden to accept such security, and it is void in its hands.

The contract to pay the money, and the collateral conveyance for security, are separable contracts, and so far independent that one may stand and the other fall.

In the present case, the money was loaned on the faith of the deed of trust, and that instrument is void in the hands of the bank, but the note, as evidence of the loan of money, is valid against Mrs. Matthews personally. With this latter contract the State court did not interfere. It enjoined proceedings under the deed of trust against the land, and did no more.

Its judgment in that matter ought, in my opinion, to be affirmed.

NATIONAL BANK *v.* WHITNEY.(103 *U. S.* 99. 1880.)

ERROR to the Supreme Court of the State of New York.

MR. JUSTICE FIELD delivered the opinion of the court:—

It appears from the record that the defendant Whitney, some time previously to 1871, executed to Maria Crocker a mortgage upon certain real property situated in the county of Genesee in the State of New York, to secure an indebtedness to her; that in a suit brought for that purpose the mortgage was foreclosed and a decree entered for the sale of the premises; that such sale was had, and the amount received satisfied the debt and left a surplus of over \$3,800, which was paid into court. The present controversy is between subsequent mortgagees and judgment creditors for this surplus.

On the 12th of January, 1871, Whitney executed a mortgage upon the same premises to the National Bank of Genesee, providing in terms for the payment of \$5,000, one year from its date, with interest, but declaring that it was made as collateral security for the payment of all notes which the bank held at the time against him, and for his other indebtedness then due or thereafter to become due. This mortgage was recorded on the 19th of September, 1872. It subsequently appeared from an examination of the accounts between the parties that his indebtedness at the date of the mortgage was \$3,200, and that this was paid before Sept. 16, 1872.

On this last day Whitney executed two other mortgages upon the same property, one to Homer Bostwick and the other to Edward McCormick. The one to Bostwick was executed as security for the payment of liabilities and indebtedness which already had been or might thereafter be incurred by him on account of Whitney, either by indorsement or otherwise, to an amount not exceeding \$2,500. This mortgage was recorded at noon on the day of its execution. The amount of the liability subsequently incurred by Whitney to Bostwick exceeded the sum named. The mortgage to McCormick was executed as security for similar liabilities and indebtedness which might be incurred by him for Whitney, to an amount not exceeding \$1,500, and was recorded at forty-five minutes past one of the day of its execution. The amount of liabilities incurred by McCormick for Whitney exceeded the sum named.

It is unnecessary to give the particulars of other subsequent incumbrances, as under no circumstances could any of the surplus be applied to their discharge. In any view that can be taken of the mortgages mentioned, the surplus in controversy will be exhausted by them.

The principal question for our determination relates to the validity of the mortgage of Whitney to the national bank, so far as it applies to future advances to him. His indebtedness existing at the execution of the mortgage has been satisfied. His indebtedness subsequently incurred amounted at the sale of the premises to \$5,160. If the mortgage for the future indebtedness can be sustained as a valid instrument for that purpose, the entire surplus will be absorbed for its payment, excepting such portion as may be first payable to McCormick, by reason of the fact that he took his mortgage without notice of the one to the bank. It is contended that the mortgage to the bank so far as it applies to future advances is invalid, because a mortgage of that character is prohibited by the national banking law. That law, after in terms authorizing every national banking association to loan money on personal security, declares that it "may purchase, hold, and convey real estate for the following purposes, and for no others: First, such as may be necessary for its immediate accommodation in the transaction of its business; second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; fourth, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it."

The question presented is not an open one in this court. It was determined in the case of *National Bank v. Matthews*, at the October Term of 1878. It there appeared that Matthews and another person had given their joint note to a mercantile company for \$15,000, secured by a deed of trust on certain real property in Missouri, executed by Matthews alone. Soon afterwards the company assigned the note and deed of trust to the Union National Bank of St. Louis, to secure a loan made to it at the time. The loan was not paid at its maturity, and the bank directed the trustee to sell the premises. Matthews thereupon filed a bill to enjoin the sale, and obtained a decree for a perpetual injunction, upon the ground that the loan was made upon real security, which was forbidden by the statute. The Supreme Court of the State affirmed the decree, and the case was brought here, where the decree was reversed, and the cause remanded, with directions to the court below to dismiss the bill.

In coming to this conclusion this court considered the transaction in two aspects: first, as not being within the letter of the statute, because the deed of trust was not executed to the bank; and second, as a loan upon real-estate security.

Viewed in the first aspect the court held that as a mortgage the deed of trust was merely an incident to the note, and a right to its benefit, whether it was delivered or not with the note, passed with the transfer of the latter. If the loan had been made upon the note alone, the benefit of the deed as a mortgage would have inured to the bank by operation of law. Of course that which the law would give

independently of a direct transfer by the mortgagee, the statute did not intend to defeat because such transfer was made.

Viewed in the second aspect, as a loan upon real-estate security, the court observed that, so treating it, the consequence insisted upon did not follow; that the statute did not declare such security void, but was silent on the subject; that had Congress so intended it would have been easy to say so, and it can hardly be presumed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. And after citing numerous cases where a disregard of statutory prohibitions has not been held to vitiate the contracts of parties, but only to authorize actions by the government against them, the court held that the prohibitory clause of the banking law did not vitiate real-estate securities taken for loans, and that a disregard of them only laid the association open to proceedings by the government. "The impending danger," said the court, "of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to enforce its application."

The construction of the act of Congress thus given has been acted upon by the national banks throughout the country ever since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends, in a great degree upon the stability of the rules by which its transactions are governed. If there should be a change, the Legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future.

The decision in the case cited controls the present case, and in conformity with it we must hold that the mortgage to the bank, so far as the subsequent incumbrances are concerned, is to be regarded as a valid security for the future advances to the mortgagor. Whatever objection there may be to it as security for such advances from the prohibitory provisions of statute, the objection can only be urged by the government. *Fleckner v. United States Bank* (8 Wheat. 338-355).

But it appears from the record that the mortgage to McCormick was taken by him without notice of the prior mortgage to the bank, which had not then been registered. He has, therefore, a right as against the bank to prior payment of the \$1,500 and interest, for which amount his mortgage was a lien upon the premises.

Bostwick took his mortgage with notice of the one to the bank. He cannot, therefore, claim any of the surplus until the debt of the bank is paid. The surplus should, therefore, be first applied to McCormick's claim, and the balance to the claim of the bank.

It follows that the decree of the Supreme Court of New York must be reversed, and the case remanded with directions to enter a decree in conformity with this opinion. *So ordered.*

MR. JUSTICE MILLER and MR. JUSTICE HARLAN dissented.

A petition for a rehearing having been filed, MR. JUSTICE FIELD, at a subsequent day of the term, delivered the opinion of the court: —

By the decision in this case we held that, in the distribution of the surplus moneys in court, the claim of McCormick should be paid before that of the bank. He took his mortgage without notice of the one to the bank, which had not been registered. The bank now asks a rehearing of the case on this point, contending that, under the decisions of the New York courts, the priority of its mortgage cannot be displaced. It cites the statute of the State to show that the recording act gives priority only to the mortgage first recorded, when that is executed for a valuable consideration, which, according to those decisions, means some new consideration advanced at the time; and that a mortgage for a pre-existing indebtedness is not protected by a prior record, against a non-recorded mortgage for value. Here the mortgage to McCormick was given to secure, to the extent of \$1,500, a previous liability and indebtedness, and such as might be subsequently incurred. The previous indebtedness at the time equalled the whole amount of the intended security.

There would be force in the position of the bank if its own mortgage stood in any better condition. When the McCormick mortgage was executed, Sept. 16, 1872, the indebtedness of Whitney to the bank was paid, and his mortgage remained in force only for any future indebtedness which he might incur. For such future indebtedness it could not cut out the mortgage to McCormick, executed for an existing indebtedness, and of which mortgage the bank had notice. For advances afterwards made, the mortgage to the bank was a subsequent incumbrance.

As between two mortgages, — one for a past indebtedness, and one for an indebtedness to be subsequently incurred, — the one for the past indebtedness must have precedence if first recorded.

The petition for a rehearing by the bank must therefore be denied.

The petition of McCormick to be allowed costs out of the fund in the court must, according to the usual practice of the court in such cases, be also denied. His costs are chargeable against the bank which contested his right to be paid out of the proceeds in court. If paid out of the fund, they would reduce by their amount the moneys properly applicable to the indebtedness of Whitney.

Petition denied.

CASE *v.* KELLY.(133 *U. S.* 21. 1890.)

THE case as stated by the court, was as follows :—

The Green Bay and Minnesota Railroad Company being in the hands of a receiver, namely, Timothy Case, in the Circuit Court of the United States for the Eastern District of Wisconsin, in a suit by the Farmers' Loan and Trust Company, to foreclose a mortgage on said railroad, said receiver was directed by the court to take possession of all the property, real and personal, of said company, namely, its road-bed, lands, right of way, and all its other property and rights whatsoever, with authority to bring suits in the name of the railroad company as he should be advised by counsel to be necessary. Under this order, Mr. Case, as receiver, brought the present suit, stating that he sues in behalf of said railroad company, and as receiver, the defendants, David M. Kelly, Henry Ketchum, and George Hiles, and the Arcadia Mineral Spring Company, a corporation created by the laws of the State of Wisconsin.

The allegations of the bill are, that the defendants, Kelly, Ketchum, and Hiles, who were officers of the railroad company during its period of construction, had procured numerous donations of land from citizens who were interested in the construction of the road, along its line, intended to be for the use and benefit of the railroad company, and to assist it in such construction. The fundamental allegation of the bill is, that these defendants, representing to the persons who made the donations that they were officers of the road, and soliciting these grants for the benefit of the road, took the conveyances to themselves individually; that they did this in a fraudulent manner, by making the grantors in the conveyances believe that they, as the officers of the company, could receive the conveyances for the benefit of the road; and that either the grantors did not really know to whom the conveyances were made, or were induced to believe that when made the grantees held the land as a trust for the benefit of the road. These defendants not recognizing this trust, and the conveyances on their faces being merely conveyances to the individuals, either separately or collectively, to wit: to Ketchum, Kelly, and Hiles, who now refuse to convey to the company or to admit its right to the lands, this suit is brought to have a declaration of the trust made by the court, and a decree ordering conveyances by the defendants of the land to the corporation.

It is further alleged that the mortgage in process of foreclosure in the court under which Case is acting as receiver covered all the lands

of the corporation, and would cover these lands if the title of the corporation in them was established.

The defendants, Kelly, Ketchum, and Hiles, filed answers, in which they denied all fraud or deception, denied that they held the lands in trust for the railroad company, and denied the right of the plaintiff to any relief. A decree for want of an answer was taken *pro confesso* against the Arcadia Mineral Spring Company; replications were filed to the answers; the case was put at issue as regards the three principal defendants, and an immense mass of testimony, documentary and otherwise, was taken.

The Circuit Court on the hearing was of opinion that the conveyances made by various persons to Kelly and Ketchum and Hiles of the lands described in the bill were made by the grantors and received by the defendants as contributions to the railroad company to aid in the construction of its road; and that if the railroad company had authority by law to receive such grants and to hold such real estate, it would be entitled to the relief sought in the bill in this case. But being also of opinion that, by the laws of Wisconsin, and under its charter, it could only receive and hold lands for the defined purposes of the road, it held that only such lands as were necessary and proper for the immediate use of the road could be recovered in this suit. *Case v. Kelly* (13 Am. and Eng. Railroad Cas., 70). It therefore entered the following interlocutory decree:—

“This day came the parties, by their counsel, and, on consideration of the pleadings and proofs in this cause and the arguments of counsel thereon, it is ordered, adjudged, and decreed by the court that the complainant is entitled to recover from the defendants the title and possession of all such lands mentioned in the bill of complaint as are required by the railroad company for right of way, depot buildings, and other necessary railroad purposes, as described and limited in the charter of the company, and that the bill of complaint as to all other portions of the lands described therein be dismissed.

“For the purpose of ascertaining what lands are required for right of way, depot grounds, and other railroad purposes, as above stated, and also the extent and value of any improvements made by defendants, this cause is referred to Hon. James H. Howe, as special master of this court, who will take such additional proof as either party may offer upon reasonable notice, the evidence to close by the first day of October next, and the report of the master to be filed herein by the twentieth day of October next. The master will accompany his report with such reasons as he may deem proper, in support of the conclusions reached by him. For that purpose he may visit the premises and report the result of his personal examination.”

The master made his report, accompanied by the testimony, to which exceptions were taken both by Case, the receiver, and by the defendants, Hiles and Kelly, which exceptions were overruled by the

court, and a final decree entered. From this the present appeal is taken.

That decree, after specifying certain pieces of land which the court considered as necessary and proper to the road for its use in the way of track, right of way, depots, and other similar, proper, and necessary uses, ordered the conveyance of these pieces of land by Kelly and by Ketchum and by Hiles and by the Arcadia Mineral Spring Company to the railroad company. It also directed a master to ascertain and report the value of certain improvements made by Hiles upon a portion of this property, and report the same to the court, for which Hiles was to be paid in case complainant should elect to take such improvements.

On Jan. 26, 1888, the day on which the cause was argued, the death of Henry Ketchum, one of the appellees, was suggested, and on July 19, 1888, the appearance of his heirs and legal representatives was filed in the cause. On Oct. 9, 1888, a motion was submitted, asking for an order making the heirs and legal representatives of said Ketchum parties to the cause. On October 15 an order was made requiring the filing of affidavits to the effect that the persons named in the papers were the sole heirs and legal representatives of said Ketchum, and providing that in default thereof publication be made pursuant to the first section of rule 15. No affidavits having been filed pursuant to that order, on Dec. 19, 1888, an order of publication was issued, and on July 6, 1889, the order was duly published, and proof of publication thereof was filed in the clerk's office of this court, Sept. 12, 1889. The parties having failed to come in within the first ten days of this term, pursuant to the requirement of said rule, the appellant, on Oct. 28, 1889, moved that such order or direction might be passed by the court as to it should seem proper, or the exigency of the case might require. On Nov. 4, 1889, the court ordered that unless application should be made on behalf of the parties or either of them, on or before the third Monday of that month, to submit further argument in the case, it would be taken and considered upon the arguments then filed. No such application was made.

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court : —

The principal question suggested by this appeal is, whether the complainant, as representing the railroad company, can maintain a suit for these lands; that is to say, whether the company was endowed by the Legislature of Wisconsin with a capacity to receive an indefinite quantity of lands, with no limitation upon their use, or upon their sale, or whether they were limited to the lands necessary to such uses as were appropriate to the operations of a railroad.

It is not pretended that there is any general statute of the State of Wisconsin which authorizes either this company or any other corporation to purchase and hold lands indefinitely, as an individual

could do, without regard to the uses to be made of such real estate. The charter of the company, approved April 12, 1866, Private Laws Wisc. 1866, c. 540, p. 1331, authorizes it to acquire real estate, namely, the fee-simple in lands, tenements, and easements, for their legitimate use for railroad purposes. It is thus authorized to take lands 100 feet in width for right of way, and also such as is needed for depot buildings, stopping-stages, station-houses, freight-houses, warehouses, engine-houses, machine-shops, factories, and for purposes connected with the use and management of the railroad. This enumeration of the purposes for which the corporation could acquire title to real estate must necessarily be held exclusive of all other purposes, and, as the court said at the time of making its interlocutory decree, "it was not authorized by its charter to take lands for speculative or farming purposes."

It must be held, therefore, that there was no authority under the laws of Wisconsin for this corporation to receive an indefinite quantity of lands, whether by purchase or gift, to be converted into money or held for any other purposes than those mentioned in its act of incorporation.

To this view of the subject counsel urges several objections. The first of these which we will notice is that the charter of the corporation is a private act of which the court cannot take judicial notice, and that if it was not pleaded nor offered in evidence, nor otherwise brought to the attention of the court, it could not be the foundation of its judgment. To this there are two sufficient answers. The first of which is, that if the statute creating this corporation gave it no power to receive and hold lands in the manner we have mentioned, then it had no such power by virtue of any law of the State of Wisconsin; for a corporation, in order to be entitled to buy and sell, to receive and hold, the title to real estate, must have some statutory authority of the State in which such lands lie, to enable it to do so, and the absence of such provision in the law of its incorporation does not create any general statute which authorizes any such right.

Another answer is, that in the charter of the railroad company itself, Laws of Wisconsin of 1866, chapter 540, section 14, it is expressly enacted that "this act is hereby declared to be a public act, and shall take effect and be in force from and after its passage and publication." To this it is replied by counsel for appellant that the statute of Wisconsin cannot make that a public law which in its essential nature is a private law. However this may be, we do not doubt the authority of the Legislature of a State to enact that after the passage and publication of one of its statutes the courts of the State shall be bound to take judicial notice of it without its being pleaded or proven before them. This rule, thus prescribed for the government of the courts of the States, must be binding in proceedings in Federal courts in the same State. Indeed, the distinction between public and private acts has become very artificial and shadowy since legislative bodies

have adopted the principle of publishing in printed form all statutes which they pass. Some of the States keep up the distinction by making a difference in the manner in which public and private acts shall be published, and in such cases this difference is to be observed and may become of some consequence, but the power of the Legislature to declare in any case that after the passage and publication of any of its laws they shall be judicially noticed as public acts, cannot, we think, be doubted.

It is next objected to the principle adopted by the court that the limitation upon the power of the corporation to receive land is one which concerns the State alone, and the title to such lands in a corporation can only be defeated by a proceeding in the nature of a *quo warranto* on behalf of the State. The case of *National Bank v. Matthews* (98 U. S. 621), is strenuously relied on to support this view. We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids.

Another alleged error in the decree of the court relates to that part of it which authorizes Hiles to recover the value of his improvements if the corporation chooses to take the improvements. We do not think this objection sufficient to reverse the decree. In the first place, the right of the plaintiff to have this land is not based so much upon the ground of the defendants having purchased it for the benefit of the road, as upon the offer of counsel of Hiles to convey it in case he were paid for the improvements. But if we suppose that Hiles held this land in trust for the benefit of the plaintiffs, and is willing to acknowledge that trust, there is no reason why, in a court of equity, when the complainant asserts his right to the land and claims to recover both the title and possession from his trustee, he should not pay the value of the improvements which that trustee has placed upon it. It is further to be observed that the option is given to complainant to take these improvements with the land or to reject the improvements and take the land without them, in which

latter case he is merely required to give the owners of the improvements access to the land for the purpose of removing them. If he desires the improvements he can keep them by paying for them. Hiles paid for the land when he got the title, and we see nothing unjust or inequitable in his receiving compensation for improvements made in good faith upon the land which he is now willing to convey to the company, if the company chooses to take them at their appraised value.

We are urged to consider that if this decree is affirmed dismissing the bill of the railroad company, the defendants will be left in the possession of property fraudulently acquired, of considerable value, for which they gave no consideration. The answer to this is, that such question cannot be raised by the plaintiff in this case, because, having no right to take the property, it is not injured by a decree of the court which fails to grant such right. The other questions must be between the defendants in this case and those from whom they took deeds of conveyance, or such other parties, public or private, as may show that they have an interest in the controversy.

The decree of the Circuit Court is

Affirmed.

CHAPTER IV.

POWERS AND LIABILITIES OF A CORPORATION.

FORM OF CONTRACTS.

BANK OF COLUMBIA *v.* PATTERSON'S ADMINISTRATOR.(7 *Cranch*, 299. 1813.)

ERROR to the Circuit Court for the District of Columbia, in an action of indebitatus assumpsit, brought by the defendant in error against the president, directors, and company of the Bank of Columbia, in their corporate capacity.

There were four counts only in the declaration. 1st. Indebitatus assumpsit, for matters properly chargeable in account: 2d. Indebitatus assumpsit, for work and labor done: 3d. Quantum meruit: and 4th. Insimul computassent. The defendant pleaded non assumpsit, and a tender.

On the trial below, the defendant took three bills of exception. The first stated, that the plaintiff read in evidence a sealed agreement, dated 10th December, 1807, between Patterson and a duly authorized committee of the directors of the bank, under their private seals. It recited, that a difference of opinion had arisen between Patterson and the committee for building the new banking-house, as to certain work extra of an agreement made between Patterson and the said committee, in 1804, and thereto annexed; whereupon, it was agreed, that all the work done by Patterson should be measured and valued by two persons therein mentioned, according to certain rates, called, in Georgetown, "old prices," and the sum certified by them should be taken by both parties, in their settlement, as the amount thereof. It was also thereby agreed, that the out-houses, respecting which there had been no specific agreement, should be measured and valued by the same persons, in the same manner. The agreement of 1804 referred to in, and annexed to, the agreement of 1807, was also offered in evidence by the plaintiff, and stated, that Patterson had agreed with the committee to do all the carpenter's work required, agreeable to the plan of the new bank, and stated particularly the manner in which it was to be done; and that "in consideration of the work being done" as stated, the committee agreed to pay Patterson \$3625 as full consideration; and that if, when the work should be finished, the committee should be of opin-

ion, that that sum was too much, Patterson agreed to have the work measured at the expense of the bank, by two persons mutually appointed, who should take the old prices as the standard, and in case the bill of measurement did not amount to the sum of \$3625, Patterson agreed to take the amount of measurement, for full satisfaction. The plaintiff then read in evidence a paper of particulars of the work, certified by the persons named in the agreement of 1807. The defendants offered in evidence the plan of the building, and that it was built principally according to that plan, and the agreement; and that any work other than that stated in the plan and agreement was to be charged separately as extra work, and that it was so charged by Patterson, before the 10th of December, 1807 (the date of the second agreement), who presented the account (so charged) to the defendants, claiming the amount of the same, and claiming also for the work done under the agreement of 1804, the sum of \$3625, and proved, that while the work was going on, the defendants paid Patterson sundry large sums of money on account thereof. The Court was thereupon prayed by the defendants to instruct the jury, that if they believed that the agreement of 1804 was assented to by Patterson and the committee, as binding between them, and that the work therein contracted for was done by Patterson, and that the sum of \$3625 therein mentioned was claimed by him on account of the same, then the plaintiff could recover for no such work, but could only recover for the work done, extra of the said agreement; which instruction the court refused to give.

It was contended by the defendant's counsel, Morsell and Key, that in that refusal, the court below erred, because, —

1. Although there were alterations in the building, after the agreement of 1804, yet Patterson was bound by that contract, so far as it could be traced; and could only recover for the extra work done, under the counts of this declaration, which were all general. 1 Comyn on Contracts 360; Peake's Cases, 103.

2. Because the plaintiff was allowed to recover the value of certain work, by measure and value, under the general counts, when he had contracted to do the said work for a certain stipulated price. Esp. N. P. 138.

The second bill of exception stated, that the defendants, upon the same evidence, prayed the court to instruct the jury that the plaintiff was not entitled to recover under any of the counts; which instruction the court refused to give, but declared that the evidence was competent.

In this refusal, it was contended, that the court erred, because the implied promise to pay for the extra work was merged in the agreement of 1807, and there was no count on that, or the other agreement of 1804. *Foster v. Allanson* (2 T. R. 479).

The third bill of exception stated, that the defendants prayed the court to instruct the jury, upon the same evidence, that the plaintiff

could not recover, unless he should prove that the defendants, after the measurement and valuation, expressly promised to pay the amount thereof to the plaintiff; and that the jury could not, from the evidence offered, presume any such promise. This instruction the court also refused.

It was contended, that the court erred in this refusal, because there was an express agreement under seal, relative to the work; and there was no count on that agreement. It was also contended, that a corporation aggregate could not promise otherwise than under its seal; and therefore, the law could not imply a promise. In support of this proposition, the following cases were cited. *Bac. Abr.* 13, tit. *Corporation*; 4 *Com. Dig.* 258, tit. *Franchises*; *Bro. Corporation*, pl. 34; 1 *Vent.* 47; 1 *Salk.* 191; 1 *Bl. Com.* pt. 2; 1 *Roll. Rep.* 82; *Rex v. Bigg* (2 *P. Wms.* 419).

Jones and C. Lee, contra, cited *Deveaux v. United States Bank* (5 *Cr.* 61; *Doug.* 526); and *Kyd* on Corporations generally. As to the form of action, viz., *assumpsit* and not *covenant*, they said, the instruments were under the private seals of the committee, not the corporate seal. The declaration need not show whether the *assumpsit* be express or implied. 1 *Chitty on Pleading*, 33, note 2. Where the contract is executed, general *indebitatus assumpsit* lies. *Fitzgibbon*, 302; *Weaver v. Borroughs* (1 *Str.* 648); *Alcorn v. Westbrook* (1 *Wills.* 117, *Dennison's* opinion); 4 *Bos. & Pul.* 330; 3 *Ibid.* 582; 6 *East*, 564, 569; 1 *Saunders*, 272, 276, note 2; *Cowp.* 284, 289; 9 *East*, 349; 1 *T. R.* 134; *Watson v. Downes* (1 *Doug.* 24; 4 *Dall.* 428).

STORY, J., delivered the opinion of the court, as follows:—

Several exceptions have been taken to the opinion of the court below, which will be considered in the order in which the objections arising out of them have been presented to us. We are sorry to say that the practice of filing numerous bills of exception is very inconvenient; for all the points of law might be brought before the court in a single bill, with a simplicity which would relieve the bar and the bench from every unnecessary embarrassment.

As the argument on the first exception has proceeded upon the ground that the agreement of 1804 was completely executed and performed, and the objection relates only to a supposed mistake in the form of the declaration, it will at present be considered in this view. And we take it to be incontrovertibly settled that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed, and that it is not in such case necessary to declare upon the special agreement. *Gordon v. Martin* (*Fitzgibbon*, 303); *Musson v. Price* (4 *East*, 147); *Cook v. Munstone* (4 *Bos. & Pul.* 351); *Clarke v. Gray* (6 *East*, 564, 569; 2 *Saund.* 350, note 2). In the case before the court we have no doubt that *indebitatus assumpsit* was a proper form of action to recover as well for the work done under the contract of 1804 as for the

extra work. It may, therefore, safely be admitted (as is contended by the plaintiff in error) that where there is a special agreement for building a house, and some alterations or additions are made, the special agreement shall, notwithstanding, be considered as subsisting, so far as it can be traced. *Pepper v. Burlund* (Peake's Cas. 103). The first exception therefore wholly fails.

Under the second exception the plaintiff in error has made various objections.

1. The first is, that though a promise would be implied by law for the extra work against the corporation, yet that such promise was extinguished by operation of law by the provisions of the sealed contract of 1807. It is undoubtedly true that a security under seal extinguishes a simple contract debt, because it is of a higher nature. Cro. Car. 415; 1 Ld. Raym. 449; 2 Jones, 158; 1 Burr. 9; 5 Com. Dig. tit. *Pleader*, 2 G. 12. But this effect never has been attributed to a sealed instrument which merely recognizes an existing debt and provides a mode to ascertain its amount and liquidation. At most the sealed agreement of 1807 could not be construed to extend beyond this import. In no sense could it be considered as a higher security for the money originally due. This objection therefore cannot prevail, even supposing that the agreement were the deed of the corporation.

2. A second objection is, that the special agreements connected with the certificates of admeasurement were inadmissible evidence under the general counts, and could be admissible only under counts framed on the special agreements. To this objection an answer has already in part been given. And we would further observe that if the agreements connected with the admeasurements were the means of ascertaining the value of the work, the evidence was pertinent under every count (2 Saund. 122, note 2). And if the certificates of admeasurement were of the nature of an award, they were clearly admissible under the *insimul computassent* count. *Keen v. Batshore* (1 Esp. 194).

3. Another objection is that as the agreement of 1807 is sealed, and is connected by reference with the prior agreement, they are to be construed as one sealed instrument, and *assumpsit* will not lie upon an instrument under seal. The foundation of this objection utterly fails, for the agreement is not under seal of the corporation, but the seals of the committee; and if it were otherwise, it is too plain for argument that the original agreement was not extinguished, but referred to as a subsisting agreement. It is quite impossible to contend that the mere recital of a prior in a later agreement after it has been executed, extinguishes the former. Two other objections are made under this exception, but as they are answered in the preceding observations it is unnecessary to notice them farther.

Under the third exception the only objections relied on are in principle the same as the objections urged under the former exceptions, and they admit the same answers.

The case has thus been considered all along as though the contracts were made between the plaintiff's administrator and the corporation, and indeed some points in the argument have proceeded upon this ground. It is very clear, however, that neither the first nor second agreements were made by the corporation, but by the committee in their own names. In consideration of the work being done, the committee, and not the corporation, personally and expressly agree to pay the stipulated price. A question has therefore occurred how far the corporation were capable of contracting, except under their corporate seal; and if it were capable, as no special agreement is found in the case, how far the facts proved show an express or implied contract on the part of the corporation.

Anciently it seems to have been held that corporations could not do anything without deed (13 Hen. VIII. 12; 4 Hen. VII. 6; 7 Ibid. 9). Afterwards the rule seems to have been relaxed, and they were, for conveniency's sake, permitted to act in ordinary matters without deed; as to retain a servant, cook, or butler (Plowd. 91 b; 2 Saund. 305); and gradually this relaxation widened to embrace other objects. (Bro. Corp. 51; 3 Salk. 191; 3 Lev. 107; Moore, 512.) At length it seems to have been established that though they could not contract directly except under their corporate seal, yet they might by mere vote or other corporate act, not under their corporate seal, appoint an agent whose acts and contracts within the scope of his authority would be binding on the corporation. *Rex v. Bigg* (3 P. Wms. 419). And courts of equity, in this respect seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal. 1 Fonbl. 305 (Phila. ed.), note *o*. The sole ground upon which such an agreement can be enforced, must be the capacity of the corporation to make an unsealed contract.

As it is conceded in the present case that the committee were fully authorized to make agreements, there could then be no doubt that a contract made by them in the name of the corporation and not in their own names, would have been binding on the corporation. As, however, the committee did not so contract, if the principles of law on this subject stopped here, there would be no remedy for the plaintiff, except against the committee.

The technical doctrine, that a corporation could not contract, except under its seal, or in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established, that its regularly appointed agent could contract, in their name, without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents,

are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. And it seems to the court that adjudged cases fully support the position. *Bank of England v. Moffat* (3 Bro. C. C. 262); *Rex v. Bank of England* (2 Doug. 524, and note); *Gray v. Portland Bank* (3 Mass. 364); *Worcester Turnpike Corporation v. Willard* (5 Ibid. 80); *Gilmore v. Pope* (Ibid. 491); *Andover & Medford Turnpike Corporation v. Gould* (6 Ibid. 40).

In the case before the court, these principles assume a peculiar importance. The act incorporating the Bank of Columbia (act of Maryland, 1793, c. 30) contains no express provision authorizing the corporation to make contracts. And it follows, that upon principles of the common law, it might contract under its corporate seal. No power is directly given to issue notes not under seal. The corporation is made capable to have, purchase, receive, enjoy, and retain lands, tenements, hereditaments, goods, chattels, and effects, of what kind, nature, or quality soever, and the same to sell, grant, demise, alien, or dispose of; and the board of directors are authorized to determine the manner of doing business, and the rules and forms to be pursued; to appoint and pay the various officers, and dispose of the money or credit of the bank, in the common course of banking, for the interest and benefit of the proprietors. Unless, therefore, a corporation, not expressly authorized, may make a promise, it might be a serious question, how far the bank-notes of this bank were legally binding upon the corporation, and how far a depositor in the bank could possess a legal remedy for his property confided to the good faith of the corporation. In respect to insurance companies also, it would be a difficult question to decide, whether the law would enable a party to recover back a premium, the consideration of which had totally failed. Public policy, therefore, as well as law, in the judgment of the court, fully justifies the doctrine which we have endeavored to establish. Indeed, the opposite doctrine, if it were yielded to, is so purely technical, that it could answer no salutary purpose, and would almost universally contravene the public convenience. Where authorities do not irresistibly require an acquiescence in such technical niceties, the court feel no disposition to extend their influence.

Let us now consider, what is the evidence in this case, from which the jury might legally infer an express or an implied promise of the corporation? The contracts were for the exclusive use and benefit of the corporation, and made by their agents, for purposes authorized by their charter. The corporation proceed, on the faith of those contracts, to pay money, from time to time, to the plaintiff's intestate. Although, then, an action might have laid against the committee, personally, upon their express contract; yet, as the whole benefit resulted to the corporation, it seems to the court, that from

this evidence, the jury might legally infer, that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement. As to the extra work, respecting which there was no specific agreement, the evidence was yet more strong to bind the corporation.

In every way of considering the case, it appears to the court, that there was no error in the court below, and that the judgment ought to be affirmed.

Judgment affirmed.

TOPPING *v.* BICKFORD.

(4 *Allen*, 120. 1862.)

CONTRACT upon three promissory notes, signed by a firm of which the defendant is the surviving member, payable to the order of the Continental Insurance Company, and indorsed, "Continental Insurance Co., Geo. W. Colladay, Pres."

At the trial in the Superior Court, before Morton, J., the plaintiff offered in evidence the depositions of William Larzelare and George W. Colladay, of Philadelphia, for the purpose of proving the existence of the Continental Insurance Company as a corporation, and that Larzelare was secretary, and Colladay president thereof, and had acted as such, and that Colladay had authority to indorse the notes. Both witnesses testified that the company was incorporated by a special act of the State of Pennsylvania, and a copy of the charter was annexed; that the president was in the habit of indorsing its notes, and had authority to do so; that the company had failed, and its records were in the hands of its assignee in insolvency. The defendant objected to this evidence, but it was admitted.

Section 6 of the charter was in part as follows: "The company shall have full power and authority to make, execute, and perfect such contracts, bargains, agreements, policies, and other instruments as shall or may be necessary, and as the nature of the case may require; and every such contract, bargain, agreement, policy, or other instrument to be made by said company, shall be in writing or in print, and signed by the president and secretary, or by such other officer or officers as the directors may appoint for that purpose."

The defendant asked the judge to instruct the jury that, under these provisions, the indorsements, to be legal, must be signed by the president and secretary; or that, in any event, the only mode in which the directors could authorize the president to make them, was by vote. The judge declined so to rule, and instructed the jury that if the directors, by vote or otherwise, authorized him to indorse the notes in suit, his indorsement would be the act of the company.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

CHAPMAN, J. —

1. The defendant, by contracting with the Continental Insurance Company in their corporate name, admitted, *prima facie*, their legal existence, and their capacity to make and enforce the contracts. *Williams v. Cheney* (3 Gray, 215).

2. The charter, a sworn copy of which is annexed to the depositions, does not absolutely require that all contracts of the corporation shall be signed by the president and secretary, but by them "or by such other officer or officers as the directors may appoint for that purpose." Therefore they might appoint the president alone.

3. The deposition of Colladay proves that he came into office as president with the other officers, and acted in that capacity in conjunction with them for a long time, and that he was, therefore, president *de facto*. *Angell & Ames on Corp.*, § 139. It also proves that he was authorized by the directors to transfer the notes of the company by indorsement of his own name as president. Proof of a vote of the directors is not necessary. *Melledge v. Boston Iron Company*, (5 Cush. 158).

4. The records of the corporation being out of the jurisdiction of the court, and out of the custody of the witnesses, the depositions were admissible without annexing to them the records or copies of them. All that the plaintiff was bound to prove, to establish a *prima facie* case, was an indorsement of the notes which would be valid as against the insurance company. This he could establish without going to their records, and the evidence sufficiently establishes the fact. *Fay v. Noble*, (12 Cush. 1); *Lester v. Webb* (1 Allen, 34).

Exceptions overruled.

GOODWIN v. UNION SCREW COMPANY.

(34 N. H. 378. 1857.)

ASSUMPSIT. The declaration contained two counts. First, on an account annexed to the writ, for seventy-two and three-fourths days' work, at nine shillings per day, commencing August 14, 1855, and ending November 18, 1855; and, second, a general count for work and labor. Plea, the general issue.

Daniel M. Robinson, a witness for the plaintiff, testified that the defendant corporation was organized on the thirteenth day of August, 1855, and all the officers and directors chosen on that day: That Samuel Shepard and himself were chosen as directors, and that Shepard was president; that the witness was engaged for the defendants from that time up to the middle of November, in manufacturing screws, and had the immediate oversight in the shop as master

mechanic: That Shepard was ordered by the directors, at a regular meeting, to take the general charge and management of the business for the defendants, and to act as their agent, although no vote was passed to that effect till some time in September: That Shepard followed the directions of the board from the beginning, and purchased stock and managed the affairs of the company as president and agent: That Shepard, after he had been ordered by the directors to take charge of the business, inquired of the witness what laborers were wanted, and he told him a machinist, and spoke of the plaintiff: That he afterwards saw the plaintiff and told him to come to the shop; that he came and said he would work for one dollar and fifty cents a day; that Shepard came in and said he was glad the plaintiff had come, that it was all right, and he directed the witness to keep a memorandum of the time the plaintiff worked, which he did: That the plaintiff worked in the shop manufacturing screws for the defendants and on their machinery, seventy-two and three-fourths days: That the plaintiff so worked with the knowledge of the directors of the company and by the directions of Shepard, who was in at the shop as often as three or four times a week. That the witness himself worked by the day.

Upon this testimony the plaintiff rested his case. The defendants thereupon moved for a nonsuit, which the court declined to grant. A verdict was then taken, by consent, for the plaintiff, which the defendants moved to set aside for the following reasons:—

1. Because the testimony of Robinson showed that he was an incompetent witness; that he himself was liable to the plaintiff for the labor which he had performed, and was therefore interested to charge it upon the defendants.

2. There was no evidence that the directors had any authority to appoint an agent of the corporation, and the court cannot judicially take notice of the charter or by-laws of any private incorporated company.

3. There was no legal evidence that the company ever appointed any agent, or that any person had any authority to bind the company by his acts. And evidence that any individual acted as agent of the corporation was not competent to show that the corporation was liable for his contracts. It should appear that he was legally constituted an agent.

4. If there was any agent, it was Shepard, and he could not delegate his authority to Robinson, and Robinson's contracts could not bind the company.

PERLEY, C. J.:—

An agent is a competent witness to prove his authority, and the due execution of it, and the objection to the witness Robinson was properly overruled. *Moses v. The B. & M. Railroad* (4 Foster, 71).

The defendants were sued in this action by the corporate name of "The Union Screw Company," and answered to that name. The

evidence showed that their business was the manufacture of screws, and it is not objected that they were not authorized 'by their charter to carry on that business. The business was conducted under the general management of Shepard, one of the directors, by order of the board of directors, and the witness Robinson, another director, had the immediate oversight of the shop as master-mechanic. Robinson negotiated the bargain with the plaintiff; but before he commenced work, the evidence, as we understand its import, shows that the terms of the bargain were communicated to Shepard, who approved of them, and so concluded the contract under which the work was done by the plaintiff. Whether Robinson or Shepard, or both, are to be regarded as the acting agents of the corporation, the contract was made by both and each of them; and where one has the actual charge and management of the general business of a corporation, with the knowledge of the members and directors, this is evidence of his authority, without showing any vote or other corporate act constituting him the agent of the corporation. Angell and Ames on Corp. 269; Story on Agency, § 52; *Bank v. Dandridge* (12 Wheat. 83); *Despatch Line v. Bellamy Man. Co.* (12 N. H. 205, 223).

Besides, the defendants would be liable in a quantum meruit, in the absence of any special bargain for services of the plaintiff, performed for them with the knowledge of the directors and general managers of the corporation, and he might recover a quantum meruit on the general counts of his declaration. Even if the special bargain made with the plaintiff was unauthorized and not binding on the defendants, they are still liable to pay him what his work was worth, and on that ground also the nonsuit was properly refused.

Judgment on the verdict.

PIXLEY v. RAILROAD COMPANY.

(33 Cal. 183. 1867.)

ON the 23d day of May, 1863, Wheeler N. French brought an action against the corporations called the "Central Pacific Railroad of California" and "The Western Pacific Railroad Company." The action mentioned is that entitled *Wheeler N. French v. Henry F. Teschemacher et als.* (24 Cal. 518). On the 11th day of June, 1863, Timothy Dame, President of the Western Pacific Railroad Company, on behalf of the defendant, made a verbal contract with plaintiffs to defend said action for defendant, and paid plaintiffs five hundred dollars retainer in said action. Under said employment plaintiffs conducted the defence to said action to its conclusion, and as the fruit of said litigation, defendant ultimately received into its treasury two hun-

dred and fifty thousand dollars in San Francisco bonds. Defendant appealed.

By the Court, CURREY, C. J.: —

Action for work, labor and services rendered by the plaintiffs as attorneys and counsellors at law for the defendant, a corporation duly organized and constituted under the act of the Legislature, entitled "An Act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto," passed on the 20th of May, 1861, and of the several acts supplementary thereto and amendatory thereof. The corporation was organized in December, 1862, and the plaintiffs were employed in June, 1863, by the president of the railroad company, and thereafter they rendered and performed labor and services in and about the business of the company, in fulfilment of their obligation under their employment. While the plaintiffs were engaged in the defendant's service the president of the company had frequent interviews with them in respect to the business which they were managing, and during the same time the directors and officers of the company, who knew of the employment of the plaintiffs and of their attending to the business of the company, advised with them respecting such business. It was proved on the trial that the services rendered by the plaintiffs were worth five thousand five hundred dollars, for which sum, less five hundred dollars, before then paid, the jury rendered a verdict in their favor, on which judgment was entered.

The books and records of the corporation were produced on the trial, but it did not appear therefrom that any corporate action had been taken by the board of directors, assembled or otherwise, concerning any employment of the plaintiffs as attorneys for the corporation; nor that there was such an action as *French v. Teschemacher*, in and about which the work, labor, and services mentioned were rendered and performed; nor did it appear on the trial that at any meeting of the board of directors, any mention was made of the action of *French v. Teschemacher*, or of the employment of the plaintiffs therein.

The evidence offered in behalf of plaintiffs was objected to as incompetent, and the reason assigned in support of the objection, when made, was, that the evidence of the employment was not in writing; that such employment was not authorized by the by-laws of the corporation, nor by resolution of the board of directors. The objection in all the forms made was overruled, and exceptions to the action of the court thereon duly taken by the defendant.

The third section of the Act of 1861 (Laws 1861, p. 609), under which the corporation was organized, declares that such corporation "shall be capable in law to make all contracts, acquire real and personal property, purchase, hold, and convey any and all real and personal property whatever, necessary for the construction, completion,

and maintenance of such railroad, and for the erection of all necessary buildings and yards or places and appurtenances for the use of the same, and be capable of suing and being sued, and have a common seal, and make and alter the same at pleasure, and generally to possess all powers and privileges for the purpose of carrying on the business of the corporation that private individuals and natural persons now enjoy." The ninth section of the act provides that the directors of any railroad company incorporated under any law of the State in force, "shall, for and on behalf of such company, manage the affairs thereof, make and execute contracts of whatever nature or kind, fully and completely to carry out the objects and purposes of such corporation, in any such way and manner as they may think proper, and exercise generally the corporate powers of such company; and such directors shall also have full power to make such by-laws as they may think proper, and alter the same from time to time, for the transfer of the stock and the management of the property and business of the company of every description whatever, within the objects and purposes of such company, and for prescribing the duties of officers, artificers, and employees of said company, and for the appointment of all officers, and all else that by them may be deemed needful and proper within the scope and power of said company; provided that such by-laws shall be approved by the stockholders, and shall not be inconsistent or in conflict with the laws of this State or with the articles of association."

The tenth section of the act reads as follows: "Sec. 10. The directors shall also cause to be kept a book, to be called 'Record of Corporation Debts,' in which the secretary shall record all written contracts of the directors, and a succinct statement of the debts of the company, the amount thereof, and with whom made, which book shall at all times be open to the inspection of any stockholder or party in interest. When any contract or debt shall be paid or discharged, the secretary shall make a memorandum thereof in the margin, or in some convenient place in the record, where the same is recorded. No contract shall be binding upon the company unless made in writing."

The defendant offered to prove that at the time the plaintiffs were employed by the president of the company, as before stated, there was, and since then to the time of the trial had remained in force, certain by-laws of said corporation, duly adopted and upon its records, one of which is in the following words: "No contract shall be binding on the company unless previously sanctioned and ordered by the board of directors; and all contracts made by the board of directors, or any officer, agent, or employee of the company, shall be subject to and shall contain the express stipulation that no stockholder shall be individually or personally liable or bound for the debts of the company, beyond or exceeding the actual amount of stock by him subscribed or held, and all contracts, not containing or subject to

such stipulation shall be void; and neither the board of directors, nor any officer, agent, or employee of the company, nor any other person, shall have the power or authority to bind the company or the stockholders by any contract or agreement unless the same shall contain such stipulation."

The plaintiffs objected to the evidence so offered on various grounds, and the objection was sustained and the defendant duly excepted.

After verdict and judgment, the defendant made an application for a new trial, which proved ineffectual, and thereupon appealed. The real, and in fact the only question which exists in the case, is whether the corporation — the Western Pacific Railroad Company — could be made liable on any contract entered into by the proper officers of the company, unless the same was reduced in some form to writing.

By the third section of the Act of 1861, as we have already seen, the corporation possessed, at the time the president of the company employed the plaintiffs, all the powers and privileges for the purpose of carrying on the business of the corporation, that private individuals and natural persons had. The power to make and execute contracts the act has committed to the directors of the corporation, and declared, among other things, that "no contract shall be binding upon the company unless made in writing." But notwithstanding the power to make and execute contracts has been vested in the board of directors, we do not understand the objection of the defendant to be that the contract in the first instance entered into by the president of the company with the plaintiffs was *ultra vires*, and therefore void. We presume the defendant has forborne any such objection, because the evidence sufficiently established a ratification by the directors *in pais* of what the president had done, or that the open and notorious exercise of the power to enter into this contract must be regarded as presupposing an authority delegated by the board of directors, in some form accredited by law, to the president of the company for the purpose. *United States v. Dandridge* (12 Wheat. 70); *Olcott v. Tioga Railroad Co.* (27 N. Y. 558, 559); *Hoyt v. Thompson* (19 N. Y. 215, 216); *Argenti v. City of San Francisco* (16 Cal. 265, 266); *Bank of Kentucky v. Schuylkill Bank* (1 Parsons' Select Cases in Equity, 250, 251).

In *Bank of Kentucky v. Schuylkill Bank*, the court said: "The artificial technicalities which in the earlier periods of the common law clogged corporations in entering into contracts, and embarrassed individuals in asserting them against these bodies, have given way before the advance of modern necessities and intelligence, so that few differences now exist in the media of proof in establishing a contract against a corporation made in accordance with its charter, and a natural person. It is now firmly established that a corporation may be bound by a promise, express or implied, resulting from the acts of its authorized agents, although such authority be only by virtue of a corporate vote, unaccompanied with the corporate seal. By the general rules of evidence, presumptions are continually made in cases of pri-

vate persons, of acts even of the most solemn nature, when these acts are the natural results or necessary accompaniment of other circumstances. The same presumptions are applicable to corporations. Acts of corporations which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter. In short, the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions from acts done of what must have preceded them. A vote of a corporation may be presumed from other acts, though there is no proof of such vote on the corporate record; for the omission of the corporation to record its own doings cannot prejudice the rights of a party relying upon the good faith of an actual vote of the corporation." The principles here laid down are also ably and elaborately discussed by Mr. Justice Story in his opinion in *United States v. Dandridge*.

The statement on motion for a new trial shows that "on production of the books of the entire records, and the examination thereof, it did not appear thereby that any corporate action had been taken by the board of directors, assembled or otherwise, concerning any employment of the plaintiffs as attorneys for the corporation in said action of *French v. Teschemacher*, and it did not appear by the said records in any wise, and it did not appear on the trial in any wise, that at any meeting or assembly of said board of directors any mention was made in any wise of said action of *French v. Teschemacher*, or of the employment of plaintiffs therein." Though the records of the corporation may have been an entire blank as to any corporate action of the board of directors respecting the employment of the plaintiffs, and though no evidence was produced at the trial of any particular mention of the case named, or of the employment of the plaintiffs, it does not therefore follow that the board did not pass a vote authorizing the president to make the contract; for, as said by the court in *Bank of Kentucky v. Schuylkill Bank*, "a vote of a corporation may be presumed from other acts, though there is no proof of such vote on the corporate record."

Returning to the objection made by the defendant to the contract entered into by the company by its president with the plaintiffs, we find that it relates entirely to the mode and manner of contracting, which it is claimed for the defendant is in effect prescribed by the statute, negatively if not affirmatively, by the immunity contained in the clause, "no contract shall be binding on the company unless made in writing." These words, in their largest import, are broad enough to embrace every species of contract, and to require, in the most exhaustive sense, every agreement or undertaking on the part of the company, to be in writing in order to be of any binding obligation. But is it necessary to give to the language of the statute a scope so comprehensive, when to do so would involve results of extreme inconvenience not only to individuals dealing with the company, but to the company itself? The words of the statute relied on by the defend-

ant in bar of the plaintiffs' right to recover, properly interpreted, relate to executory contracts. In our judgment they are not, when considered in conjunction with the other provisions of the statute and in view of the objects of the corporation, to be read as exempting the company from liability in all cases founded in contract, not in writing. It may be that while such contract remains executory on both sides, an action could not be maintained by either party to enforce it, but where one of the contracting parties has completely performed it on his part, and thereby rendered to the other the consideration stipulated, the party having received the consideration promised cannot be permitted to escape liability on the naked letter of the statute, because the meaning of the law is not such as to afford immunity from liability in such a case.

To give the statute the construction which the defendant insists upon would be to hold that the company could not be compelled to answer for any breach of a verbal contract to transport over its road and deliver at an appointed destination goods intrusted to it for the purpose, for a consideration paid; or for a breach of a like contract to safely carry a passenger to a place designated, for a consideration completely performed on his part. On the other hand, such construction would be to hold that the company could not recover for the carriage of property or persons over the road after the service had been rendered, unless the contract to pay therefor was in writing; because contracts between a railroad corporation and an individual, as well as between natural persons, must be mutual, or else neither party is bound.

The clause of the act under consideration does not render verbal contracts, of the kind of that on which this action was brought, void. They are voidable so long as unexecuted on both sides; but when executed by one of the parties by complete performance, the other becomes liable, and must render the consideration stipulated in advance, or a reasonable compensation, to be ascertained as a matter of fact, if not fixed and agreed upon by the parties themselves. The doctrine here laid down must be admitted to be just, and we have no doubt of its perfect accord with the true intent and meaning of the act, which places the corporation acting within the scope of its powers upon the same footing as natural persons. The third section of the act declares such corporations capable of suing and being sued, and generally as possessing all the powers and privileges for the purpose of carrying on the business of the corporation that private individuals and natural persons enjoy. In illustration of the principle upon which we have endeavored to resolve the question considered, we may refer to cases arising upon constructions of various provisions of the Statute of Frauds.

The fourth section of Ch. 3, Stat. 29, Car. II., provides that no action shall be brought to charge any person upon any agreement that is not to be performed within the space of one year from the

making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. In *Donellan v. Read* (3 Barn. & Adol. 899), it was decided that where a contract within the letter of the statute had been fully performed on one side, the consideration of that performance, though by the contract not payable until after the expiration of the year, could be recovered by action when the stipulated time arrived. Browne on Statute of Frauds, Sec. 117; *Lockwood v. Barnes* (3 Hill, 130). And so a party who has paid money in fulfilment of a verbal contract for an interest in land, which cannot be enforced because within the Statute of Frauds, may recover back the money so paid in an action for money had and received, upon the refusal or inability of the other party to the contract to carry into execution the contract on his part. *Kidder v. Hunt* (1 Pick. 328); *Seymour v. Bennet* (14 Mass. 266); *Barickman v. Kuykendall* (6 Blackf. 22). In like manner, one who has rendered services in execution of a verbal contract, which on account of the statute cannot be enforced against the other party, can recover the value of the services upon a quantum meruit. *Souch v. Strawbridge* (2 Com. Bench, 813, 814); *Burlingame v. Burlingame* (7 Cow. 94); *King v. Brown* (2 Hill, 485); Browne on Stat. of Frauds, Sec. 118. It would indeed be extremely unjust if the law was so construed as to permit a party, after having obtained the benefit of a contract, originally within the Statute of Frauds or other statute of like or analogous nature, not only to avoid his agreement, binding him *in foro conscientie*, but to retain the consideration or benefit received without rendering for it any recompense.

In the case of *Fister v. La Rue and Others, Trustees, etc.* (15 Barb. 323), it was objected to the recovery by the plaintiff, that she was not employed by the corporation to render the services for which she sued, in the mode and manner prescribed by the statute. But the court held that in an action brought upon an executed contract, to recover for services rendered under it, no proof that the contract was made on the part of the corporation in the mode and manner prescribed by the statute was necessary. The court, in further consideration of the question, said: "It is well settled, at least in this country, that where a person is employed for a corporation, by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services according to the agreement. Having availed itself of the services and received the benefits, it is bound in conscience to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract. Ang. & Ames on Corp., 216,

218, Ch. 8, Sec. 8. Where the contract is still executory, and nothing has been done under it, and the action is to recover damages merely for non-performance, it is for the plaintiff to show a legal contract binding upon the corporation."

The case here cited clearly distinguishes between contracts executory and executed, recognizing the doctrine that so long as a contract remains entirely executory the party who seeks to recover merely for non-performance of it by the other, must show a legal contract binding upon the corporation.

In the consideration of this case we have proceeded on the theory that the contract entered into with the plaintiffs was one which the corporation by its duly constituted agents had the capacity to make. That the corporation had such capacity is not attempted to be controverted, nor could it be with seeming plausibility. The act confers on the directors the power to make and execute on behalf of the company contracts of every nature and kind, "to carry out the objects and purposes of such corporation, in any such way and manner as they may think proper." The act does not in terms provide what shall be the mode or manner of contracting, unless it be by the clause declaring that "No contract shall be binding upon the company unless made in writing." This clause is no interdiction to making a contract otherwise than in writing. On the contrary, it is fairly to be implied from the words employed that the company is competent to make contracts not in writing, which it may perform if it elects to do so. Then, if the corporation may so contract, and upon performance may lawfully demand the consideration therefor, it follows, upon the principle of reciprocity already alluded to, that when the company has by the terms of its contract promised to pay for services when performed, it cannot escape the consequences of its contract after having received the consideration for its promise, but must pay the consideration due, as a natural person would be bound to do under the like circumstances.

In conclusion, we may remark that we have not overlooked the cases of *Zottman v. The City and County of San Francisco* (20 Cal. 96), and the cases therein cited, nor that of *Wallace v. The Mayor and Common Council of San José* (29 Cal. 180). In the first of these cases it was held that where the charter of a municipal corporation prescribes the mode in which its contracts shall be made, the mode must be followed in order to render them valid and binding. The doctrine thus declared had not its origin in that case, as will be observed by reference to the authorities referred to therein. When to a corporation is prescribed, by the law of its being, the mode of exercising its power, it results necessarily that such mode must be observed in order to render its acts binding. But when, by its organic law it is declared in general terms that its proper officers shall for and in behalf of it manage its affairs, and make and execute all contracts to carry out the objects and purposes of such corpora-

tion, in any way and manner which they may deem proper, it cannot be held that the corporate powers existing must be exercised in any particular mode. Therefore, mode, in such case, is not the measure of the corporate power. By reference to the portions of the act above cited, it is to be seen that the Western Pacific Railroad Company is not restricted by the law of its being to any special mode and manner of exercising its corporate powers; but on the contrary, the third section of the act provides that the corporation shall possess all the powers and privileges for the purpose of carrying on its business that private individuals and natural persons enjoy; and the ninth section provides that the directors of the company shall manage the affairs thereof, and make and execute all contracts necessary to carry into effect the objects and purposes of the corporation, in such way and manner as they may think proper.

In the case of *Wallace v. The Mayor and Common Council of San José*, the question decided was one relating to the power of the Common Council. In that case the Common Council entered into a contract with the plaintiff, which was plainly beyond the power delegated by the act of incorporation, and the point determined was that the corporation could not be rendered liable upon it, for the obvious reason that it was not the contract of the corporation, it being *ultra vires* under the organic law of the corporation.

Judgment affirmed.

SHAFTER, J., concurring specially:—

I concur in the judgment, and on the ground that if a person not duly authorized make a contract on behalf of a trading corporation, and the corporation take and hold the benefit derived from such contract, it will be held to have made the contract its own by ratification or adoption, and will be estopped from disputing its liability thereon.

It is quite impossible to reconcile the authorities upon this subject, but in so far as trading corporations are concerned, the decisions, in this State at least, are consistent with each other and sustain the proposition. Some of them hold municipal corporations to be within the principle. *Gas Company v. San Francisco* (9 Cal. 453); *Argenti v. San Francisco* (16 Cal. 265); *Fraylor v. Sonora Mining Co.* (17 Cal. 594); *Rosborough v. The Shasta River Canal Co.* (22 Cal. 556); *Allen v. Citizens' Steam Navigation Co.* (22 Cal. 28).

SAWYER, J., concurring specially:—

This is an action to recover attorney's fees in the suit of *French v. Central Pacific Railroad Co. and Western Pacific Railroad Co.*, in which plaintiffs, upon the request of the president and officers of the company, acted as attorneys and conducted the defence to a successful termination. The defendant, as the result of the litigation, received into its treasury two hundred and fifty thousand dollars of the bonds of the City and County of San Francisco. The main point in the case, to which all others are subordinate, is, that there

was no contract of retainer in writing between plaintiffs and defendant, and, for that reason, no liability could be incurred by the defendant to pay for the services. The question arises, under section ten of the Act of 1861, concerning railroad corporations, which provides that "the directors shall cause to be kept a book, to be called 'Record of Corporation Debts,' in which the secretary shall record all written contracts of the directors, and a succinct statement of the debts of the company, the amount thereof, and with whom made; which book shall at all times be open to the inspection of any stockholder or party in interest. When any contract or debt shall be paid or discharged, the secretary shall make a memorandum thereof in the margin, or in some convenient place in the record, where the same is recorded. No contract shall be binding upon the company unless made in writing."

The last clause is the one supposed to be an insuperable obstacle in the way of a recovery in this case. When taken in connection with the context, it is not so clear what was intended by this provision. But, manifestly, it cannot possibly have been intended to have so broad a scope as is claimed for it; for, to give it such a construction would be to so utterly bind the company down to a mode of proceeding that, under it, it would be utterly impossible for it to perform its functions, or transact its ordinary business. It could not do the least thing in the way of contract, whereby a right is acquired, or a responsibility incurred about the smallest matters, which are occurring every minute in the day, without making a contract in writing, and having it recorded by the secretary in the "Record of Corporation Debts." It would be impossible to make a contract, although fully executed on one side, which would bind the other party to carry a passenger, or a pound of freight from station to station, or purchase a cord of wood, or a pint of oil, without these formalities. To give the provision any such construction would be absurd in the extreme. No man in his senses could knowingly vote for such a law, and no sane man would attempt to build or operate a railroad under its provisions. The provision must be limited to express contracts wholly executory, — such contracts as are generally made in the ordinary course of business, when important matters are involved, and there is time for deliberation, and in which the terms are usually arranged in advance, and specified with more or less particularity. It cannot refer to those liabilities; which the law itself implies from benefits received and actually enjoyed, without making any express contract in advance, where the services have been performed on one side, and the consideration received and enjoyed by the other. The provision itself says, all "written contracts" shall be recorded, as if there would necessarily be other contracts. If there were to be no others of any kind, why not say all contracts? All the provisions must be construed together, and so construed, if possible, that while some significance is allowed to every word, there

may still be no conflict. The corporation has a capacity to be sued, and when sued it is bound to appear and defend its interests, or they will be sacrificed, and it can only appear by attorney. The employment of an attorney is not *ultra vires*. It is one of the necessities resulting from the capacity to be sued, likely to occur at any moment, and the emergency may be sudden. The law itself casts upon the corporation the necessity of defending its rights when sued, and it may be impossible to make a written contract with an attorney. It takes two to make a contract. The corporation defended in this instance, and the question was, whether it should gain or lose the sum of two hundred and fifty thousand dollars. It could only maintain its right by appearing by attorney. The plaintiffs appeared with the knowledge and concurrence of the officers of the defendant, and made a successful defence. The corporation actually received, and it still retains, the avails of the litigation. This reception of the proceeds is a corporate act, for there is nothing to inhibit it. It had the benefit of the service without making any express contract. The service was performed, and the benefits enjoyed, and there is nothing to inhibit it from availing itself of the service, or enjoying its fruits. Can it now retain and enjoy the avails of the litigation, and escape liability for the service by which they were acquired? In my judgment, the provision in question has no application, and the law of the land casts upon the defendant the liability to pay what the services are reasonably worth. The question might have been different had the contract of the retainer been wholly executory only, and an action been brought by either party to recover damages for a breach in not performing. This provision has been since repealed, and its construction with reference to later transactions is no longer important.

The case is different from *Wallace v. San José*. In that case the contract itself was *ultra vires* under the circumstances. There was then no power to make the contract at all. The inhibitory provision was not of a general character, but it was very specific, and applied particularly to the case then in hand. There could be no doubt about it. Upon the whole, without noticing particularly the subordinate questions, I am not satisfied that there is any error that would justify a reversal of the judgment. The judgment and order denying new trial should be affirmed.

ROYAL BANK v. RAILROAD COMPANY.

(100 Mass. 444. 1868)

CONTRACT on forty-eight overdue and unpaid bonds of the defendants, a corporation under the law of Massachusetts, one half of which

bonds bore numbers less than 200 and the other half numbers above 300, each bond being dated Jan. 1, 1850, acknowledging the debt of the corporation in the sum of \$480, money of the United States, or one hundred pounds sterling, money of Great Britain, and promising to pay the same in dollars or pounds sterling, to the holder of the bond on July 1, 1855. Each bond bore an impression of the seal of the corporation upon the paper so as to indent its surface, without any intervening substance; was expressed that "the company has hereunto affixed its corporate seal;" and was signed by the president and treasurer. The answer set up that the bonds were not under seal, and were barred by the statute of limitations.

At the trial before Hoar, J., "the defendants asked permission to amend the answer by adding thereto the assertion that the bonds numbered above 300 had been delivered to the plaintiffs as additional security for the payment of the bonds numbered below 200. The judge refused to permit the amendment to be filed on the ground that it was immaterial, and reserved that question. Upon the evidence offered at the trial, the judge ruled that if the impression appearing on each of the bonds was made from the corporate seal of the defendant company upon the paper after the bonds were printed, and made by the printer to whom the seal had been sent by the officers of the company for the purpose of making the impression in order to prepare the bonds to be signed and issued as the bonds of the company, and having been so impressed, the bonds were afterwards signed by the proper officers and delivered as the bonds of the company, they were obligations under the seal of the company, not barred by the statute of limitations. Under this ruling a verdict was taken for the plaintiff for \$480, and interest from July 1, 1855, on each bond, and the case was reserved for the consideration of the whole court."

FOSTER, J.:—

That the bonds declared upon were sealed instruments was settled by *Hendee v. Pinkerton* (14 Allen, 381).

The corporate seal having been affixed by the printer by the direction of the officers of the corporation, and they having adopted his act, and subsequently signed and issued the bonds, the sealing was duly made, and the instruments became obligatory upon the corporation. This is no more nor less than constantly takes place when a scrivener prepares and affixes a seal to a deed which the grantor thereupon signs and delivers. The practice is of unquestionable validity, and the authorities for it are abundant. "If a stranger seal an instrument by the allowance, or the commandment precedent, or agreement subsequent, of the person who is to seal it, that is sufficient" (Cruise Dig. tit. 32, c. 2, § 55).

The allowance of the proposed amendment to the defendants' answer would have been unavailing. A sealed instrument conclusively imports a consideration. And these bonds having been duly executed and delivered, the holders could have maintained an action upon

them, if their delivery had been merely gratuitous, and no value had ever been given for them. A delivery of a portion as collateral security for the payment of the residue, is sufficient. If the defendants wish to avail themselves of the fact that a part were held only as collateral security for the rest, they cannot do so until they have paid in full the amount of their real indebtedness. Until such payment is tendered, there is apparently no equity in their favor, and certainly no defence to a common-law action upon all the securities which they have issued.

Judgment on the verdict.

WHITE v. RAILROAD COMPANY.

(21 Howard (U. S.), 575. 1858.)

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Massachusetts.

MR. JUSTICE NELSON delivered the opinion of the court: —

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The suit was brought in the court below by the plaintiff (White) against the company, upon several bonds issued by the same.

The case was presented to the court upon an agreed state of facts, and among others that the bonds in question were issued by the company in regular course and for a sufficient consideration, and that payment had been demanded and refused. Coupons for the accruing interest previous to the maturity of the bonds had been duly paid.

It was further agreed that bonds of this description issued by the company, were sold in the market and passed from hand to hand by delivery, at prices varying according to the state of the market; and that those in question were issued at or about their date, to a person a citizen of Massachusetts, and were payable in blank, no payee being inserted; and that they came into the hands of the plaintiff through several intervening holders in regular course; and that he then and since lived in the State of New Hampshire, and before this suit was brought filled up the blank by inserting "Selden F. White, or order," the name of plaintiff, without knowledge or consent of the defendants.

The court ruled that the suit could not be sustained for want of jurisdiction.

The ground upon which this ruling below is sought to be maintained is, that these bonds were issued to citizens of Massachusetts; and as they could not be regarded as negotiable instruments, or if negotiable, not payable to bearer, the plaintiff was disabled from suing in the Federal court within the prohibition of the eleventh section of the Judiciary Act (15 Pet. R. 125; 2 ib. 318; 3 How. 574; 8 ib. 441).

In answer to this ground we think it quite clear on looking into the agreed state of facts, in connection with the bonds and the mortgage given to secure their payment, that it was the intention of the company by issuing the bonds in blank to make them negotiable and payable to the holder as bearer, and that the holder might fill up the blank with his own name or make them payable to himself or bearer or to order. In other words the company intended by the blank to leave the holder his option as to the form or character of negotiability without restriction. If the utmost latitude in this respect was not intended, why leave the payee in blank when issuing the bonds, or why not fix the limit of negotiability or negative it altogether? To adopt any other conclusion would seem to us to be unjust to the company, for then the blank would be wholly unmeaning, or if any, a meaning calculated if not intended to embarrass the title of the holder.

Assuming then that these bonds were intended to be made negotiable, we do not see the difficulty suggested in maintaining the suit in the Federal court; for until the plaintiff chose to fill up the blank, he is to be regarded as holding the bonds as bearer, and held them in this character till made payable to himself or order. At that time he was a citizen of New Hampshire, and therefore competent to bring suit in the court below.

As to the negotiability of this class of securities when shown to be intended that they should possess this character by the form in which issued and mode of giving them circulation, we think the usage and practice of the companies themselves, and of the capitalists and business men of the country dealing in them, as well as the repeated decisions or recognition of the principle by courts and judges of the highest respectability, have settled the question. *Morris Canal Co. v. Fisher* (1 Stockton, 667, 699); *Delafield v. State of Illinois* (2 Hill, N. Y. 177; 8 Paige Ch. R. 527, S. C.), *Michigan Bank v. N. Y. and N. H. R. R. Co.* (3 Kern. R. 625); *Carr v. Le Fevre* (27 Penn. R. 418); *Craig v. The City of Vicksburg* (31 Miss. R. 216); *Chester W. Chapin v. The Vt. and Mass. R. R. Co.*, decided Sept. 7, 1857, in Sup. Court of Mass.

Indeed, without conceding to them the quality of negotiability, much of the value of these securities in the market, and as a means of furnishing the funds for the accomplishment of many of the greatest and most useful enterprises of the day, would be impaired. Within the last few years large masses of them have gone into general circulation, and in which capitalists have invested their money; and it is not too much to say that a great share of the confidence they have acquired as a desirable security for investment, is attributable to this negotiable quality, as well on account of the facility of passing from hand to hand, as the protection afforded to the *bona fide* holder.

It is true that in England the law is, that a bond delivered in blank as it respects the payee, is void, and the blank incapable of

being filled up by the holder, either upon an implied or express parol authority from the maker. This is maintained upon the principle that the authority of an agent to make a deed for another must be by deed; and also that to admit the parol authority to fill up the blank would in effect make a bond transferable and negotiable, like a bill of exchange or exchequer bill. *Hibble White v. McMorine* (6 Mees. and Welsb. 200), and *Enthoven v. Hoyle et al.*, in the Exch. (9 Eng. L. and Eq. R. 434).

The law had been otherwise held by Lord Mansfield in the case of *Texira v. Evans*, cited in *Masten v. Miller* (1 Anstruther, 228); but was distinctly overruled by Parke B., in delivering the opinion of the court in the case first above cited, and the opinion reaffirmed by him still more strongly in the second case.

Courts of the highest authority in this country have followed Lord Mansfield, and have not hesitated to meet the fears expressed by Parke, B. (that the effect would be to make bonds negotiable), by admitting the consequence. Chief Justice Marshall, in the case of the *United States v. Nelson & Myers* (2 Brock. R. 64), hesitated to reach this conclusion, but expressed a strong belief that at some future day it would be by this court.

We think, for the reasons above given, the ruling of the court below cannot be upheld, and that the judgment should be reversed, with a *venire de novo*, etc.

CHAPTER V.

POWERS AND LIABILITIES OF A CORPORATION.

 IN RESPECT OF CONTRACTS IN GENERAL.

COLMAN v. THE EASTERN COUNTIES RAILWAY COMPANY.

(10 *Beavan* 1, 1846.)

THIS was a motion to dissolve a special injunction under the following circumstances:—

Under the powers contained in their acts of Parliament, the Eastern Counties Railway Company and the Eastern Union Railway Company had formed a railroad from London to Manningtree, a place within ten miles of the port of Harwich. The directors of these companies conceived that it would add to the traffic and profits of the railway if a steam-packet company could be formed, communicating between Harwich and the northern ports of Europe, and they accordingly took proceedings for the establishment of such a company.

A prospectus was issued, and a deed of settlement prepared whereby it was proposed that the shares in the projected company called "The Harwich Steam-Packet Company," should be offered to the shareholders in the above-mentioned railway companies.

The railway companies intended to guarantee to the shareholders in the steam-packet company a dividend of five per cent per annum, upon their paid-up capital, until the dissolution of the steam-packet company; and that, upon the dissolution, the whole paid-up capital should be paid by the railway companies to the shareholders of the Steam-Packet Company, in exchange for a transfer of their assets and property.

The plaintiff, a shareholder in the Eastern Counties Railway Company, objected to this, and to prevent it he instituted this suit on behalf of himself and all other proprietors of shares in that company (except the defendants) who should come in and contribute to the expenses of the suit against the company and all the directors.

The bill, after alleging a case to the above effect, stated that in October, 1846, the plaintiff called upon the secretary to inquire into the nature of the arrangement between the companies, and was informed that the proposed arrangement was of this nature; that pas-

sengers should be conveyed from London to Rotterdam, etc., for certain fixed fares, and that if it should be found necessary that the whole of those fares should be paid over to the Steam-Packet Company, in order to declare a dividend of five per cent, the railway company would pay the whole amount received for the fares to the Steam-Packet Company.

The bill also stated that many of the proprietors of shares in the Eastern Counties Railway Company had declined to take any share in the Steam-Packet Company, and had altogether disapproved of the proposed arrangement between the railway company and the Steam-Packet Company; but that several proprietors of shares in the Eastern Counties Railway Company, upon the faith of the proposed guarantee, had accepted the shares allotted to them, and had paid the deposits thereon.

The bill stated that no contract or agreement had at present been entered into with the Harwich Steam-Packet Company, under the common seal of the Eastern Counties Railway Company, or in any other manner, sufficient to render an agreement or contract legally binding upon the said railway companies.

The bill prayed a declaration that it would be a breach of trust on the part of the directors of the Eastern Counties Railway Company to enter into any contract, etc., on behalf of the Eastern Counties Railway Company to guarantee to the Harwich Steam-Packet Company any dividend on their capital, or the repayment of the said capital in case of the dissolution of the Steam-Packet Company, or to apply any funds of the railway company in making any payment to the Steam-Packet Company for any of the purposes aforesaid; and that it might also be declared that the directors of the railway company were not authorized to make any reduction from their usual tolls, etc., in favor of any persons or goods conveyed to or from Harwich by any steam packet belonging to the said Steam-Packet Company; and that the directors of the Eastern Counties Railway Company might be restrained by injunction from entering into such proposed arrangement, or any such contract, agreement, or undertaking as aforesaid, etc.

On the 19th of November, 1846, a special injunction was granted *ex parte* by the Master of the Rolls, to restrain the defendants, the directors, until the 26th of November, from entering into the proposed arrangement with the Steam-Packet Company, or any such contract, agreement, or undertaking as was mentioned in the bill.

This injunction was afterwards continued till the 14th of December, when the case was argued before the Master of the Rolls upon a motion and a cross-motion; the defendants moving to dissolve the injunction, and the plaintiff moving to continue it.

In support of the motion to dissolve the injunction, an affidavit was sworn by Mr. Roney, the secretary of the Eastern Counties Railway Company, stating that it was the general practice for railway

companies to agree with the proprietors of coaches, omnibuses, and other vehicles for the conveyance of passengers and goods, between the various stations on the railways and adjoining places, with a view to increase the traffic on the railways, and that the railway companies usually guaranteed to the proprietors of the coaches or omnibuses a percentage of at least £5 per cent, and indemnified them against loss in the use of their vehicles; that he believed the proposed arrangement with the Harwich Steam-Packet Company would be very beneficial to the railway company; that the arrangement had not been agreed to by the shareholders in the railway company, nor had it been discussed at any meeting of their shareholders called for that purpose; and that there were more than eight thousand shareholders in the Eastern Counties Railway Company.

He further stated that the plaintiff was a wharfinger, and in that capacity was an agent of the General Steam Navigation Company, and that his solicitors in this suit were the solicitors of that company; and that the deponent believed that the bill had been filed and the injunction obtained at the instigation and request of the General Steam Navigation Company, who feared that their interests would be injuriously affected by the establishment of the Harwich Steam-Packet Company, and not for the purpose of protecting the interests of the shareholders in the railway company; that a special general meeting of the shareholders in the Eastern Counties Railway Company had been held on the 12th of November, 1846, and that the chairman of the company had then stated that nothing would be done to bind the shareholders of the railway company to any arrangement with the Steam-Packet Company until such arrangement should have been approved at a special general meeting convened for that purpose; and that the directors had not nor ever had, any intention of entering into any such contract without the sanction of their shareholders. This affidavit was not contradicted.

THE MASTER OF THE ROLLS [LORD LANGDALE]:—

This is a motion to dissolve an *ex parte* injunction restraining the defendants from entering into a particular agreement with a company called the Harwich Steam-Packet Company.

Three reasons have been offered for dissolving the injunction. One is personal to the plaintiff, and as to this I am of opinion, looking at the affidavit of Mr. Roney, that there is not sufficient ground to say that the plaintiff has not a right to sue and ask for an injunction if the merits of his case entitle him to one.

The next objection is as to the form of the pleadings, and I do not think I should be right in coming to a conclusion upon it, without carefully examining the frame of the record.

The third ground is upon the merits, and I think after the full discussion the matter has undergone, and considering the great and extensive importance of the principle involved in it, that I ought not to abstain from at once giving my opinion upon the point.

There are four parties to be considered: the plaintiff; the defendants, — the Eastern Counties Railway Company, — the Eastern Union Railway Company, and a company, or proposed company, called the Harwich Steam-Packet Company. The plaintiff is a shareholder in the Eastern Counties Railway Company, and has no interest whatever except in that company, and he is exposed to no liability except such as may be incurred in properly carrying on the business of that company.

I think it right to observe that companies of this kind, possessing most extensive powers, have so recently been introduced into this country, that neither the Legislature nor courts of justice have been yet able to understand all the different lights in which their transactions ought properly to be viewed. We must, however, adhere to ancient general and settled principles so far as they can be applied to great combinations and companies of this kind.

Joint-stock companies have funds so extremely large, and exercise powers so extensive and so materially affecting the rights and interests of other persons and the rights which the public or the subjects of Her Majesty have been accustomed to enjoy under the protection of the laws established in this kingdom, that to look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise, of interference, not only with the public, but with the private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several acts, those powers must always be carefully looked to; and I am clearly of opinion that the powers which are given by an act of Parliament, like that now in question, extend no farther than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned.

How far those powers which are necessarily or properly to be exercised for the purposes intended by the act, extend, may very often be a subject of great difficulty. We cannot always ascertain what they are. Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made; but I apprehend, that it has nowhere been stated, that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted, that railway companies have no right to enter into new trades or businesses not pointed out by their acts; but it has been contended, that they have a right to pledge, without limit,

the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind.

It has been stated, that these things, to a small extent, have frequently been done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament, under which those acts are done, they furnish no authority whatever. To suppose that the acquiescence of railway shareholders, for the last fifteen years, in any transaction conducted by a railway company, is any evidence whatever of their having a lawful right to enter into it, is, I think, wholly to forget the sort of frenzy which, during that period, the country has been in. There has been no project, however wild, which has not been encouraged by some one or more of these companies; there has been no project, however wild, in which the shareholders have not acquiesced, either from cupidity, hoping to gain extraordinary profits, beyond their first anticipations, or from the terror of entering into a contest with a combination of persons so powerful as a railway company. I must, in the absence of any legal decision, say, that I consider that the acquiescence of the shareholders in such transactions affords no ground whatever for the presumption of their legality.

I am far from saying, that that which is here proposed to be done might not be profitable to this company, or that it might not be a public advantage. I am far from expressing an opinion, that the establishment of a steam-packet company at Harwich, communicating with this railway, might be not only of public, but of national importance, or that it might not be proper to give this company authority to do that which they are now attempting to do, as it seems to me, without authority; I mean to express no opinion as to this.

What they are doing is this: under the powers of this act of Parliament enabling them to do what is required for the construction, maintenance, and proper and convenient use of this railway, they are proposing to pledge the funds of this company, to support the proposed Harwich Steam-Packet Company, to the extent of £150,000, or even £300,000. The agreement is of this nature: a proposition is made to certain individuals, to establish a steam-packet company from Harwich to the northern ports, and the directors say, we will do all that we can to encourage the shareholders in the railway company to become shareholders in the steam-packet company. This might be a very legitimate and proper mode of encouragement, because it would be done at the expense and risk of each individual, who makes his own choice, whether he will incur any liability. But besides this, the directors of the

railway company propose, whatever may be the success of the steam-packet company, and even if it should fail, to secure to the subscribers to the steam-packet company interest to the extent of £5 per cent upon the capital out of the funds of the railway company; and, moreover, if the steam-packet company should fail altogether, so that it would be proper to put an end to it, the directors of the railway company propose that the funds of the railway company shall be pledged to pay back to every subscriber to the steamboat company the full amount of his subscription.

It is not proposed that the railway company should directly, and by their own directors, engage in the steam-packet company, and carry on that trade; but only that they should impose on the railway company, the whole risk and liability not only of paying interest at the rate of £5 per cent, but if the transaction should turn out an unprofitable one, of making good to every shareholder the full amount which he has paid. Is there anything in this act of Parliament sanctioning such a course of proceeding? Do the powers to construct, maintain, regulate the traffic, and to do all that is necessary for the purpose of carrying on and working the railroad, imply that the directors are to be at liberty to pledge the funds of the company for a completely different transaction, in the hope that it may turn out a profitable one, and by being itself profitable, add to the profits of the railway company? Surely there is nothing in the powers given by this act of Parliament which can authorize that.

It has been argued, that I must either allow this to be done, or that I must hold that nothing can be done that is at all out of the express words of the act of Parliament. Now I shall remain of opinion, until it has been decided otherwise by higher authority, that this is not within the powers given by the act of Parliament; and when another and a different case is brought before the Court, it will be judged of by the circumstances which attend it. But I must say that, in my opinion, to pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation, is a thing which, according to the terms of this act of Parliament, they have not a right to do. At the same time, I am far from saying, that there may not be many small things, perhaps small excesses of authority, which are obviously so beneficial, that the shareholders would all acquiesce in them, and never think of complaining of them. It does not, therefore follow, that they cannot do the least thing not expressly mentioned in the act. I believe they have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of Parliament, and they have no power of doing anything beyond it.

I do not now intend to enter into a discussion of how far such proceeding is affected by the principles of public policy; but this may be observed, that if there is any one thing more desirable than

another, after providing for the safety of all persons travelling upon railways, it is this, that the property of railway companies should be itself safe; that a railway investment should not be considered a wild speculation, exposing those engaged in it to all sorts of risks, whether they intended it or not. Considering the vast property which is now invested in railways, and how easily it is transferable, perhaps one of the best things that could happen to them would be, that the investment should be of such a safe nature, that prudent persons might, without improper hazard, invest their moneys in it. Quite sure am I, that nothing of that kind can be approached, if railway companies should be at liberty to pledge their funds in support of any plausible speculations, not authorized by their legal powers, and which might, very possibly, to say the least, lead to extraordinary losses on the part of the railway company.

I repeat, as I said at first, that I consider this to be a question of great importance, not merely to the railway companies who claim these powers, but to the public, in a greater variety of ways than it is necessary for me to point out upon this occasion. I say, therefore, that, subject to the examination which I shall feel it my duty to give to the pleadings, I shall not dissolve this injunction. If I find that the pleadings are improperly framed, then I think the objection ought to be brought forward in another form, namely, by demurrer.

The Master of the Rolls stated [December 23], that he had examined the bill, and was of opinion that it had been properly framed, and that the injunction must be continued.

THE EAST ANGLIAN RAILWAYS COMPANY *v.* THE EASTERN COUNTIES RAILWAY COMPANY.

(11 C. B. 775. 1851.)¹

JERVIS, C. J., now delivered the judgment of the court:²—

This is an action of covenant. The declaration states that before the contract was made, there were four railway companies, each incorporated by a separate act of Parliament,—The Lynn and Ely Railway Company, the Ely and Huntington Railway Company, The Lynn and Dereham Railway Company, and the defendants, The Eastern Counties Railway Company; that the Lynn and Ely Railway Company had introduced into Parliament, upon their own petition,

¹ The statement of facts is omitted.

² The demurrer was argued before JERVIS, C. J., MAULE, J., WILLIAMS, J., and TALFOURD, J

four bills for purposes connected with their railway; that the three first-named companies had agreed to amalgamate and form one company under the name and style of the East Anglian Railways Company; and that a bill was then pending in Parliament to give effect to such agreement. The declaration then states that the defendants by an indenture under their common seal, between themselves and the plaintiffs (comprehending the three first-named companies, since amalgamated by act of Parliament), covenanted with the plaintiffs (amongst other things) to take a lease of their railways upon certain terms mentioned in the indenture, and to find the capital necessary for the construction of the extensions, branches, and works authorized to be constructed by the bills then pending in Parliament, and to pay the costs of preparing and promoting such bills, whether the same should pass into law or not. The declaration further states that the bills were proceeded with; that two were passed; and that the costs of the bills, amounting to a large sum, had not been paid by the defendants to the plaintiffs.

The defendants set out the indenture upon oyer, and pleaded that the plaintiffs had no authority to grant leases of their railways to the defendants; that they had been unable to obtain acts of Parliament for that purpose; that they had abandoned all intention of so doing; and that several shareholders of the defendants' company (naming them) had not assented to the making or executing the indenture or the agreement therein contained.

The plaintiffs demurred generally to this plea, and the question for the opinion of the court is, whether, upon this record, the plaintiffs can maintain their action. We are of opinion that they cannot, and that the defendants are entitled to judgment.

The defendants are incorporated by the statute 6 & 7 W. 4, c. cvi., the first section of which enacts that certain persons shall be united into a company for making and maintaining the railway mentioned in that section, and other works by that act authorized, and for other purposes in that act declared, and for that purpose shall be one body corporate by the name and style of "The Eastern Counties Railway Company," and have perpetual succession and a common seal.

The third section empowers the company to raise a sum of money for making and maintaining the said railway and other works authorized by the act; and the 5th section directs the money so raised to be expended in and towards making and maintaining the said railway and other works, and in otherwise carrying the act into execution. The money raised on mortgage is to be applied in the same way, — § 246; and the profits of the company, after defraying the expenses of making, maintaining, and working the said railway, are to be accounted for and divided amongst the proprietors of the undertaking, — §§ 170, 171.

This act is a public act accessible to all, and supposed to be known to all; and the plaintiffs must, therefore, be presumed to have dealt

with the defendants with a full knowledge of their respective rights, whatever those rights may be.

It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act; and that their funds can only be applied for the purposes directed and provided for by the statute. Indeed, it is not contended that a company so constituted can engage in new trades not contemplated by their act; but it is said that they may embark in other undertakings, however various, provided the object of the directors be to increase the profits of their own railway.

This, in truth, is the same proposition in another form; for if the company cannot carry on a new trade, merely because it was not contemplated by the act, they cannot embark in other undertakings not sanctioned by their act, merely because they hope the speculation may ultimately increase the profit of the shareholders. They cannot engage in a new trade, because they are a corporation only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object or the prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act, and not within the scope of their authority.

Every proprietor when he takes shares has a right to expect that the conditions upon which the act was obtained will be performed; and it is no sufficient answer to a shareholder expecting his dividend, that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the line. The public also has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously impaired, if the money supposed to be necessary, and destined by Parliament for the maintenance of the railway, be expended in other undertakings not contemplated when the act was obtained, and not expressly sanctioned by the Legislature.

The cases in equity which have been cited, proceeded upon this view of the subject, and were decided not because the particular act restrained by injunction was a breach of trust, but because it was not within the scope of the directors' authority, was not justified by the statute, and was therefore illegal. In *Colman v. The Eastern Counties Railway Company* (10 Beavan, 15), the Master of the Rolls (Lord Langdale) says: "It has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts; but it has been contended that they have a right to pledge, without limit, the funds of the company in the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the

traffic upon the railway and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind." So in *Salomons v. Laing* (12 Beavan, 352), he says: "A railway company incorporated by act of Parliament is bound to apply all the moneys and property of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever."

The same principle was adopted by the Lord Chancellor in the case of *Bagshaw v. The Eastern Union Railway Company* (2 M'Naght. & G. 389) by Lord Cranworth, in *Beman v. Rufford* (as reported in the Jurist for this year, 15 Jurist, 914) and, as we are told, by Vice-Chancellor Turner, in the case of *The Great Northern Railway Company v. The Eastern Counties Railway Company*. In the last two cases the learned judges treated questions similar to the present as purely legal questions, and therefore directed cases to be stated for the opinion of a court of law; but at the same time expressed their opinion that the contracts were illegal and therefore void.

If the contract is illegal, as being contrary to the act of Parliament, it is unnecessary to consider the effect of dissentient shareholders; for, if the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity or render liable their corporate funds.

But it is said that it does not sufficiently appear upon this record that the bills in Parliament, and for which the defendants covenanted to pay the costs, were not connected with the defendants' railway. If railway companies could embark in undertakings collateral to their main line, merely because the main line might in the result be benefited, there would be much in this objection; but upon the view which we have above expressed, the objection cannot prevail.

We know that each of the four litigant companies has a separate act of Parliament; we know that the statute incorporating the defendants' company gives no authority respecting the bills promoted by the plaintiffs; and we are therefore bound to say that any contract relating to such bills is not justified by the act of Parliament, is not within the scope of the authority of the company as a corporation, and is therefore void.

For these reasons we are of opinion that there ought to be judgment for the defendants.

Judgment for the defendants.

PEARCE v. RAILROAD COMPANIES.

(21 How. (U.S.) 441. 1858.)

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

MR. JUSTICE CAMPBELL delivered the opinion of the court: —

The defendants are separate corporations, existing under the laws of Indiana, and were created to construct distinct lines of railroad that connect at Indianapolis, in that State. The plaintiff is the assignee of five promissory notes, that were executed under conditions set forth in the declaration, and of which he had notice. The two corporations (defendants), some time before the date of the notes, were consolidated by agreement, and assumed the name of the Madison, Indianapolis, and Peru Railroad Company; and under that name, and under a common board of management, conducted the business of both lines of road.

While the business of the two corporations was thus directed and managed, the president of the consolidated company gave these notes in its name in payment for a steamboat, which was to be employed on the Ohio River, to run in connection with the railroads. After the execution of the notes, and the acquisition of the boat, this relation between the corporations was dissolved, by due course of law, and at the commencement of the suit each corporation was managing its own affairs. The plaintiff claims that the two corporations are jointly bound for the payment of the notes; but the Circuit Court sustained a demurrer to the declaration.

The rights, duties, and obligations of the defendants are defined in the acts of the Legislature of Indiana under which they were organized, and reference must be had to these to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive

from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority. In *McGregor v. The Official Manager of the Deal & Dover Railway Co.* (16 L. and Eq. 180), it was considered that a railway company incorporated by act of Parliament was bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatever, and that a contract to do something beyond these was a contract to do an illegal act, the illegality of which, appearing by the provisions of a public act of Parliament, must be taken to be known to the whole world. In *Colman v. The Eastern Counties Railway Co.* (10 Beav. 1), Lord Langdale, at the suit of a shareholder, restrained the corporation from using its funds to establish a steam communication between the terminus of the road (Harwich) and the northern ports of Europe. The directors of the company vindicated the appropriation as beneficial to the company, and that similar arrangements were not unusual among railway companies. Lord Langdale said: "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made. But I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts. But it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders.

"There is, however, no authority for anything of that kind. It has been stated that these things, to a small extent, have been frequently done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament under which those acts are done, they furnish no authority whatever. In the *East Anglian Railway Co. v. The Eastern Counties Railway Co.* (11 C. B. 803), the court say the statute incorporating the defendants' company gives no authority respecting the bills in Parliament promoted by the plaintiffs, and we are therefore bound to say that any contract relating to such bills is not justified by the act of Parliament, is not within the scope of the authority of the company as a corporation, and is therefore void."

We have selected these cases to illustrate the principle upon which the decision of this case has been made. It is not a new principle in the jurisprudence of this court. It was declared in the early case of *Head v. Providence Insurance Co.* (2 Cr. 127), and has been reaffirmed in a number of others that followed it. *Bank of Augusta v. Earle* (13 Pet. 519); *Perrine v. Ches. and Ohio Railroad Co.* (9 How. 172).

It is contended, that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes, as an indorsee; and the only question is, had the corporation the capacity to make the contract, in the fulfilment of which they were executed? The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority.

Judgment affirmed.

DOWNING v. MOUNT WASHINGTON ROAD COMPANY.

(40 N. H. 230. 1860.)

ASSUMPSIT, brought by Lewis Downing & Sons, to recover the price of eight omnibuses, and a model for the same, one light wagon, and one baggage wagon, made for the defendants, under a contract entered into by D. O. Macomber, president of the defendant corporation in their behalf.

The light wagon was made and sent to one Cavis, the agent for building the road, and was used by him in making it. The omnibuses and baggage wagon were intended to be used in conveying passengers up and down the mountain, after the road was completed. The omnibuses were constructed in a peculiar way, and are not fit for use on ordinary roads.

By their act of incorporation, passed July 1, 1853, the corporation was empowered to lay out, make, and keep in repair, a road from such point in the vicinity of Mt. Washington as they may deem most favorable, to the top of said mountain, etc., and thence to some point on the northwesterly side of said mountain, etc., to take tolls of passengers and for carriages, to build and own toll-houses, and to take land for their road.

The corporation was duly organized, and at a meeting of the directors on the 31st of August, 1853, before said contract was made, it was "voted that the president be the legal agent and commissioner of the company;" and his compensation as such was fixed.

"The president" was "directed to proceed with the letting of the work for the construction of the road, . . . the obtaining the right of way," and "what other action he shall deem proper for the interests of the company," etc.

A committee was appointed "to settle in relation to the right of way, etc., and in relation to land on which to build stables and other buildings, for the use of the road, and also for building all such stables and houses as may be necessary for the operations of the company."

It appeared that by an additional act, passed July 12, 1856, the corporation were authorized "to erect and maintain, lease and dispose of any building or buildings, which may be found convenient for the accommodation of their business, and of the horses and carriages and travellers passing over said road."

The defendants denied the authority of Macomber to make such a contract in behalf of the corporation, and the power of the corporation under its charter either to authorize or to enter into such a contract.

BELL, C. J. :—

Corporations are creatures of the Legislature, having no other powers than such as are given to them by their charters, or such as are incidental, or necessary to carry into effect the purposes for which they were established. *Trustees v. Peaslee* (15 N. H. 330); *Perrine v. Chesapeake Canal Co.* (9 How. 172). In giving a construction to the powers of a corporation, the language of the charter should in general neither be construed strictly nor liberally, but according to the fair and natural import of it, with reference to the purposes and objects of the corporation. *Enfield Bridge v. Hartford R. R.* (17 Conn. 454); *Strauss v. Eagle Co.* (5 Ohio (N. S.) 39).

If the powers conferred are against common right, and trench in any way upon the privileges of other citizens, they are, in cases of doubt, to be construed strictly, but not so as to impair or defeat the objects of the incorporation.

In the present case the power to take the lands of others, and to take tolls of travellers, must be strictly construed, if doubts should arise on those points; but it is not seen that the other grants to the defendant corporation should not receive a fair natural construction.

The charter of the Mount Washington Road empowers them to lay out, make and keep in repair, a road from Peabody River Valley to the top of Mount Washington, and thence to some point on the north-west side of the mountain. It grants tolls on passengers and carriages, and authorizes them to take lands of others for their road, and to build and own toll-houses, and erect gates, and appoint toll-gatherers to collect their tolls. The remaining provisions contain the ordinary powers of corporations relating to directors, stock, dividends, meetings, etc. Laws of 1853, chapter 1486.

This chapter confers the usual powers heretofore granted to turn-pike corporations, and no others. The most natural and satisfactory mode of ascertaining what are the powers incidentally granted to such companies, is to inquire what powers have been usually exercised under them, without question by the public or by the corporators. It may be safely assumed that the powers which have not heretofore been found necessary, and have not been claimed or exercised under such charters, are not to be considered generally as incidentally granted. Such charters have in former years been very common in this and other States, and they have not, so far as we are aware, been

understood as authorizing the corporations to erect hotels, or to establish stage or transportation lines, to purchase horses or carriages, or to employ drivers in transporting passengers or freight over their roads; and no such powers have anywhere been claimed or exercised under them. We are, therefore, of opinion that the power to establish stage and transportation lines to and from the mountain, to purchase carriages and horses for the purpose of carrying on such a business, was not incidentally granted to the defendant corporation by their charter. *State v. Commissioners* (3 Zab. 510).

But it is contended that the power to make this contract is conferred by the act in amendment of the charter, passed July 12, 1856. By this act the corporation may "erect and maintain, lease and dispose of any building or buildings which may be found convenient for the accommodation of their business, and of the horses and carriages and travellers passing over their said road." By their business, which the buildings to be erected were designed to accommodate, it is said the Legislature must have intended some permanent and continuing business beyond that of merely building and maintaining a road; and that it could be no other than that of erecting a hotel on the mountain, and establishing lines of carriages, for the purpose of carrying visitors up and down the mountain.

But the foundation of this implication is very slight. The express grant is of an authority to erect, etc., buildings, not of all kinds, but such as may be found convenient for the accommodation of their business, and of travellers, etc. The business here referred to must be understood to be such as they are by their charter authorized to engage in. If nothing had been said of horses and travellers, there could hardly be any foundation for the idea that a hotel could have been contemplated by the Legislature. Buildings suitable for the accommodation of their toll-gatherers and workmen employed on their road, would probably be thought everything the Legislature intended to authorize by this additional act. Connected as this authority now is with travellers, horses, and carriages, there is scarce a pretence for argument that this additional act goes any further than the original act, to authorize a stage and transportation company. It is not unlikely that some of the projectors of this enterprise intended to secure much more extensive rights than those of a turnpike and hotel company, but it seems certain they have not exhibited this feature of their case to the Legislature so distinctly as to secure their sanction, and the charter and its amendment as yet justifies them in no such claim.

The power of buying and selling real and personal property for the legitimate purposes of the corporation, and the power of contracting generally for the same purposes, within the limits prescribed by the charter, being granted, we understand the principle to be, that their purchases, sales, and contracts generally, will be presumed to be made within the legitimate scope and purpose of the corporation,

until the contrary appears, and that the burden of showing that any contract of a corporation is beyond its legitimate powers, rests on the party who objects to it. *Indiana v. Woram* (6 Hill, 37); *Ex parte Peru Iron Company* (7 Cow. 540); *Farmer's Loan v. Clowes* (3 Comst. 470); *Same v. Curtis* (3 Seld. 466); *Biers v. Phenix Company* (14 Barb. 358).

If a corporation attempt to enforce a contract made with them in a case beyond the legitimate limits of their corporate power, that fact, being shown, will ordinarily constitute a perfect defence. *Green v. Seymour* (3 Sandf. Ch. 285); *Bangor Boom v. Whiting* (29 Me. 123); *Life, &c. Company v. Manufacturers, &c. Company* (7 Wend. 31); *New York, &c. Insurance Company v. Ely* (5 Conn. 560).

And if a suit is brought upon a contract alleged to be made by the corporation, but which is shown to be beyond its corporate power to enter into, the contract will be regarded as void, and the corporation may avail themselves of that defence. *Beach v. Fulton Bank* (3 Wend. 573); *Albert v. Savings Bank* (1 Md. Ch. Dec. 407); *Abbot v. Baltimore, &c. Company* (1 Md. Ch. Dec. 542); *Strauss v. Eagle Insurance Company* (5 Ohio, n. s. 59); *Baron v. Mississippi Insurance Company* (31 Miss. 116); *Bank of Genesee v. Patchin Bank* (3 Kern. 315); *Gage v. Newmarket* (18 Q. B. 457).

The contract set up in this case was made not by the corporation itself, by a vote, nor by an agent expressly authorized to sign a contract already drawn, but it was made by the president of the corporation, acting under an appointment as their general agent; and it is argued that he was fully authorized by votes of the corporation to bind them by such a contract as the present; but it is not necessary to consider this question, as we think it settled that the powers of the agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make. This principle is distinctly recognized in *McCullough v. Moss* (5 Den. 567); overruling the case of *Moss v. Rossie Lead Co.* (5 Hill. 137), and in *Central Bank v. Empire Co.* (26 Barb. 23); *Bank of Genesee v. Patchin Bank* (3 Kern. 315).

The same want of power to give authority to an agent to contract, and thereby bind the corporation in matters beyond the scope of their corporate objects, must be equally conclusive against any attempt to ratify such contract. What they cannot do directly they cannot do indirectly. They cannot bind themselves by the ratification of a contract which they had no authority to make. (5 Den. 567, above cited.) The power of the agent must be restricted to the business which the company was authorized to do. Within the scope of the business which they had power to transact, he, as its agent, may be authorized to act for it, but beyond that he could not be authorized, for its powers extend no further.

This view seems to us entirely conclusive against the claim

made for the omnibuses and model, and probably for the baggage wagon.

As to the light wagon, that may stand on a different ground. Such a wagon might be useful and necessary for the use of the agent of the company, in conducting the undoubted business of the corporation, — the building and maintaining the road.

We are unable to assent to the position taken in the argument, that a ratification of part is a ratification of the whole contract. While the corporation may be restricted from ratifying a contract beyond the scope of the objects of the corporation, there could be no such objection as to any matter clearly within their power. The other contracting party might have a right to reject such ratification, claiming that the contract is entire, and if not ratified as such, it should not be made good for a part only. But if they claim the benefit of the partial ratification, the corporation can hardly object.

ASHBURY COMPANY *v.* RICHE.

(*L. R. 7 H. L.* 653. 1875.)

MR. JOHN ASHBURY had carried on at two places in Lancashire a very extensive business in making railway carriages and wagons, turntables, points, crossings, and roofs, and other things of a like sort needed by a railway company, but had not been concerned in the construction of railways themselves.

A company called "The Ashbury Railway Carriage and Iron Company," incorporated under the Companies Act, 1862, was started for the purpose of buying Mr. John Ashbury's business, and among the other articles in the agreement for its purchase was this, that the said John Ashbury shall not be interested (except as shareholder in a company) in "the business of a railway-carriage maker, iron manufacturer or contractor, or any other business or branch of business theretofore carried on by him at the said works."

A Memorandum of Association of the company, dated on the 12th of September, 1862, was drawn up. By the 3rd clause of this memorandum of association the objects of the company were thus defined: "The objects for which the company is established are to make and sell, or lend on hire, railway-carriages and wagons, and all kinds of railway plant, fittings, machinery, and rolling-stock; to carry on the business of mechanical engineers and general contractors; to purchase and sell, as merchants, timber, coal, metals, or other materials; and to buy and sell any such materials on commission, or as agents."

The Articles of Association recited an agreement to purchase the business of John Ashbury. The first portion of these articles need

not be referred to. In a second portion (which was marked by a different enumeration of clauses), under the heading "Business," the 4th clause was in these terms: "An extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." By clause 36 of the articles it was provided that "the directors may, with the sanction of a special resolution of the company, previously given in general meeting, increase its capital," etc. By clause 68 the directors were to have the general conduct of the business of the company, and to "exercise all such powers of the company as are not, by the Act of Parliament or the regulations of the company," to be exercised in general meeting. By clause 70 the directors might "at any board meeting direct the affixing of the seal of the company to any deed or document." By clause 85 the directors might delegate "any of their powers to committees consisting of such member or members of their body as they shall think fit."

In 1864 Mr. Riche, the defendant in error, was carrying on business in Belgium, in partnership with his brother (since deceased), as a railway contractor. On the 14th of March, 1864, the Belgian Government granted to certain persons named Gillon and Bertsoen a provisional concession for making a line of railway from Antwerp to Tournay, the payment of two sums of £4,000 and £16,000 being settled as what is called "caution money." The two concessionaries desired a company to be formed to carry this concession into effect. It was agreed that Messrs. Riche were to have the construction of the line; and in the early part of 1865 the two concessionaries and Messrs. Riche and the directors of the Ashbury Company met together, and agreed to form a company (*Société Anonyme*) to work the concession. The arrangement was for the Ashbury Company to purchase the concession from Messrs. Gillon for £70,000, and to give the contract for its construction to Messrs. Riche, the company thus becoming, in fact, the contractor for the construction of the line. In this negotiation Mr. James Ashbury, one of the directors of the English company, represented that company, and entered into the contracts. Sir Cusack Roney afterwards acted in the same character.

The formation of a *société anonyme* in Belgium, and the agreement with Messrs. Riche that they should construct the line, — the Ashbury company undertaking to supply the *société anonyme* with the requisite funds, — was said to have been adopted because the rails, etc., supplied by a Belgian house would be free from the duty that the Belgian Government imposed on rails imported from England, and consequently the profit from the construction of the line would be increased. Messrs. Riche began and for some time continued the works for the construction of the line; and for some time too the Ashbury directors paid, in the name of their company, money to the *société anonyme* to which Messrs. Riche had become entitled.

Difficulties about payment arose as the work went on, the English

shareholders not adopting the views of their directors as to the speculation.

In May, 1867, there was an "extraordinary meeting of the shareholders of the company," at which a report was read from a committee previously appointed at the general meeting of December, 1866. This report disapproved of what had been done by the directors in the matter of the Belgian railway (and likewise of what had been done by them in a similar manner with respect to a Spanish railway), and contained the following declarations: "As regards the two railway concessions, the committee consider the items appertaining to these concessions should not have appeared in the company's books, nor in the balance sheets. But looking at the important interests involved, and the extent to which they would be jeopardized by proceedings in chancery extending over a considerable period, they would recommend the shareholders to endeavor to effect an amicable settlement with the directors, without having recourse to legal proceedings."

The annual meeting was held on the 14th of May, 1867, to consider (among other things) this report. This recommendation in the report of an "amicable settlement with the directors" was considered, and an arrangement was proposed by which the directors were to "purchase from the Ashbury Company any estate or interest which the company may have in the Antwerp and Tournay railway contract or concession." The Ashbury Company was, by the same arrangement, to allow legal proceedings to be taken to enforce the claims or defend any actions, or otherwise, in relation to said businesses, which might be required, in the name of the Ashbury Company, but "at the expense of the said purchasers" (the directors), who were to indemnify the company against all liabilities.

At a general meeting on the 24th of December, 1867, this arrangement was sanctioned, and though a resolution was proposed "that the accounts be approved and adopted, with the exception that the term 'advances or contracts' be expunged," that was withdrawn and the accounts passed, including that item.

The company, however, dealing with the brothers Riche, repudiated the contract for constructing the line as one *ultra vires*. Messrs. Riche brought an action for damages for breach of contract. The case was referred to a barrister to state a special case, and the question of *ultra vires* was that on which the decision was to depend. The court was to be at liberty to draw inferences of fact. The question of *ultra vires* was to depend on the following considerations:—

First. The declaration of the objects of the company made in the Memorandum of Association.

Secondly. The words of several of the Articles of Association.

Thirdly. The acts of the directors, and of meetings of the company.

The case, setting forth the various matters already stated, was heard, on the 25th of November, 1872, before the Court of Exchequer, consisting of Barons Martin, Bramwell, and Channell, when the

judges differed in opinion, Baron Bramwell thinking that the verdict ought to be entered for the defendants, who represented the shareholders of the company, and the other two learned Barons being in favor of entering the verdict for the plaintiffs, the Messrs. Riche. It was so entered, and the judgment was taken on error to the Exchequer Chamber, where there was again a difference of opinion; Mr. Justice Blackburn delivering a judgment, in which Mr. Justice Brett and Mr. Justice Grove concurred, in favor of affirming the judgment of the court below, and Mr. Justice Archibald delivering an opinion on behalf of Mr. Justice Keating, Mr. Justice Quain, and himself, for reversing it (the case, in both courts, is fully reported *Law Rep.* 9 Ex. 224, 249). The judges being thus equally divided, it stood affirmed, and error was then brought to this House.

THE LORD CHANCELLOR (LORD CAIRNS):¹—

My Lords, the history and progress of the action out of which the present appeal arises is not, I must say, creditable to our legal proceedings. There was not in the case any fact in dispute, and the only questions which arose were questions of law, or questions, perhaps, as to the proper inference to be drawn from facts as to which there was no dispute. The action, however, was commenced so long ago as the month of May, 1868. The litigation appears to have been active and continuing, and yet seven years have been consumed, and the result of all, up to the present time, is this, that in the Court of Exchequer two out of the three judges were of opinion that the plaintiff should have judgment; and when the case came before the Exchequer Chamber it was heard before six judges, three of whom were of opinion that the plaintiff was entitled to judgment, the other three thinking that the defendant was entitled to judgment. The result, therefore, was the judgment of the Court of Exchequer was affirmed.

My Lords, but for this difference of opinion among the learned judges, I should have said that the only questions of law which arise in the case, the questions which appear to me to be sufficient altogether to dispose of the case, were of an extremely simple character. The action was brought by the plaintiffs, who appear to be contractors in Belgium, and it was brought for damages for the breach of an agreement entered into between the plaintiffs and the shareholders, constituting the Ashbury Railway Carriage and Iron Company, Limited.

These persons constituted a company established under the Joint Stock Companies Act of 1862. I think your Lordships will find it necessary to consider with some minuteness some of the leading provisions of that Act of Parliament. But, in the first place, you will find it convenient to ascertain the purposes for which this company was formed, and then the nature of the agreement, or contract, for the breach of which the present action was brought.

¹ The opinions of LORD CHELMSFORD, LORD HATHERLEY, LORD O'HAGAN, and LORD SELBORNE are omitted.

The purposes for which a company, established under the Act of 1862, is formed, are always to be looked for in the Memorandum of Association of the company. According to that memorandum, the Ashbury Railway Carriage and Iron Company, Limited, is formed for these objects — “to make and sell, or lend on hire, railway carriages and wagons, and all kinds of railway plant, fittings, machinery, and rolling-stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents.” Part of the argument at your Lordships’ Bar was as to the meaning of two of the words used in this part of the memorandum, — the words “general contractors.” My Lords, as it appears to me, upon all ordinary principles of construction those words must be referred to the part of the sentence which immediately precedes them. The sentence which I have read is divided into four classes of works. First, “to make and sell or lend on hire railway carriages and wagons and all kinds of railway plant, fittings, machinery, and rolling-stock.” That is an object *sui generis* and complete in the specification which I have read. The second is “to carry on the business of mechanical engineers and general contractors.” That, again, is the specification of an object complete in itself; and, according to the principles of construction, the term “general contractors” would be referred to that which goes immediately before, and would indicate the making generally of contracts connected with the business of mechanical engineers, — such contracts as mechanical engineers are in the habit of making, and are in their business required, or find it convenient, to make for the purpose of carrying on their business. The third is, “to purchase, lease, work, and sell mines, minerals, land, and buildings.” That is an object pointing to the working and the acquiring of mineral property, and the generality of the last two words, “land and buildings,” is limited by the purpose for which land and buildings are to be acquired, namely, the leasing, working, and selling mines and minerals. The fourth head is, “to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents.” That requires no commentary.

My Lords, if the term “general contractors” were not to be interpreted as I have suggested, the consequence would be that it would stand absolutely without any limit of any kind. It would authorize the making, therefore, of contracts of any and every description, and the memorandum in place of specifying a particular kind of business would virtually point to the carrying on of business of any kind whatever, and would therefore be altogether unmeaning.

My Lords, that being the object for which the company professes by the memorandum of association to be incorporated, I now turn to examine the contract upon which the present action is brought. I

may relieve your Lordships from any lengthened exposition of the nature of that contract by referring you to the account given of it by Mr. Baron Bramwell in the Court of Exchequer, which appears to me accurately to describe the general nature of the contract. Mr. Baron Bramwell states this (Law Rep. 9 Ex. 234): "The substance of those contracts" — that is, the contract upon which the action was brought, and two other contracts which are inseparably connected with it — "The substance of those contracts was this: Gillon and Bertsoen had obtained the right to make a railway in Belgium. This right the defendants' directors supposed to be valuable to its owners; that is to say, the line could be constructed for a certain sum, and a *société anonyme* could be constituted with shareholders to take its shares to an amount which would give a large sum over the cost of construction. The benefit of this the directors desired to obtain for the defendant company, and to do so purchased the concession. This was their main object. But the plaintiffs held a contract with the concessionaries to construct the line, and to accomplish the directors' object it was necessary or desirable, or they thought it was, that they should agree with the plaintiffs that the defendants should constitute a *société anonyme*, and as the plaintiffs went on with the work, the defendants should pay into the hands of the *société* proportionate funds. The farther contract entered into in the defendants' name, called D., is of no importance in this case. The directors accordingly entered into two contracts in the defendants' name, — one with the concessionaries to purchase the concession; the other with the plaintiffs to furnish the *société anonyme* with funds, the latter contract being auxiliary to the former. They paid the concessionaries £26,000, part of the price. Now, whatever may be the meaning of 'carry on the business of mechanical engineers and general contractors,' to my mind it clearly does not include the making of either of these contracts. It could only be held to do so by holding that the words 'general contractors' authorized generally the making of any contracts; and this they certainly do not."

My Lords, I agree entirely, both with the description given here by Mr. Baron Bramwell of the nature of the contract and with the conclusion at which he arrived, that a contract of this kind was not within the words of the memorandum of association. In point of fact it was not a contract in which, as the memorandum of association implies, the limited company were to be employed; they were the employers. They purchased the concession of a railway, — an object not at all within the memorandum of association; and having purchased that, they employed or they contracted to pay, as persons employing, the plaintiffs in the present action, as the persons who were to construct it. That was reversing entirely the whole hypothesis of the memorandum of association, and was the making of a contract not included within, but foreign to, the words of the memorandum of association.

Those being the results of the documents to which I have referred, I will ask your Lordships now to consider the effect of the act of Parliament — the Joint Stock Companies Act of 1862 — on this state of things. And here, my Lords, I cannot but regret that by the two judges in the Court of Exchequer the accurate and precise bearing of that act of Parliament upon the present case appears to me to have been entirely overlooked or misapprehended; and that in the Court of Exchequer Chamber, speaking of the opinion of those learned judges who thought that the decision of the Court of Exchequer should be maintained, the weight which was given to the provisions of this act of Parliament appears to me to have entirely fallen short of that which ought to have been given to it. Your Lordships are well aware that this is the act which put upon its present permanent footing the regulation of joint stock companies, and more especially of those joint stock companies which were to be authorized to trade with a limit to their liability.

The provisions under which that system of limiting liability was inaugurated, were provisions not merely, perhaps I might say not mainly, for the benefit of the shareholders for the time being in the company, but were enactments intended also to provide for the interests of two other very important bodies; in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly, the outside public, and more particularly those who might be creditors of companies of this kind. And I will ask your Lordships to observe, as I refer to some of the clauses, the marked and entire difference there is between the two documents which form the title-deeds of companies of this description, — I mean the Memorandum of Association on the one hand, and the Articles of Association on the other hand. With regard to the memorandum of association, your Lordships will find, as has often already been pointed out, although it appears somewhat to have been overlooked in the present case, that that is, as it were, the charter, and defines the limitation of the powers of a company to be established under the act. With regard to the articles of association, those articles play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, the rights, and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulation of the company may from time to time be made. With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise whether that which is done is *ultra vires*, not only of the directors of the company, but of the company itself. With regard to the articles of association, if you find anything which, still

keeping within the memorandum of association, is a violation of the articles of association, or in excess of them, the question will arise whether that is anything more than an act *extra vires* the directors, but *intra vires* the company.

The clauses of the statute to which it is necessary to refer are four; in the first place, the sixth clause. That provides that "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company, with or without limited liability." My Lords, this is the first section which speaks of the incorporation of the company, but your Lordships will observe that it does not speak of that incorporation as the creation of a corporation with inherent common-law rights, such rights as are by common law possessed by every corporation, and without any other limit than would by common law be assigned to them, but it speaks of the company being incorporated with reference to a memorandum of association; and you are referred thereby to the provisions which subsequently are to be found upon the subject of that memorandum of association.

The next clause which is material is the eighth: "Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things" (I pass over the first and second, and I come to the third item which is to be specified): "The objects for which the proposed company is to be established." That is, therefore, the memorandum which the persons are to sign as a preliminary to the incorporation of the company. They are to state "the objects for which the proposed company is to be established:" and the existence, the coming into existence, of the company is to be an existence and to be a coming into existence for those objects and for those objects alone.

Then, my Lords, the 11th section provides: "The memorandum of association shall bear the same stamp as if it were a deed, and shall be signed by each subscriber in the presence of, and be attested by one witness at the least, and that attestation shall be a sufficient attestation in Scotland, as well as in England and Ireland. It shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this act." Your Lordships will observe, therefore, that it is to be a covenant in which every member of the company is to covenant that he will observe the conditions of the memorandum, one of which is that the objects for which the company is established are the objects mentioned in the memorandum, and that he not only will observe that, but will observe

it subject to the provisions of this act. Well, but the very next provision of the act contained in the 12th section is this: "Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock; but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association." The covenant, therefore, is not merely that every member will observe the conditions upon which the company is established, but that no change shall be made in those conditions; and if there is a covenant that no change shall be made in the objects for which the company is established, I apprehend that that includes within it the engagement that no object shall be pursued by the company, or attempted to be attained by the company in practice, except an object which is mentioned in the memorandum of association.

Now, my Lords, if that is so — if that is the condition upon which the corporation is established — if that is the purpose for which the corporation is established — it is a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary so to state, negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified.

Now, my Lords, with regard to the articles of association, observe how completely different the character of the legislation is. The 14th section deals with those articles: "The memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee, or unlimited, be accompanied, when registered, by articles of association, signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient." They are to be the masters of the regulations which (always keeping within the limit allowed by law) they may deem expedient for the internal regulation of the company. "The articles shall be expressed in separate paragraphs, numbered arithmetically. They may adopt also any of the provisions contained in the table marked A. in the first schedule hereto." I need not read the remainder of that section.

But your Lordships must take, in connection with that, the 50th section of the act. That provides that "subject to the provisions of this act, and to the conditions contained in the memorandum of asso-

ciation, any company formed under this act may, in general meeting, from time to time, by passing a special resolution in manner herein-after mentioned, alter all or any of the regulations of the company contained in the articles of association, or in the table marked A. in the first schedule, where such table is applicable to the company, or make new regulations to the exclusion of, or in addition to, all or any of the regulations of the company." Of the internal regulations of the company, the members of it are absolute masters, and, provided they pursue the course marked out in the act, that is to say, holding a general meeting and obtaining the consent of the shareholders, they may alter those regulations from time to time; but all must be done in the way of alteration subject to the conditions contained in the memorandum of association. That is to override and overrule any provisions of the articles which may be at variance with it. The memorandum of association is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit.

My Lords, that reference to the act will enable me to dispose of a provision in the articles of association in the present case, which was hardly dwelt upon in argument, but which I refer to in order that it may not be supposed to have been overlooked. It appears that there has come into the articles of association of this company one which is in these words: "An extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." In point of fact, no resolution for the extension of the business of the company was in this case come to; but even if it had been come to, it would have been entirely inept and inefficacious. There was, in this fourth article, an attempt to do the very thing which, by the act of Parliament, was prohibited to be done,—to claim and arrogate to the company a power under the guise of internal regulation to go beyond the objects or purposes expressed or implied in the memorandum.

Now, my Lords, bearing in mind the difference which I have just taken the liberty of pointing out to your Lordships between the memorandum and the articles, we arrive at once at all which appears to me to be necessary for the purpose of deciding this case. I have used the expressions *extra vires* and *intra vires*. I prefer either expression very much to one which occasionally has been used in the judgments in the present case, and has also been used in other cases, the expression "illegality."

In a case such as that which your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not

as to the legality of the contract; the question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, "That is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company," the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the act of Parliament, they were prohibited from doing.

But, my Lords, if the shareholders of this company could not *ab ante* have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made? I endeavored to follow as accurately as I could the very able argument of Mr. Benjamin at your Lordships' Bar on this point; but it appeared to me that this was a difficulty with which he was entirely unable to grapple. He endeavored to contend that when the shareholders had found that something had been done by the directors which ought not to have been done, they might be authorized to make the best they could of a difficulty into which they had thus been thrown, and therefrom might be deemed to possess power to sanction the contract being proceeded with. My Lords, I am unable to adopt that suggestion. It appears to me that it would be perfectly fatal to the whole scheme of legislation to which I have referred, if you were to hold that, in the first place, directors might do that which even the whole company could not do, and that then, the shareholders, finding out what had been done, could sanction, subsequently, what they could not antecedently have authorized.

My Lords, if this be the proper view of the act of Parliament, it reconciles, as it appears to me, the opinion of all the judges of the Court of Exchequer Chamber; because I find Mr. Justice Blackburn, whose judgment was concurred in by two other judges who took the same view, expressing himself thus (Law Rep. 9 Ex. 262): "I do not entertain any doubt that if, on the true construction of a statute creating a corporation, it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified." My Lords, that sums

up and exhausts the whole case. In my opinion, beyond all doubt, on the true construction of the statute of 1862, creating this corporation, it appears that it was the intention of the Legislature, not implied, but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description. If, so, according to the words of Mr. Justice Blackburn, every court, whether of law or of equity, is bound to treat that contract, entered into contrary to the enactment, I will not say as illegal, but as *extra vires*, and wholly null and void, and to hold also that a contract wholly void cannot be ratified.

My Lords, that relieves me, and if your Lordships agree with me, relieves your Lordships from any question with regard to ratification. I am bound to say that if ratification had to be considered I have found in this case no evidence which to my mind is at all sufficient to prove ratification; but I desire to say that I do not wish to found my opinion on any question of ratification. This contract, in my judgment, could not have been ratified by the unanimous assent of the whole corporation.

I have only to add to what I have already said, that I observe that some cases have been referred to here, — those arising out of the Agriculturist Cattle Insurance Company in your Lordships' House, *Spackman v. Evans* (Law Rep. 3 H. L. 171); *Houldsworth v. Evans* (Ibid. 263); *Evans v. Smallcombe* (Ibid. 249); and the case of the *Phosphate of Lime Company v. Green*, in the Court of Common Pleas (Law Rep. 7 C. P. 43); as if they had some bearing on the present question. Those cases have a bearing upon some of the observations with which I have troubled your Lordships. They are cases which illustrate extremely well what I have said just now, that the articles of association of a company of this kind are the documents which define the power of directors as between themselves and the company. In those cases which I have mentioned the whole question was, whether the directors had gone beyond the powers which were entrusted to them, and by which their authority was limited under the articles of association, or whether that which had been agreed to had been duly performed. In no one of those cases was there any question as to whether the power of the whole company had been exceeded. In the cases of the Agriculturist Cattle Insurance Company (*ubi supra*) no person ever doubted that if the shareholders had assembled together they might have released from the obligation of a partnership contract *inter se* (for there was no question of outside creditors) any member of the company upon any terms that they thought fit. The only question was whether the directors had released those who were released upon terms which they were authorized to make, or whether, if they had not released them upon such terms, the release subsequently became known to the company and was sanctioned by the company. The shareholders might have passed a

resolution sanctioning the release, or altering the terms in the articles of association upon which releases might be granted. If they had sanctioned what had been done without the formality of a resolution, it was quite clear that that would have been perfectly sufficient. So also in the case of the *Phosphate of Lime Company* (*ubi supra*) the question was, whether that had been done by the sanction of the company which clearly might have been done by a resolution passed by the company. Those cases have no application whatever to the present case. The present case stands upon the power, not of the directors alone, but of the whole company as settled by the act of Parliament.

My Lords, for the reasons which I have thus endeavored to express, I submit to your Lordships and move your Lordships that the judgment in the present case should be reversed, and judgment entered for the defendants.

Judgment of the Court of Exchequer Chamber reversed and judgment entered for defendants.

THOMAS *v.* RAILROAD COMPANY.

(101 U. S. 71. 1879.)

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action of covenant, by George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, against the West Jersey Railroad Company, and they, to maintain the issue on their part, offered to prove the following facts:—

On the eighth day of October, 1863, the Millville and Glassboro Railroad Company, a corporation incorporated by the Legislature of New Jersey, March 9, 1859, entered into an agreement with them, whereby it was stipulated that the company should, and did thereby, lease its road, buildings, and rolling-stock to them for twenty years from the first of August, 1863, for the consideration of one-half of the gross sum collected from the operation of the road by the plaintiffs during that period; that the company might at any time terminate the contract and retake possession of the railroad, and that in such case, if the plaintiffs so desired, the company would appoint an arbitrator, who, with one appointed by them, should decide upon the value of the contract to them, and the loss and damage incurred by, and justly and equitably due to them, by reason of such termination thereof; that in event of a difference of opinion between the arbitrators, they were to choose a third, and the decision of a majority was to be final, conclusive, and binding upon the parties.

On the 10th of April, 1867, the Legislature of New Jersey passed an act entitled "A supplement to the act entitled 'An Act to incor-

porate the Millville and Glassboro Railroad Company.'” It was therein enacted that it should be unlawful for the directors, lessees, or agents of said railroad to charge more than the sums therein named for passengers and freight respectively. The plaintiffs claim that at the date of the passage of this act, it was well known that they were acting under the said agreement of 8th October, 1863.

On the 12th of October, 1867, articles of agreement were entered into between the Millville and Glassboro Railroad Company and the West Jersey Railroad Company, the defendant, whereby it was agreed that the former should be merged into and consolidated with the latter.

In November, 1867, a written notice was served by the Millville and Glassboro Railroad Company upon the plaintiffs, putting an end to the contract and to all the rights thereby granted, and notifying them that the company would retake possession of the railroad on the first day of April, 1868.

On the 18th of March, 1868, the Legislature of New Jersey passed an act whereby it was enacted that, upon the fulfilment of certain preliminaries, the Millville and Glassboro Railroad Company should be consolidated with the West Jersey Railroad Company, “subject to all the debts, liabilities, and obligations of both of said companies.” The conditions required by that act were fulfilled, and the railroad was duly delivered by the plaintiffs to the West Jersey Railroad Company on the first of April, 1868.

On April 13, 1868, and again on May 22 of the same year, notices to arbitrate according to the terms of the agreement were served by the plaintiffs upon the Millville and Glassboro Railroad Company, and immediately thereafter upon the West Jersey Railroad Company. The latter company refused to comply with the terms of either notice; but subsequently, on the 21st of December, 1868, an agreement of submission was entered into between the plaintiffs and the latter company, whereby H. F. Kenney and Matthew Baird were appointed arbitrators, with power to choose a third, to settle the controversy between the parties. These arbitrators, disagreeing, called in a third, who joined with said Baird in an award, by which the value of the unexpired term of the lease, and the loss sustained by reason of the termination thereof, to and by the plaintiffs, was adjudged to be the sum of \$159,437.07; and the West Jersey Railroad company was ordered to pay that sum to the plaintiffs. This award was subsequently set aside in a suit in equity brought in New Jersey.

The plaintiffs further offered to prove their compliance in all respects with the terms of the lease, its value, and the loss and damage they had sustained by reason of its termination as aforesaid. The court excluded the offered testimony on the ground that the lease by the Millville and Glassboro Railroad Company to the plaintiffs was *ultra vires*, and directed the jury to return a verdict for the defendant. The plaintiffs duly excepted, and sued out this writ.

They assign for error that the court below erred, —

1. In excluding from the consideration of the jury the offered evidence of the said agreement between the Millville and Glassboro Railroad Company and the plaintiffs; of the acts of assembly of New Jersey, one an act to incorporate the Millville and Glassboro Railroad Company, approved the 9th of March, 1859, and another an act entitled "A supplement to the act entitled 'An Act to incorporate the Millville and Glassboro Railroad Company,' passed the tenth day of April, 1867," and the acts referred to therein; of the fact that it was well known at the date of the last-named act that the plaintiffs were lessees acting under the said contract and agreement; and of all the other acts of the Legislature of the State of New Jersey relating to the West Jersey Railroad Company, and to the Millville and Glassboro Railroad Company.

2. In directing the jury that their verdict must be for the defendant.

3. In entering judgment upon the verdict for the defendant.

MR. JUSTICE MILLER, after stating the case, delivered the opinion of the court: —

The ground on which the court held the contract to be void, and on which the ruling is supported in argument here, is that the contract amounted to a lease, by which the railroad, rolling-stock, and franchises of the corporation were transferred to plaintiffs, and that such a contract was *ultra vires* of the company.

It is denied by the plaintiffs that the contract can be fairly called a lease.

But we know of no element of a lease which is wanting in this instrument. "A lease for years is a contract between lessor and lessee, for possession of lands, etc., on the one side, and a recompense by rent or other consideration on the other" (4 Bac. Abr. 632).

"Any thing corporeal or incorporeal lying in livery or in grant may be the subject-matter of a lease, and, therefore, not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent-charges, and all other incorporeal hereditaments are included in the common-law rule" (Bouv. L. D., "*Lease*;" 1 Wash. Real Prop. 310).

The railroad and all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls, are for a period of twenty years leased by the company to the plaintiffs, from whom in return it receives as rent one half of all the gross earnings of the road. The usual provision for a right of re-entry on the failure to perform covenants in addition to the special right to terminate the lease on notice, and the usual covenant for repairs and proper running of the road, equivalent to good husbandry on a farm, are inserted in the instrument.

The provision for the complete possession, control, and use of the property of the company and its franchises by the lessees is perfect. Nothing is left in the lessor but the right to receive rent. No power of control in the management of the road and in the exercise of the

franchises of the company is reserved. A solitary exception to this statement, of no value in the actual control of affairs, is found in the sixth clause of the lease, which covenants that the lessees will discharge any one in their service on the request of the corporation, evidenced by a resolution of the board of directors.

But while we are satisfied that the contract is both technically and in its essential character a lease, we do not see that the decision of that point either way affects the question on which we are to pass. That question is, whether the railroad company exceeded its powers in making the contract, by whatever name it may be called, so that it is void.

It is, perhaps, as well to consider this question in the order of its presentation by the learned counsel for plaintiffs, upon whom the burden of showing the error of the Circuit Court devolved the duty of proving one of the following propositions:—

1. The contract was within the powers granted to the railroad company by the act of the New Jersey Legislature under which it was organized.

2. That if this be not established, the lease was afterwards ratified and approved by another act of that Legislature.

3. That if both these propositions are found to be untenable, the contract became an executed agreement under which the rights acquired by plaintiffs should be legally respected.

The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter:—

“That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfilment of such contracts.”

This is no more than saying: “You may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals.” No doubt a contract by which the goods received from railroad or other carrying companies should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease, or transfer to others the entire road and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers, and of performing the duties which it implies.

In *The Ashbury Railway Carriage & Iron Co. v. Riche*, decided in the House of Lords in 1875 (Law Rep. 7 H. L. 653), the memorandum

of association, which, as Lord Cairns said, stands under the act of 1862 in place of a legislative charter, thus described the business which the company was authorized to conduct: "The objects for which this company is established are to make, sell, or lend on hire railway-carriages and engines, and all kinds of railway plant, fittings, machinery, and rolling-stock; and to carry on the business of mechanical engineers and general contractors; to purchase and sell as merchants timber, coal, metals, or other materials; and to buy and sell any such materials on commission or as agents." This company purchased a concession for a railroad in Belgium, and entered into a contract for its construction, on which it paid large sums of money. The company was sued afterwards on its agreement with Riche, the contractor, and the contract was held valid in the Exchequer Chamber by a majority of the judges, on the ground that while it was in excess of the power conferred on the directors by the memorandum, it had been made valid by ratification of the shareholders, to whom it had been submitted.

The House of Lords reversed this judgment, holding unanimously that the contract was beyond the powers conferred by the memorandum above recited, and being beyond the powers of the association, no vote of the shareholders whatever could make it valid. The case is otherwise important in its relation to the one before us, but it is cited here for its parallelism in the construction of the clause defining the powers of the company.

If a memorandum which describes the parties as engaging in furnishing nearly all the materials, machinery, and rolling-stock which enter into the construction of a railroad and its equipments, and then empowers them to carry on the business of mechanical engineers and general contractors, cannot authorize a contract to build a railroad, surely the authority to build a railroad and to contract for carrying passengers and goods over it and other roads is no authority to lease it, and with the lease to part with all its powers to another company or to individuals. We do not think there is anything in the language of the charter which authorized the making of this agreement.

It is next insisted, in the language of counsel, that though this may be so, "a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution, and the State may, by proper process, forfeit the charter."

We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers,

and that the enumeration of these powers implies the exclusion of all others.

This class of subjects has received much consideration of late years in the English courts, and counsel have relied largely on the decisions of those courts. Among the cases cited by both sides is *The East Anglian Railways Co. v. The Eastern Counties Railway Co.* (11 C. B. 775).

In that case the Eastern Counties Railway Company had made a contract in which, among other things, it covenanted to take a lease of several other railroads whose companies had introduced into Parliament a bill for consolidation under the name of East Anglian Railways Company, and to assume the payment of the Parliamentary expenses of this act of consolidation.

This covenant was held void as beyond the power conferred by the charter. "They cannot," said the court, "engage in a new trade, because they are incorporated only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority." This case, decided in 1851, was afterwards cited with approval by the Lord Chancellor in 1857 in delivering the opinion of the House of Lords in *Eastern Counties Railway Co. v. Hawkes* (5 H. L. Cas. 331); and it is there stated that it was also acted on and recognized in the Exchequer Chamber in *McGregor v. The Deal & Dover Railway Co.* (22 Law J. N. S. Q. B. 69; 18 Q. B. 618). Both these cases are cited approvingly in the opinion of Lord Cairns in the Ashbury Company, on appeal in the House of Lords.

This latter case, as decided in the Exchequer Chamber (Law Rep. 9 Exch. 224), is much relied on by counsel for plaintiffs here as showing that, though the contract may be *ultra vires* when made by the directors, it may be enforced if afterwards ratified by the shareholders or if partly executed.

But in the House of Lords, where the case came on appeal, this principle was overruled unanimously in opinions delivered by Lord Chancellor Cairns, Lords Selborne, Chelmsford, Hatherly, and O'Hagan, and the broad doctrine established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action.

It would be a waste of time to attempt to examine the American cases on the subject, which are more or less conflicting, but we think we are warranted in saying that this latest decision of the House of

Lords represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle.

There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in *The York & Maryland Line Railroad Co. v. Winans* (17 How. 30). The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the Legislature of that State. The stock in it was taken by a Maryland corporation, called the Baltimore and Susquehannah Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling-stock. In reference to this state of things, and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this court said: "This conclusion [argument] implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the Legislature. *Beman v. Rufford* (1 Sim. N. s. 550); *Winch v. B. & L. Railway Co.* (13 L. & Eq. 506)."

And in the case of *Black v. Delaware & Raritan Canal Co.* (22 N. J. Eq. 130), Chancellor Zabriskie says: "It may be considered as settled that a corporation cannot lease or alien any franchise, or any property necessary to perform its obligations and duties to the State, without legislative authority" (p. 399). For this he cites some ten or twelve decided cases in England and in this country.

This brings us to the proposition that the Legislature of New Jersey has given her consent by an act which amounts to a ratification of this lease.

That act is entitled "A supplement to the act entitled 'An Act to incorporate the Millville and Glassboro Railroad Company,'" approved April 10, 1867; and its only purpose was to regulate the rates at which freight and passengers should be carried. It reads as follows:—

"That it shall be unlawful for the directors, lessees, or agents of said railroad to charge more than three and a half cents per mile for the carrying of passengers, and six cents per ton per mile for the carrying of freight or merchandise of any description, unless a single package, weighing less than one hundred pounds; nor shall more than one-half of the above rate be charged for carrying any fertilizing materials, either in their own cars or cars of other companies running over said railroad: Provided, that nothing contained in this act shall deprive the said railroad company, or its lessees, of the benefits of the provisions of an act entitled 'An Act relative to freights and fares on railways in the State,' approved March 4, 1858, and applicable to all other railroads in this State."

It may be fairly inferred that the Legislature knew at the time the statute was passed that plaintiffs were running the road, and claiming to do so as lessees of the corporation. It was not important for the purpose of the act to decide whether this was done under a lawful contract or not. No inquiry was probably made as to the terms of that lease, as no information on that subject was needed.

The Legislature was determined that whoever did run the road and exercise the franchises conferred on the company, and under whatever claim of right this was done, should be bound by the rates of fare established by the act. Hence, without undertaking to decide in whom was the right to the control of the road, language was used which included the directors, lessees, and agents of the railroad.

The mention of the lessees no more implies a ratification of the contract of lease than the word "directors" would imply a disapproval of the contract. It is not by such an incidental use of the word "lessees" in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State.

It remains to consider the suggestion that the contract, having been executed, the doctrine of *ultra vires* is inapplicable to the case. There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred.

In regard to corporations the rule has been well laid down by Com-

stock, C. J., in *Parish v. Wheeler* (22 N. Y. 494) that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action. Damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this it is not an executed contract.

Not only so, but it is a contract forbidden⁴ by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to the plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.

We cannot see that the present case comes within the principle that requires that contracts, which, though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction.

We have given this case our best consideration on account of the importance of the principles involved in its decision, and after a full examination of the authorities we can see no error in the action of the Circuit Court.

Judgment affirmed.

DAVIS *v.* RAILROAD COMPANY.SAME *v.* ORGAN COMPANY.(131 *Mass.* 258. 1881.)

GRAY, C. J.:—

These actions are brought upon an agreement, signed by the Old Colony Railroad Company in the sum of \$6,000, and by the Smith American Organ Company in the sum of \$5,000, and by other corporations, partnerships, and individuals in various sums, amounting in all to more than \$200,000.

The agreement is in these words: "Boston, January 23, 1872. We the undersigned subscribers hereby agree, each with the other, that we will contribute towards any deficiency (should there be one) that may arise towards defraying the expenses of the World's Peace Jubilee and International Musical Festival, to be held in Boston, commencing on the 17th of June and closing on the 4th of July next, in such proportions as the amounts affixed to our several names bear to the whole amount subscribed; provided that no subscription shall be binding until the whole amount subscribed shall reach the sum of two hundred thousand dollars, and that no expenditure be incurred except under the authority of the executive committee, which committee shall represent the subscribers, and consist of ten or more persons, who may be chosen by the first six subscribers hereto."

At the trial of the first action, the plaintiffs offered to prove that the signature of each corporation was made by authority of its directors, with the reasonable belief that the holding of the festival proposed would be of great pecuniary benefit to the corporation by increasing its proper business, and that the signature would promote such holding; that the festival was held as mentioned in the agreement of guaranty; and that the reasonable expenditures therefor, made under authority of the plaintiffs, who relied upon that agreement in making them, exceeded the receipts by more than \$200,000.

The only point argued and decided when one of these cases was before us upon demurrer to the declaration was, that the promise of the subscribers was to the executive committee therein mentioned, and that these plaintiffs as such committee were the proper parties to sue thereon. *Davis v. Smith American Organ Co.* (117 *Mass.* 456).

The principal question now presented by the answer, and which lies at the threshold of each case, is whether it was within the power of the defendant corporation to bind itself by such an agreement. Upon full consideration of the elaborate arguments of counsel upon that question, the court is of opinion that the agreement is *ultra*

vires, and therefore no action can be maintained upon it against either defendant.

The reported cases on the subject are so numerous, that we shall refer to comparatively few of them, except the principal cases in England and the decisions of the Supreme Court of the United States and of this court.

A corporation has power to do such business only as it is authorized by its acts of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a Court of Chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a Court of Common Law will sustain no action on the contract against the corporation.

Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where, as in this Commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the Secretary of the Commonwealth a certificate showing the purpose for which the corporation is constituted. Gen. Sts. c. 3, § 5; St. 1870, c. 224, §§ 7, 11; *Whittenton Mills v. Upton* (10 Gray, 582, 598); *Richardson v. Sibley* (11 Allen, 65, 72); *Pearce v. Madison & Indianapolis Railroad* (21 How. 441, 443); *East Anglian Railways v. Eastern Counties Railway* (11 C. B. 775, 811); *Ashbury Railway Carriage & Iron Co. v. Riche* (L. R. 7 H. L. 653).

There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie v. Cleveland, Columbus, & Cincinnati Railroad* (23 How. 381, 398); by Mr. Justice Hoar in *Monument Bank v. Globe Works* (101 Mass. 57, 58), and by Lord Chancellor Cairns and Lord Hatherley in *Ashbury Railway Carriage & Iron Co. v. Riche* (L. R. 7 H. L. 668, 684), between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting party.

In the leading case of *Coleman v. Eastern Counties Railway* (10 Beav. 1), the directors of a railway company were restrained by injunction from carrying out an agreement by which, for the purpose of

increasing its traffic, they proposed to guarantee certain profits to, and to secure the capital of, a steam-packet company, to ply between a port near one end of the railway in England and certain foreign ports; and Lord Langdale, M. R., said: "To look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public but with the private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several acts, those powers must always be carefully looked to; and I am clearly of opinion, that the powers which are given by an act of Parliament, like that now in question, extend no farther than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned." "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made; but I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by their acts; but it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind. It has been stated that these things, to a small extent, have frequently been done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament, under which those acts are done, they furnish no authority whatever" (10 Beav. 14, 15). And after full consideration of the case he summed up his opinion thus: "To pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation, is a thing which, according to the terms of this act of Parliament, they have not a right to do." "They have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of Parliament, and they have no power of doing anything beyond it" (10 Beav. 17, 18). See also *Salomons v. Laing* (12 Beav. 339, 352, 353).

In *Bagshaw v. Eastern Union Railway* (7 Hare, 114; 2 Macn. &

Gord. 389; and 2 Hall & Twells, 201), where a railway company, authorized by act of Parliament to purchase a branch line, and to raise a sum of money for the purpose of constructing that line, applied part of the sum so raised to the construction of its main line, Vice-Chancellor Wigram, and Lord Chancellor Cottenham on appeal, sustained the bill of a shareholder, not only to restrain such application of the rest of the sum, but also for an account of the part already illegally expended.

The same principles have been frequently applied in actions at law. In *East Anglian Railways v. Eastern Counties Railway* (11 C. B. 775), it was held that no action could be maintained by one railway company against another upon an agreement made by the latter to take a lease of the railway of the first company, and to pay the expenses incurred by that company in the soliciting and promoting of bills in Parliament for the extension and improvement of that railway, even if the object and effect of the agreement were to increase the profits of the defendants' railway; and Chief Justice Jervis, in delivering the judgment of himself and Justices Maule, Williams, and Talfourd, said: "This act is a public act, accessible to all, and supposed to be known to all; and the plaintiffs must therefore be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be. It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act; and that their funds can only be applied for the purposes directed and provided for by the statute. Indeed, it is not contended that a company so constituted can engage in new trades not contemplated by their act; but it is said that they may embark in other undertakings, however various, provided the object of the directors be to increase the profits of their own railway. This, in truth, is the same proposition in another form; for if the company cannot carry on a new trade, merely because it was not contemplated by the act, they cannot embark in other undertakings not sanctioned by their act, merely because they hope the speculation may ultimately increase the profit of the shareholders. They cannot engage in a new trade, because they are a corporation only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object or the prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades, because they have only a limited authority, for the same reason they can do nothing not authorized by their act, and not within the scope of their authority. Every proprietor, when he takes shares, has a right to expect that the conditions upon which the act was obtained will be performed; and it is no sufficient answer to a shareholder, expecting his

dividend, that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the line. The public also has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously impaired if the money supposed to be necessary, and destined by Parliament for the maintenance of the railway, be expended in other undertakings not contemplated when the act was obtained, and not expressly sanctioned by the Legislature." "If the contract is illegal, as being contrary to the act of Parliament, it is unnecessary to consider the effect of dissentient shareholders; for if the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render liable their corporate funds" (11 C. B. 811-813). So in *Macgregor v. Dover & Deal Railway* (18 Q. B. 618), the Court of Exchequer Chamber, in an opinion delivered by Baron Alderson, in which Justices Maule, Cresswell, Williams, and Talford, and Baron Platt concurred, arrested judgment in an action brought by the Dover and Deal Railway Company upon the agreement of a person interested in the Southeastern Railway Company, to pay the expenses of an application of the latter to Parliament to authorize it to establish a connecting railway, because "both plaintiffs and defendant here must be taken, with full knowledge of the powers conferred on the Southeastern Railway Company, to have made a contract by which the defendant is to bind the company to do an illegal act; not merely an act which they have no power to do, but an act contrary to public policy and the provisions of a public act of Parliament" (18 Q. B. 632). In each of those cases the plaintiff had actually incurred and paid the expenses sued for.

Baron Parke stated the rule to be that, where a corporation is created by act of Parliament for particular purposes with special powers, "their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*; that is, that the Legislature meant that such a deed should not be made." *South Yorkshire Railway v. Great Northern Railway* (9 Exch. 55, 84). See also *Scottish Northeastern Railway v. Stewart* (3 Macq. 382, 415), by Lord Wensleydale.

Lord St. Leonards — while asserting that "the safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds;" and that railway companies "have all the powers incident to a corporation, except so far as they are restrained by their act of incorporation," and are "bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which cannot clearly

be shown not to fall within them;" and inclining "to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express, or implied from the nature of the corporation and of the contract entered into" — distinctly recognized that "directors cannot act in opposition to the purpose for which their company was incorporated," nor "bind their companies by contracts foreign to the purposes for which they were established." *Eastern Counties Railway v. Hawkes* (5 H. L. Cas. 331, 371, 373, 381).

Lord Chancellor Cranworth, in the same case, said that the English authorities above cited had "established the proposition that a railway company cannot devote any part of its funds to an object not within the scope of its original constitution, how beneficial soever that object might seem likely to prove;" and after a review of the cases, repeated: "It must therefore be now considered as a well-settled doctrine that a company incorporated by act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be" (5 H. L. Cas. 345, 348). His opinion, in which Lord Brougham concurred, upon which the House of Lords held that no action would lie against a railway company on an agreement of its projectors to advance money to construct a pier and harbor at the end of a proposed branch of the railway, is to the like effect. *Caledonian & Dumbartonshire Railway v. Magistrates of Helensburgh* (Macq. 391, 416, 417, 422). And he afterwards observed that he thought the statement of Baron Parke, above quoted, "the more correct way of enunciating the doctrine, though practically it makes very little difference whether we say that the railway company has no authority given to it by its incorporation to enter into contracts as to matters not connected with its corporate duties, or that it is impliedly prohibited from so doing, because by necessary inference the Legislature must be considered to have intended that no such contracts should be entered into." *Shrewsbury & Birmingham Railway v. Northwestern Railway* (6 H. L. Cas. 113, 135-137).

In *Ashbury Railway Carriage & Iron Co. v. Riche* (L. R. 7 H. L. 653, and L. R. 9 Ex. 224), the objects for which a company registered under the English Joint Stock Companies Act of 1862, was created, were stated in its memorandum of association to be "to make and sell, or lend on hire, railway carriages and wagons, and all kinds of railway plant, fittings, machinery, and rolling-stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents." The directors agreed to purchase a concession for making a railway in a foreign country, and afterwards (on account of difficulties existing by the law of that country) agreed to

assign the concession to an association formed there, which was to supply the materials for the construction of the railway, and to receive periodical payments from the English company. In an action at law brought by the foreign associates against the English company upon this agreement, it was held in the lower courts, as well as in the House of Lords, to be *ultra vires*. The judges below were divided in opinion upon the question whether it had been ratified by the stockholders so as to bind the company. But in the House of Lords it was unanimously held, by Lord Chancellor Cairns and Lords Chelmsford, Hatherley, O'Hagan, and Selborne, that the contract was not within the scope of the memorandum of association, and was therefore void and incapable of being ratified, and the action could not be maintained.

Lord Selborne said: "The action in this case is brought upon a contract, not directly or indirectly to execute any works, but to find capital for a foreign railway company, in exchange for shares and bonds of that company. Such a contract, in my opinion, was not authorized by the memorandum of association of the Ashbury Company. All your Lordships, and all the judges in the courts below, appear to be, so far, agreed. But this, in my judgment, is really decisive of the whole case. I only repeat what Lord Cranworth, in *Hawkes v. Eastern Counties Railway Company* (when moving the judgment of this House), stated to be settled law, when I say that a statutory corporation, created by act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that act. The present and all other companies incorporated by virtue of the Companies Act of 1862 appear to me to be statutory corporations within this principle. The memorandum of association is under that act their fundamental, and (except in certain specified particulars) their unalterable law; and they are incorporated only for the objects and purposes expressed in that memorandum. The object and policy of those provisions of the statute which prescribe the conditions to be expressed in the memorandum, and make these conditions (except in certain points) unalterable, would be liable to be defeated if a contract under the common seal, which on the face of it transgresses the fundamental law, were not held to be void, and *ultra vires* of the company, as well as beyond the power delegated to its directors or administrators. It was so held in the case of the *East Anglian Railway Company*, and in other cases upon railway acts, which cases were approved by this House in *Hawkes's* case; and I am unable to see any distinction for this purpose between statutory corporations under the Joint Stock Companies Act of 1862." "I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association, are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the liability of such companies to make such contracts rests on an original limitation and circum-

scription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do. This being so, it necessarily follows (as indeed seems to me to have been conceded in Mr. Justice Blackburn's judgment) that, where there could be no mandate, there cannot be any ratification; and that the assent of all the shareholders can make no difference when a stranger to a corporation is suing the company itself in its corporate name, upon a contract under the common seal. No agreement of shareholders can make that a contract of the corporation, which the law says cannot and shall not be so" (L. R. 7 H. L. 693-695).

In the very recent case of *Attorney-General v. Great Eastern Railway* (5 App. Cas. 473, 478), in which the contract in question was held to be expressly authorized by the terms of the act of Parliament, and therefore not *ultra vires*, Lord Chancellor Selborne, while expressing the opinion that "this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*," declared his sense of the importance of maintaining the doctrine of *ultra vires*, as explained in the case of *Ashbury Railway Carriage & Iron Co. v. Riche*. And Lord Blackburn said, "That case appears to me to decide at all events this, that where there is an act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited; and consequently that the Great Eastern Company, created by act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose;" although he also agreed "that those things which are incident to, and may reasonably and properly be done under, the main purpose, though they may not be literally within it, would not be prohibited" (5 App. Cas. 481).

These statements are the more significant, because Baron Bramwell in the same case below (11 Ch. D. 449, 501, 503) had cast doubts upon the correctness of the decision in the case of *East Anglian Railways v. Eastern Counties Railway*; and Lord Blackburn himself, when a justice of the Court of Queen's Bench, had more than once approved Baron Parke's form of stating the doctrine. *Chambers v. Manchester & Milford Railway* (5 B. & S. 588, 610); *Taylor v. Chichester & Midhurst Railway* (L. R. 2 Ex. 356, 384); *Riche v. Ashbury Railway Carriage & Iron Co.* (L. R. 9 Ex. 264).

The same principles have been clearly and positively enunciated in two unanimous judgments of the Supreme Court of the United States.

In *Pearce v. Madison & Indianapolis Railroad* (21 How. 441) two corporations, created by the laws of Indiana to construct distinct though connecting lines of railroad in that State, were consolidated by agreement, and conducted the business of both lines under a common board of management, which gave notes in the name of the consolidated company in payment for a steamboat to be employed on the Ohio River and to run in connection with the railroads. After the execution of the notes and the acquisition of the steamboat, this relation between the corporations was legally dissolved. It was held, that an action brought by an indorsee against the two corporations upon the notes could not be maintained.

Mr. Justice Campbell, in delivering judgment, said: "The rights, duties, and obligations of the defendants are defined in the acts of the Legislature of Indiana under which they were organized, and reference must be had to these to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority."

He then referred with approval to the cases of *Colman v. Eastern Counties Railway*, *East Anglian Railways v. Eastern Counties Railway*, and *Macgregor v. Dover & Deal Railway*, above cited, and added: "It is contended that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes, as an indorsee; and the only question is, Had the corporation the capacity to make the contract, in the fulfilment of which they were executed? The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority." Judgment was therefore rendered for the defendants. It is to be observed that in that case there was no suggestion that the plaintiff took the notes sued on without notice

of the illegality in the original consideration, which would have presented a different question. *Lexington v. Butler* (14 Wall. 282); *Macon v. Shores* (97 U. S. 272); *Monument Bank v. Globe Works* (101 Mass. 57).

In *Thomas v. Railroad Co.* (101 U. S. 71), a railroad corporation, without authority of the Legislature, leased its railroad to three persons for twenty years, for the consideration of one half of the gross sums collected from the operation of the road by the lessees during the term, reserving the right at any time to terminate the contract and retake possession of the road, paying such damages for the value of the unexpired term as should be determined by arbitration. At the end of five years the corporation resumed possession, and the accounts for that period were adjusted and paid. It was held that no action could be maintained against the corporation to recover the value of the unexpired term. The opinion was delivered by Mr. Justice Miller.

It was argued by the counsel for the plaintiffs in that case that though there was nothing in the language of the charter which authorized the making of this agreement, yet "a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution, and the State may, by proper process, forfeit the charter." But the court said: "We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." The court then, after referring to some of the English cases above cited, and particularly to the decision of the House of Lords in *Ashbury Railway Carriage & Iron Co. v. Riche*, as establishing "the broad doctrine that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right action," expressed the opinion that that decision "represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle."

The court indeed further said: "There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract. That principle is, that where a corporation like a railroad company has

granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." This proposition is supported by the cases there cited, and by many others. See *Richardson v. Sibley* (11 Allen, 65, 67); *Whittenton Mills v. Upton* (10 Gray, 582); *Proprietors of Locks & Canals v. Nashua & Lowell Railroad* (104 Mass. 1); *Middlesex Railroad v. Boston & Chelsea Railroad* (115 Mass. 347). But that the decision was not intended to be put exclusively upon this ground is manifest from the terms in which it was introduced, as well as from those in which the general doctrine had been already laid down, and from the concluding sentence of the opinion.

The judgments of the English courts, and of the Supreme Court of the United States, to which we have referred, do but affirm and apply principles long ago declared by this court.

More than fifty years since, Chief Justice Parker said: "The power of corporations is derived only from the act, grant, charter, or patent by which they are created. In this Commonwealth, the source and origin of such power is the Legislature, and corporations are to exercise no authority except what is given by express terms or by necessary implication by that body. No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the corporators." *Salem Milldam v. Ropes* (6 Pick. 23, 32). And the importance for the security of the rights of each stockholder, of a steady adherence to the principle that "corporations can only exercise their powers over their respective members for the accomplishment of limited and well-defined objects," was strongly stated by Chief Justice Shaw in 1839. *Spaulding v. Lowell* (23 Pick. 71, 75).

As was observed in *Morville v. American Tract Society* (123 Mass. 129, 136), "the power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which a private corporation is created, is always implied where there is no positive restriction in the charter." Thus a corporation may let or mortgage property lawfully held by it under its charter, and not immediately needed for its own business. *Simpson v. Westminster Hotel Co.* (8 H. L. Cas. 712); *Brown v. Winnisimmet Co.* (11 Allen, 326); *Hendee v. Pinkerton* (14 Allen, 381). A corporation established "for the purpose of manufacturing and selling glass," may contract to purchase glassware from a like corporation to keep up its own stock and supply its customers while its works are being put in repair. *Lyndeborough Glass Co. v. Massachusetts Glass Co.* (111 Mass.

315). A corporation authorized to purchase and hold water power created by the erection of dams, and to hold real estate, may, when the water power has been lawfully extinguished, sell its lands, and as part of the contract of sale agree to raise their grade. *Dupee v. Boston Water Power Co.* (114 Mass. 37). A railroad corporation may agree to transport as a common carrier over connecting railroads goods intrusted to it for carriage over its own line. *Hill Manuf. Co. v. Boston & Lowell Railroad* (104 Mass. 122); *Railway Co. v. McCarthy* (96 U. S. 258). And it cannot dispute its liability for goods delivered to it to be carried over a railroad of which it is in actual possession and use under a lease, on the ground that the lease is void. *McCluer v. Manchester & Lawrence Railroad* (13 Gray, 124)

Several of the cases most relied on by the plaintiffs were not suits against a corporation to compel it to pay money for a purpose not within the scope of its charter, but suits by a corporation to recover money or property, which, when recovered, would be held for the lawful uses of the corporation. *Chester Glass Co. v. Dewey* (16 Mass. 94); *Old Colony Railroad v. Evans* (6 Gray, 25); *National Pemberton Bank v. Porter* (125 Mass. 333); *National Bank v. Matthews* (98 U. S. 621).

In *Chester Glass Co. v. Dewey*, the plaintiff, a corporation established for the purpose of manufacturing glass, kept a shop near its factory, for the accommodation of its workmen, containing a general assortment of such goods as are usually kept in country stores; and the defendant was a carpenter, living near, who made boxes and did other carpenter's work for the corporation. In an action for the price of goods sold and delivered to him from the shop, the defendant objected that the plaintiff was not authorized by law to keep such a shop and to sell goods in this manner; and it was held that this objection could not avail him. The leading reason assigned was, "The Legislature did not intend to prohibit the supply of goods to those employed in the manufactory;" in other words, the contract sued on was not *ultra vires*. That reason being decisive of the case, the further suggestion in the opinion, "Besides, the defendant cannot refuse payment on this ground; but the Legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused," was, as has been since pointed out, wholly *obiter dictum*. *Whittenton Mills v. Upton* (10 Gray, 599).

In *Old Colony Railroad v. Evans*, the defendant, being under contract to haul a large quantity of gravel on to lands belonging to the city of Boston, made an agreement in writing with the plaintiff corporation, by which it agreed to purchase a tract of land in Quincy, and he agreed to take gravel therefrom and to carry it in his own cars over the plaintiff's road to Boston, paying a specified toll; the defendant afterwards further agreed in writing that, if the plaintiff would purchase another tract for the same purpose, he would pay the cost of the first tract; and both tracts were purchased by the plaintiff. The objection that the corporation had no right to trade in gravel. or

land was raised by the defendant by way of defence to a bill in equity by the corporation for specific performance of his second agreement by accepting a deed of and paying for the first tract. There can be no doubt of the correctness of the decision overruling the objection. The corporation by its purchase had acquired a title to the land, which was good against all the world, except possibly the Commonwealth; and the defendant, having knowledge of all the facts, did not and could not object that the title might be defeasible by the Commonwealth. *Banks v. Poitiaux* (3 Rand. 136); *Leazure v. Hillegas* (7 S. & R. 313); *Goundie v. Northampton Water Co.* (7 Penn. St. 233); *Silver Lake Bank v. North* (4 Johns. Ch. 370, 373); *Smith v. Sheeley* (12 Wall. 358); *Commonwealth v. Wilder* (127 Mass. 1, 6). Although it was said in the opinion that the purchase of the land seemed to have been made as a mode of promoting the purposes of the plaintiff's incorporation, the increasing of its business in transportation upon its railroad, and not as an object of trade or speculation in lands, the point adjudged was that the want of corporate capacity to purchase and sell lands was not a legal objection to the maintenance of the bill. The only authority referred to by the court was the treatise of Angell and Ames on Corporations (§§ 10, 11, 151, 153), of which the section most directly applicable is § 153, in which it is clearly laid down that a court of equity will enforce against a natural person his agreement to purchase of a corporation lands which it holds in violation of its charter, but will not enforce against a corporation its agreement to purchase lands for a purpose not authorized by its charter. The distinction is obvious. In the latter case, to enforce the agreement against the corporation is to compel the application of its funds to a purpose not authorized by law. In the former case, to compel the individual to take and pay for the property according to his agreement, is the surest and most effectual means of replacing in the treasury of the corporation, for its lawful uses and the benefit of its stockholders, the funds which it had misapplied. *Rutland & Burlington Railroad v. Proctor* (29 Vt. 93, 97).

In *National Pemberton Bank v. Porter*, the point decided was, that the objection that a national bank had exceeded its powers by purchasing a promissory note from an indorsee thereof, did not prevent it from maintaining action upon the note against the maker; for the reasons, that the action was not brought upon the contract of purchase, or against any party to that contract, and that it was not necessary in this Commonwealth that the plaintiff in an action on the promissory note should have any title or interest in it. See also *Attleborough National Bank v. Rogers* (125 Mass. 339).

In *National Bank v. Matthews*, the act of Congress providing that a national bank might purchase and hold real estate for certain enumerated purposes only, of which to secure money lent at the time of taking a mortgage was not one, was held by a majority of the court, in accordance with the opinion of Chancellor Kent in *Silver Lake Bank*

v. *North*, above cited, not to make void a mortgage given to secure the payment of a promissory note for money so lent, nor to prevent the bank from enforcing such a mortgage. A like decision was made in *National Bank v. Whitney* (103 U. S. 99).

A corporation may indeed be bound to refund to a person from whom it has received money or property, for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such a case, to maintain the action against the corporation is not to affirm, but to disaffirm, the illegal contract. *White v. Franklin Bank* (22 Pick. 181); *Morville v. American Tract Society* (123 Mass. 129, 137); *In re Cork & Youghal Railway* (L. R. 4 Ch. 748). But when the corporation has actually received nothing in money or property, it cannot be held liable upon an agreement to share in, or to guarantee the profits of, an enterprise which is wholly without the scope of its corporate powers, upon the mere ground that conjectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expenses upon the faith of it. *East Anglian Railways v. Eastern Counties Railway*, *MacGregor v. Dover & Deal Railway*, *Ashbury Railway Carriage & Iron Co. v. Riche*, and *Thomas v. Railway Co.*, above cited. *Downing v. Mt. Washington Road Co.* (40 N. H. 230); *Franklin Co. v. Lewiston Institution for Savings* (68 Maine, 43).

The Old Colony Railroad Company is a railroad corporation, established by public statutes of the Commonwealth for the purpose of constructing and maintaining a railroad, and carrying passengers and freight thereon. Sts. 1844, c. 150; 1854, c. 133; 1862, c. 149; 1872, c. 143. The holding of a "world's peace jubilee and international musical festival," is an enterprise wholly outside the objects for which a railroad corporation is established; and a contract to pay, or to guarantee the payment of, the expenses of such an enterprise, is neither a necessary nor an appropriate means of carrying on the business of the railroad corporation; it is an application of its funds to an object unauthorized and impliedly prohibited by its charter, and is beyond its corporate powers. Such a contract cannot be held to bind the corporation, by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in or to guarantee the success of any enterprise that might attract population or travel to any city or town upon or near its line. It follows that in the first of the actions before us there must be

Judgment for the defendant.

The same reasons are no less applicable to manufacturing and trading corporations, established under general laws, and the purposes of which are required by those laws to be stated in their articles of association. The Smith American Organ Company was organized under the general act of 1870, c. 224, and the purposes of its incorporation are limited by its articles of association, as appearing in the certificate

thereof filed in the office of the Secretary of the Commonwealth pursuant to that act, to "the manufacture and sale of reed organs, and other musical instruments." The power to manufacture and sell goods of a particular description does not include the power to partake in, or to guarantee the profits of, an enterprise that may be expected to increase the use of or the demand for such goods. The case of *Ashbury Railway Carriage & Iron Co. v. Riche*, before cited, is directly in point.

This ground being decisive of the second action, it becomes unnecessary to consider the other objections to its maintenance, and the plaintiff's exception must be

Overruled.

BISSELL v. RAILROAD COMPANIES.

(22 N. Y. 259. 1860.)

APPEAL from the general term of the Supreme Court, in the sixth district, where a judgment entered in favor of the plaintiff, upon the report of referees, had been affirmed.

This was an action against the Michigan Southern Railroad Company and the Northern Indiana Railroad Company, two distinct corporations, for an injury sustained by the plaintiff, whilst a passenger upon a train which they had jointly united in running, resulting from a collision with another train, in consequence of the negligence of their servants and agents.

The Michigan Southern Railroad Company was chartered by the State of Michigan, to construct and operate a railroad through the southern part of that State; and the Northern Indiana Railroad Company, by the State of Indiana, to construct a railroad through the northern part of the latter State; each of these corporations, accordingly, built a railroad within the State by which it had been chartered. They also, in conjunction with another corporation, constructed a railroad from the northern line of the State of Indiana, through a part of the State of Illinois, to the city of Chicago.

The two companies formed a business connection under the name of the Michigan Southern and Northern Indiana Railroad Companies, and ran their trains, carrying passengers and freight, from Lake Erie to Chicago and back, stopping at the intermediate places, through the States of Ohio, Michigan, Indiana, and Illinois. The cars and other property connected with these roads were used by the companies in common, and each shared in the profits and losses; the business was transacted under their associate name, and they were thus practically consolidated into one company.

On the 25th April, 1853, the plaintiff took passage, with his baggage, in the defendants' train of cars, near Chicago, to be conveyed

to Toledo, and paid his fare. A collision occurred with another train, through the negligence of the defendants' agents, at the crossing of the Illinois Central Railroad, in the State of Illinois, whereby the plaintiff's leg was broken, and he was otherwise injured; and for this injury the present suit was brought.

At the time of the occurrence, and at the commencement of the suit, the defendants had a general business office, in the city of New York, occupied by their president and treasurer, where a large portion of their funds and other property was kept.

The referees made a report in favor of the plaintiff for \$2,500, and the judgment entered thereon having been affirmed at general term, the defendants took this appeal.

COMSTOCK, C. J. : —

A general statement of the plaintiff's case is, that the two corporations defendant were jointly engaged in the business of carrying passengers and freight between Chicago and Lake Erie, through a part of the State of Illinois, and through the States of Indiana and Michigan, by three connected railroads which they owned or controlled, and the business of which was managed under a consolidated arrangement, which had been in force between the defendants, for some time previously to the injury complained of; that, being so engaged, they undertook and assumed to carry him, the plaintiff, as a passenger, from Chicago, or a point near that place, eastward over the consolidated line of road; that he took his seat in their cars accordingly, and that, during the transit, he was injured by an accident which happened through their carelessness and neglect. Assuming the truth of this statement, there is no doubt of the plaintiff's right to recover.

But the defendants deny the legal truth of these facts, because one of the companies was chartered by the Legislature of Michigan, with power to build a road in that State, and the other by the Legislature of Indiana, with power to build one in that State. They both insist, that they had no right or power, under their respective charters, to consolidate their business in the manner stated, and especially, that they could not legally, either separately or jointly, acquire the possession and use of a connecting road in the State of Illinois, and undertake to carry passengers or freight over the same. They do not deny that their boards of directors and agents, duly authorized to wield all the powers which the corporations themselves possessed, entered into the arrangements which have been mentioned, nor that, in the execution of those arrangements, they made the contract with the plaintiff to carry him as a passenger; nor do they deny that they received the benefit of that contract, in the customary fare which he paid. Their defence is, simply and purely, that they transcended their own powers, and violated their own organic laws. On this ground, they insist that their business was not, in judgment of law, consolidated; that they did not use and operate a road in Illinois;

that they did not undertake to carry the plaintiff over it; and did not, by their negligence, cause the injury of which he complains; but that all these acts and proceedings were, in legal contemplation, the acts and proceedings of the natural persons who were actually engaged in promoting the same.

Can, then, two railroad corporations, having connecting lines, thus unite their business, for the purpose of promoting their common interest; charter another connecting road, in furtherance of the same policy; hold themselves out to the public as carriers over the whole route; enter into contracts accordingly; receive the benefit of those contracts; and then, when liabilities arise, interpose the violation of their own charters to shield them from responsibility? Such a defence is shocking to the moral sense, and although it appears to have some support in judicial opinions, I think, it has no foundation in the law.

The doctrine has certainly been asserted on some occasions, that, in all cases where the contracts and dealings of a corporation are claimed to be invalid for want of power to enter into the same, a comparison must be instituted between those contracts and dealings and the charter, and, if the charter does not appear to embrace them, then that they must be adjudged void to all intents and purposes, and in all conceivable circumstances. The reasoning on which this doctrine has been usually claimed to rest, denies, in effect, that corporations can, or ever do, exceed their powers. They are said to be artificial beings, having certain faculties given to them by law, which faculties are limited to the precise purposes and objects of their creation, and can no more be exerted outside of those purposes and objects, than the faculties of a natural person can be exerted in the performance of acts which are not within human power. In this view, these artificial existences are cast in so perfect a mould, that transgression and wrong become impossible. The acts and dealings of a corporation, done and transacted in its name and behalf, by its board of directors, vested with all its powers, are, unless justified by its charter, according to this reasoning, the acts and dealings of the individuals engaged in them, and for which they alone are responsible. But such, I apprehend, is not the nature of these bodies; like natural persons, they can overleap the legal and moral restraints imposed upon them: in other words, they are capable of doing wrong. To say that a corporation has no right to do unauthorized acts, is only to put forth a very plain truism; but to say that such bodies have no power or capacity to err, is to impute to them an excellence which does not belong to any created existences with which we are acquainted. The distinction between power and right is no more to be lost sight of in respect to artificial, than in respect to natural persons.

I think, this doctrine of theoretical perfection in corporations would convert them practically into most mischievous monsters. A

banking institution, through its board of directors, may invest its funds in the purchase of stocks or cotton, and every holder of its stock may acquiesce, expecting to profit by the speculation. If the enterprise is successful, the corporation and its stockholders gain by the result; if a depression occurs in the market, and disaster is threatened, the doctrine that a corporation can never act outside of its charter enables it to say, "this is not our dealing," and the money used in the adventure may be unconditionally reclaimed from what ever parties have received it in exchange for value; while the injured dealer must seek his remedy against agents perhaps irresponsible or unknown. Corporations may thus take all the chances of gain, without incurring the hazards of loss. Familiar maxims of the law must be reversed. In the relation of private principal and agent, the adoption of an agent's unauthorized dealing is equivalent to an original authority; and the adoption is perfect, when the principal receives the proceeds of that dealing. Corporations may practically act in the same manner. The proceeds of unauthorized adventures may be received and become blended with their legitimate business and funds, so as to be wholly undistinguishable; but, as the adventures themselves were, in judgment of law, impossible, considered as corporate transactions, so they cannot become possible upon any principle of ratification or estoppel. If we say there is an utter absence of power or faculty to engage in the dealing, it is a self-evident proposition that no rule of estoppel can change the result.

It is not uncommon, in charters of corporations, to lay express prohibitions upon them, as a limitation of their powers, having in view the maintenance of some public policy; as, for example, prohibitions relating to the currency of the State. If they violate these prohibitions, they have been supposed to be public offenders, and on that ground, the law has always denied to them its remedial processes, either in affirmance or disaffirmance of their unlawful contracts; thus regarding them as private offenders are regarded. But this rule of law must be overthrown, if we admit this theory of constitutional inability in corporations to overstep the limits of rightful power.

In the case of *The Life and Fire Insurance Company v. Mechanics' Fire Insurance Company* (7 Wend. 31), it was contended, that a certain corporate transaction, if unlawful, was to be regarded as the act of the agents or officers of the company, and not of the company, and therefore, that the company should be allowed to recover back the money or property improperly disposed of. That doctrine was refuted by Mr. Justice Sutherland, in this language: "This would be a most convenient distinction for corporations to establish, — that every violation of their charter, or assumption of unauthorized power on the part of their officers, although with the full approbation of their directors, is to be considered the act of the officers, and is not to prejudice the corporation itself. There would be no possibility of

ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established." These remarks suggest an unanswerable argument against the doctrine. Why, it may be asked, does the law provide the remedy by *quo warranto* against corporations, for usurpation and abuse of power? Is it not the very foundation of that proceeding, that corporations can and do perform acts and usurp franchises beyond the rightful authority conferred by their charters? Most assuredly this is so. The sovereign power of the state interposes, alleges the excess or abuse, and on that ground demands from the courts a sentence of forfeiture.

One of the sources of error, in reasoning upon legal as well as other questions, is inexactness in the use of language, or perhaps in the imperfectness of language to express the varieties of thought. It is a self-evident truth, that a natural person cannot exceed the powers which belong to his nature. In this proposition, we use words in their literal and exact sense. In the same sense, it is a truth, equally evident, that a corporation cannot exceed its powers; but this is only asserting that it cannot exercise attributes which it does not possess. As an impersonal being, it cannot experience religious emotion, nor feel the moral sentiments. Corporations are said to be clothed with certain powers enumerated in their charters, or incidental to those which are enumerated, and it is also said, they cannot exceed those powers; therefore, it has been urged, that all attempts to do so are simply nugatory. The premises are correct, when properly understood; but the conclusion is false, because the premises are misinterpreted. When we speak of the powers of a corporation, the term only expresses the privileges and franchises which are bestowed in the charter; and when we say it cannot exercise other powers, the just meaning of the language is, that as the attempt to do so is without authority of law, the performance of unauthorized acts is a usurpation, which may be a wrong to the state, or, perhaps, to the shareholders. But the usurpation is possible. In the same sense, natural persons are under the restraints of law, but they may transgress the law, and when they do so, they are responsible for their acts. From this consequence, corporations are not, in my judgment, wholly exempt. The privileges and franchises granted are not the whole of a corporation. Every trading corporation aggregate includes an association of persons having a collective will, and a board of directors or other agency in which that will is embodied, and through which it may be exerted in modes of action not expressed in the organic law. Thus, like moral and sentient beings, they may and do act in opposition to the intention of their creator, and they ought to be accountable for such acts.

A great variety of cases might be supposed, in which this doctrine of corporate exemption from liability could not be defended, upon any rule of reason or principle of justice. But perhaps none of them

would afford a more persuasive illustration than the one now under consideration. Let us look at the facts and consider the results. These corporations had boards of directors, in whom were vested every power, faculty, or function which belonged to the bodies they represented. We have then no question in the law of agency; for the agents, if that be the proper term, had all the powers of the principals; indeed, in an important sense, they were the principals; because their authority was not received by delegation from any other principal. These boards proceeded to consolidate the two lines of road, and they included in the scheme another connecting road. This being done, they entered into all the relations of carriers, with the public, and the entire business of both companies was thus conducted, for a period of several years, with no complaint on the part of the State sovereignties which granted the charters, and none on the part of the shareholders. All the gains and profits of the business were received to the use of the corporations, and it is to be assumed that the shareholders were benefited thereby. The question arises, Where were these companies, and what were they doing, during all this period? The question would be the same, if that mode of conduct were to continue, without limit of time. If the acts mentioned were in excess of the powers granted, and if we concede the doctrine that such acts are, in all circumstances, to be imputed to the agents who perform them, the conclusion follows, that the corporations became virtually extinct by non-user of their franchises. If the business thus conducted was not the business of the companies, they were engaged in none whatever, and thus, practically, if not legally, ceased to exist. If it was the business of the directors, as natural persons, then, those persons must be deemed not only to have taken a wrongful possession of all the estate and funds of the corporations they professed to represent, but also to have usurped their franchises, and to have stolen their corporate names and seals. If this be the legal interpretation of the course of dealing and conduct actually carried on under the acts of incorporation passed by the Legislatures of Michigan and Indiana, then the companies might have been proceeded against by those States, not on the ground of a usurpation of powers and privileges which did not belong to them, but for a total non-user of the franchises which did belong to them; while, on the other hand, writs of *quo warranto* might have been issued against the individual directors and agents, for usurping corporate rights without any charter at all. 16 Wend. 655; 23 Id. 193; 3 Bl. Com. 263.

These conclusions are not founded in any known principle or practice, and they are totally opposed to the facts of the case. In rejecting them, we must also reject the theory of corporate perfection and immunities on which they were based; and we are compelled to hold, that those companies, as legal and accountable persons, engaged themselves in the business of carrying passengers and freight, under

and according to the arrangements which have been mentioned, and thereby placed themselves in that relation to the public, and to the plaintiff in particular, which is the subject of the present controversy.

But the doctrine, that corporations can never be bound by engagements not justified by the grant of power from the State, is next defended on a different ground. Although it be conceded, that they are present, and acting as legal persons, or entities, when such engagements are entered into, it is said, that all contracts in excess of the rightful power possessed by corporations are illegal, and therefore void. This is an argument totally different from the one which has been so far examined, because it necessarily imputes the making of the contract to the corporate person or being; whereas, the doctrine which I have endeavored to refute denies that proposition. The very point of the supposed illegality consists, or, at least, it may consist, in the performance of acts perfectly lawful in themselves, but which, being done by a corporation and not by individuals, are pronounced illegal, because they are so done without authority contained in the charter.

But, is it true, that all contracts of corporations for purposes not embraced in their charters are illegal, in the appropriate sense of that term? This proposition I must deny. Undoubtedly, such engagements may have the vices which sometimes infect the contracts of individuals. They may involve a *malum in se* or a *malum prohibitum*, and may be void for any cause which would avoid the contract of a natural person. But where no such vices exist, and the only defect is one of power, the contract cannot be void, because it is illegal or immoral. Such a doctrine may have some slight foundation in the earlier English railway cases, *East Anglian Railways Co. v. Eastern Counties Railway Co.* (11 C. B. 775); *McGregor v. Deal and Dover Railway Co.* (18 Q. B. 618); but it was never established, and is not now received in the English courts. *Mayor of Norwich v. Norfolk Railway Co.* (4 El. & Bl. 397); *Eastern Counties Railway Co. v. Hawkes* (5 H. L. C. 347).

The books are full of cases upon the powers of corporations, and the effect of dealing in a manner and for objects not intended in their charters; but with the slight exception named, there is an entire absence, not only of adjudged cases, but of even judicial opinion or *dicta*, for the proposition that mere want of authority renders a contract illegal. Such a proposition seems to me absurd; the words *ultra vires* and illegality represent totally different and distinct ideas. It is true, that a contract may have both those defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription, made by authority of the board of directors and under the corporate seal, for the building of a church or college, or an almshouse, would be clearly *ultra vires*, but it would

not be illegal; if every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*, but no wrong would be committed, and no public interest violated. So, a manufacturing corporation may purchase ground for a school-house or a place of worship for the intellectual, religious, and moral improvement of its operatives; it may buy tracts and books of instruction for distribution amongst them. Such dealings are outside of the charter; but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So a church corporation may deal in exchange; this, although *ultra vires*, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no state policy in restraint of that business.

To illustrate the subject in another manner: An agent may make a contract in the name and behalf of his principal, but not within the scope of his agency. If the consideration and purpose of such a contract be lawful, it may be void as against the principal, but not on the ground of illegality. A corporation is not an agent of the state, nor, in any strict sense, of the shareholders; but it derives its powers from the state, and it may transcend those powers for purposes which, in themselves considered, involve no public wrong. Contracts so made may be defective in point of authority, and may contemplate a private wrong to the shareholders; but they are not illegal, because they violate no public interest or policy. My meaning, in short, is, that the *illegality* of an act is determined in its quality, and does not depend on the person or being which performs it.

There has been, I think, some want of reflection, even in judicial minds, upon the reasons and policy which mainly govern in the granting of charters to corporations, with certain specified powers and no others. A private or trading corporation is essentially a chartered partnership, with or without immunity from personal liability beyond the capital invested, and with certain other convenient attributes which ordinary partnerships do not enjoy. It is also something more than a partnership, because the legal or artificial person becomes vested with the title to all the estate and capital contributed, to be held and used, however, in trust for the shareholders. Now, in a well-regulated unincorporate partnership, the articles entered into by the associates specify the objects of their association. But, suppose the same associates desire a charter of incorporation for the more convenient prosecution of the same business, and obtain one. We shall find it to contain the like specification, which becomes the grant of power from the sovereign authority of the state. I am speaking of powers and privileges granted which are not, in their essential nature, corporate or public franchises, as distinguished from the private enterprises which any class of citizens may embark in; and, with the exception of municipal or governmental charters, the class of powers here referred to will be found to cover nearly the whole field of corporate rights. It is not difficult,

then, to see, the reason and policy which underlie such grants. The associates ask for a charter, in order to carry on their business with greater advantages; and the same reason exists for a specification of the purposes of their organization, as in the case of an association without a charter. The charter takes the place of the articles of agreement, and becomes the appropriate rule of action. No public interest or policy is involved, because the objects of the grant are not of a public nature; the powers and rights specified are identical with those which any private person or association of persons may exercise. If those who manage the concerns of a simple partnership deal with the funds in a manner or for purposes not specified, their acts are *ultra vires*; and if the directors of such a corporation as I am here speaking of, do the same thing, their acts are also *ultra vires* in the same sense and no other. To apply the word "illegality" to such transactions, is to confound things of a totally different nature. It is only private interests which are affected by them; and there is no statute or rule of the common law by which they become public offences.

In every treatise upon the law of contracts — and there are many of them — we shall find an enumeration of such as are immoral or illegal; but amongst them cannot be found a specification of the promise or agreement of a corporation, founded on a lawful consideration, and to do that which in itself is lawful to be done, although not within the powers granted. It has always been supposed, and to that effect are all the authorities, that contracts are illegal either in respect to the consideration or the promise. Where both of these are lawful and right, the maxim, "*ex turpi contractu non oritur actio*," can have no application. The incapacity of the contracting party, whether it be a corporation, an infant, a *feme covert*, or a lunatic, has nothing to do with the legality of the contract, in that sense of the word which is now under discussion. So, in the treatises upon corporations, we shall find their rights and privileges to be very extensively considered, but nowhere an intimation that their dealings outside of their charters are deemed illegal for that cause.

Even the proceeding against them by *quo warranto*, for the exercise of ungranted powers, will illustrate the subject. This is a civil, and not a criminal proceeding, and its object is purely and solely to try a civil right. 2 Kyd on Corporations, 439; Angell & Ames, 686; 1 Serg. & Rawle, 385; 3 Dallas, 490; 1 Blackf. 267. Our statute on this subject makes it the duty of the attorney-general to institute the proceeding, under leave of the court, when the case is one of public interest; but, in other cases, only at the instance of private parties claiming to be aggrieved by the abuse of power, and on security being given to indemnify the state (2 R. S. 583, §§ 39, 40). In any case, whether the suit be founded on the alleged usurpation of a public or corporate office, or on the non-user or misuser of the franchises granted to a corporation, it is purely a civil right which

is tried, and the judgment is not penal, but simply one of ouster from the right claimed.

The legislature may, and sometimes does, expressly prohibit the doing of certain acts by corporations, having in view the promotion of some particular policy of the state, and may declare such acts to be public offences, to be punished by fine or imprisonment of the parties engaged in them. There are such laws in regard to incorporated as well as private banks, the object of which is to protect the currency of the state. But where there are no such penalties or prohibitions, and the dealings of a corporation have no relation to state policy, but are such as all mankind may freely engage in, the law has provided no punishment for such dealings, because it does not regard them as a violation of its principles and enactments, in any sense which is material to the present inquiry. I do not deny, that there is, in a different sense, a legal wrong, in the misapplication of the corporate capital and funds; and so there is in every breach of trust or violation of contract. But the true inquiry here is whether it belongs to the class of public, as distinguished from private wrongs, so that the guilty party may set it up in avoidance of just obligations; and whether the courts must, in all circumstances, accept the defence, without regard to the situation and rights of the other party. I cannot believe such to be the rule of reason or of law.

Let us now concede that the unauthorized contracts of a corporation are illegal in the sense contended for; it by no means follows, that they are never to be enforced. An agreement declared by statute to be void cannot be enforced, because such is the legislative will; but when, without any such declaration, it is simply illegal, it is capable of enforcement, where justice plainly requires it. Circumstances may, and often do, exist, which estop the offender from taking advantage of his own wrong. The contract may be entered into on the other side, without any participation in the guilt, and without any knowledge even of the vice which contaminates it. An innocent person may part with value, or otherwise change his situation, upon the faith of the contract. A railroad corporation, for example, may purchase iron rails, and give its obligation to pay for them, with a design to sell them again on speculation, instead of using them for continuing its track; such a transaction is clearly unauthorized, and is, therefore, said to be illegal. But if the corporation is deemed to make the contract, — in other words, if, as I have above shown, it is a legal possibility for corporations to make contracts outside of their just powers, how can its illegality be set up against the other party, who knows nothing of the unlawful purpose? So, an incorporated bank may purchase land, having power to do so for a banking-house, but actually intending to speculate in the transaction. This is also *ultra vires*; but can the want of authority be interposed, in repudiation of a just obligation to pay for the

same land, the vendor not being *in pari delicto*? Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to the illegal contracts of private individuals.

As I am not contending that the unauthorized dealings of a corporation are never to be questioned, the object of this discussion has been to ascertain the true ground on which they can be impeached, where they are not attended by the vices which are fatal to private contracts also. I have shown, I trust—1. That such dealings are possible in law, as they often take place in fact; in other words, that it is in the nature of these bodies to overleap the restraints imposed upon them. 2. That a transgression of this nature is a simple excess of power (using that word to express the rules of action prescribed in their charters, and by which they ought to regulate their conduct), but is not tainted with illegality, so as to avoid the contract or dealing, on that ground. This proposition, it seems hardly necessary to repeat, is applied only to transactions which involve or contemplate no violation of the code of public or criminal law, but, on the contrary, are innocent and lawful in themselves. 3. Even illegal contracts, in the proper sense, are not, universally and indiscriminately, to be adjudged void: and especially this is not so, where the offender alleges his own wrong to avoid just responsibility, the other party being innocent of the offence.

If these negative conclusions cannot be denied, it follows, that contracts and dealings, such as I have been speaking of, are to be condemned by the courts only on the ground that they are a breach of the duty which private corporations owe to the stockholders to whom the capital beneficially belongs. It is the undoubted right of stockholders to complain of any diversion of the corporate funds to purposes unauthorized in the charter. This, as a general principle, cannot be too strongly asserted; and by this principle, justly applied to particular instances, the question in such cases is to be resolved. The original subscribers contribute the capital invested, and they and those who succeed to their shares are always, in equity, the owners of that capital. But, legally, the ownership is vested in the corporate body, impressed with the trusts and duties prescribed in the charter; in these relations we have the only true foundation of the plea of *ultra vires*. That term is of very modern invention, and I do not think it well chosen, to express the only principle which it can be allowed to represent in cases of this nature. It is not to be understood as an absolute and peremptory defence, in all cases of excess of power, without regard to other circumstances and considerations. It is not to be looked upon as a plea which denies the actual exertion of corporate power, when a corporation enters into an engagement which, according to its charter, it ought not to make; but, because such was the nature of the contract, it presents the breach of trust or duty to the shareholders as an excuse for the non-perform-

ance. And I do not deny the validity of this excuse, in many cases, I may say, in all cases, where it can be received without doing greater injustice to others. If the person dealing with a corporation knows of the wrong done or contemplated, and he cannot show the acquiescence of the shareholders, he ought not to complain, if he cannot enforce the contract. Aside from the law of corporations, agreements which involve or propose a violation of trust will not be enforced by the courts, where no greater equities demand it. Corporate bodies are more than mere agents; they are more than a partner who manages as the agent of his associates; their powers are undelegated. They are the legal owners of the capital, or estate, and they have capacity to deal with it in contravention of duty or trust.

But the equitable rights of shareholders will enable them, in many circumstances, to claim the affirmative interposition of the courts, to arrest an unauthorized course of dealing, or to prevent a threatened diversion of the capital to improper uses. Of this character are many of the cases usually cited, to prove that corporations cannot exceed their powers. *Dodge v. Woolsey* (18 How. 331); *Rolf v. Rogers* (3 Paige, 154); *Angell & Ames on Corp.* 424, 4th ed., and cases cited. So, too, it is plain, without citing authority, that a stockholder, who can show that he has sustained a pecuniary loss by such a use of the capital, may have his redress in damages against the individuals who commit the wrong, unless he has himself acquiesced. These are extensive, and, it would seem, ample remedies to prevent or redress the abuse of power; and it appears to me a much higher and better policy, that the private shareholders should be confined to these remedies, than to sacrifice the interests of the rest of the community, by conceding to these bodies absolute immunity, whenever power is thus abused.

But the principles which belong to this question need not present that naked alternative. In many cases, no injustice will be done, by receiving the plea of *ultra vires*, when defensively interposed by the corporation itself. But these are cases where a want of good faith can be imputed to the dealer, and where the defence, if allowed, will leave the parties substantially in the enjoyment of their previous rights. An artificial, not less than a natural person, having the title and possession of an estate which, in equity, belongs to others, and entering into engagements inconsistent with duty or trust, should have a *locus pœnitentiæ*, where it can be allowed without manifest wrong to others. It may be difficult to lay down a rule so general and so exact as to include every case; but the principles and analogies of the law will be sufficient for the solution of such questions as they arise. Justice, not only in this, but in very many other cases of constant occurrence, can be administered according to law, if I have succeeded in showing, negatively, that a comparison of the charter of a corporation with what it actually does, is not always the test of liability.

It is said, that there will be no restraint upon the acts and dealings of corporate bodies, if we uphold them when in excess of rightful authority. To this I answer, that the most ample restraints will be found in the principles here advocated; while, on the other hand, if we concede to corporations immunity in all cases when they do wrong, we invite and reward the very abuse. It is also said, in order to render this doctrine less offensive to the reason and conscience, that the innocent dealer may, upon the voidness of the contract and a disaffirmance of it, recover back the value or consideration with which he has parted. This position necessarily concedes that the corporation, as a legal person, made the unauthorized contract, and received the money, or value, under and according to it; thus overthrowing the main objection to its liability to respond directly upon the contract. It also concedes the innocence of the other contracting party; thus, according to all the analogies of the law, refuting the only other objection (illegality) on which the absolute invalidity of such dealings is claimed to rest: for, surely, after conceding that the corporation actually made the contract, it will not be contended that it can set up, that it ought not to have made it, against an innocent person who has given up his money or property on the faith of the same contract. But I answer, further, that while in many cases the remedy of a suit in disaffirmance of the agreement, and to recover back the consideration, will be sufficient to prevent wrong, in many others it will be entirely worthless. All collateral securities must fall to the ground with the principal contract, and all its consequences and results. The present case will afford the best illustration. The defendants, in consideration of a trifling sum received from the plaintiff for fare, agreed to perform the service of carrying him in their cars, perhaps some two hundred miles. By the negligent performance of that agreement, they inflicted on him injuries for which a jury has said the proper compensation was \$2,500. This being the measure of damages for the breach of the contract, the absurdity, not less than the injustice, of confining him to the remedy of disaffirmance, because the agreement was *ultra vires*, must be quite apparent.

I have examined these questions with the more attention, because, aside from their bearing on the present controversy, they are of great practical importance. A vast amount of the business of the community has come to be carried on under corporate forms of organization; besides innumerable special charters, we have general laws which impart corporate attributes to associations formed according to articles of agreement, for a great variety of purposes. When we consider these to be any less than partnerships, with the superadded privileges of succession, of a corporate seal, etc., we forget that corporations are no longer confined to the exercise of public or political franchises. These commercial, manufacturing, and trading bodies are brought into relation with almost every member of the

community; and I think it greatly to be desired, that, in laying down the rules of law which are to govern in such relations, we should avoid a system of destructive technicalities. Those rules should be founded in the principles of justice which are recognized in other and analogous dealings among men.

If we could find the law to be settled in the manner which must be, and is contended for, in order to exonerate the defendants in this case from responsibility, it would be our duty to follow it; but such is not the case. There are, certainly, judicial opinions, and some adjudged cases, which countenance the extreme doctrines on which the defence must rest. Among these cases, a leading one is *Hood v. New York and New Haven Railroad Company* (22 Conn. 502). That case appears to go the length of holding that corporations cannot, and never do, perform acts in excess of their powers. No authority was cited for such a proposition, and it cannot, as I think I have shown, be maintained. Another extreme authority is *Pearce v. Madison and Indianapolis Railroad Company* (21 How. 442), where it appeared that a corporation, in furtherance of its general objects, although, strictly speaking, in excess of its powers, had entered into an engagement, upon a consideration which it had received and appropriated; it was allowed to repudiate that engagement; but the principles of the question were not much discussed. A considerable number of other cases and *dicta*, of a character less marked, but tending in the same direction, might be referred to.

But, on the other hand, there are well-considered authorities which sustain the principles advocated in this opinion. *Steam Navigation Co. v. Weed* (17 Barb. 378); *Silver Lake Bank v. North* (4 Johns. Ch. 370); *Chester Glass Co. v. Dewey* (16 Mass. 94, 102); *Bank of Genesee v. Patchin Bank* (13 N. Y. 309, 314); *Bulkley v. Derby Fishing Co.* (2 Conn. 252, 255); *Parker v. Boston and Maine R. R.* (3 Cush. 107, 108); *Allegheny City v. McClurkan et al.* (14 Penn. St. 83); 29 Vt. 93. In the case from 2d Connecticut, it was said: "A corporate body, by transgressing the limits of its charter, may doubtless incur a forfeiture of its privileges and powers; but who ever imagined that it could thus acquire immunity, to the prejudice of third persons?" It will be found, indeed, that such a doctrine is of very modern origin.

In the case from 14th Pennsylvania, Coulter, J., observed: "It is not universally true, that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. There is a power to contract, undoubtedly; and if a series of contracts have been made, openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted. A bank, which has been long in the habit of doing business of a particular description, would not be exonerated from liability, because such business was not expressly authorized in its charter. The object of all law is, to promote justice

and honest dealing, when that can be done without violating principle. I cannot perceive that any principle is violated, by holding a corporation liable for the acts of its accredited agents, even not expressly authorized, when these contracts, for a series of times, were entered into publicly and in such a manner as, by necessary and irresistible implication to be within the knowledge of the corporators." "One rule of law," he adds, "is often met and counter-checked by another of equal force, so that, although the corporators are, in general, protected from unauthorized acts of their agents, yet, at the same time, a rule of equal force requires that they should not deceive the public or lead them to trust and confide in the unauthorized acts of their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them." A more particular discussion of the authorities on either side, would not be profitable. The general question is one which ought to be considered on principle; and I have so viewed it, because I find no settled rule which stands in the way of such an examination.

But little more need be said in reference to the particular case now before us. If the defendants did not become liable for the breach of their undertaking to carry the plaintiff, or of their duty resulting from that undertaking, I can see no ground for holding them accountable as simple wrongdoers. If their contract was *ultra vires*, and that defence to an action upon it must be received as absolute and peremptory, — if no principle of estoppel or rule of justice can be urged against that defence, — then it is more clear, that the simple wrong to the plaintiff's person was also *ultra vires*. It was with considerable difficulty that the liability of a corporation in any case for a pure tort was ever established; and they are never so liable, except when engaged in the performance of some duty or undertaking in respect to which accountability arises. If the defendants' express undertaking was absolutely void, so that no duty could arise thereupon, the implied undertaking, resulting from the actual attempt to carry the plaintiff as a passenger, is encountered by the same objection; and there is nothing left of the transaction, except a pure and simple tort, committed by the defendants' servants, while not engaged in any business which could bring responsibilities upon the defendants themselves. I think it plain, that this theory of liability will not sustain the plaintiff's case.

But I have no hesitation in affirming the judgment of the court below, upon the principles of contract and of duty resulting therefrom. That the entire course of business in which the defendants were engaged could not be justified by their charters, I am not prepared to deny. Each of them was chartered to build a railroad, the *termini* of which were specified; they built the roads, and then consolidated their business. The common interest might thus be promoted; but it is difficult to affirm, that the charter of either au-

thorized its capital to be thus blended with that of the other; it is equally difficult to hold, that they had any rightful authority to construct or lease another road in continuation of the line. But these things were actually done, and they were done openly and publicly. If these acts were an abuse of power, the shareholders had ample opportunity to prevent or arrest the abuse; but no complaint from them has ever been heard, and their acquiescence must be presumed. If State sovereignties were wronged by the course of dealing pursued, no interference or complaint has come from that quarter. Conceding, then, that the defendants might change the attitude in which they stood toward the public, and return at any time to the sphere of legitimate duty, they could not revoke past contracts, the consideration of which they had received, and upon the performance of which they had entered. They were bound to pay their servants and laborers, and they were liable for the careful transportation of freight committed to their charge. They could not invite a traveller into their cars, and, after injuring him by their negligence, reject the responsibilities of their contract. A traveller from New York to the Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations. The present case, in short, plainly falls within the principles of corporate liability herein asserted, and the defendants must respond to that liability. The judgment should be affirmed.

SELDEN, J.:—

It was not strenuously insisted, upon the argument, that the acts of these two railroad companies in entering into the arrangement found by the referee, and in running their cars upon joint account through the States of Ohio, Indiana, and Illinois, were authorized by law; nor have I been able to find in the statutes of those States any sufficient warrant for these acts. I shall assume, therefore, that in undertaking to carry the plaintiff from Chicago, in the State of Illinois, to Toledo, in the State of Ohio, the defendants exceeded their corporate powers; and, as the allegation in the complaint, of carelessness and negligence on the part of the defendants, or their agents, is fully sustained by the finding of the referee, the defence must rest exclusively upon this want of power. The counsel on both sides have treated the action as founded upon contract, and in that aspect of the case, the question arises, whether want of authority on the part of a corporation, to enter into any engagement, is a valid defence to such corporation when sued for its violation.

This question has not, until lately, attracted much attention; but the recent rapid multiplication of these artificial bodies, and the extensive powers and privileges conferred upon them, have made it a question of importance. It has, within a few years past, been repeatedly presented to the courts, both in this country and in England, and with one unvarying result. I cannot, myself, regard it, therefore, as in any just sense open to discussion. If questions,

which have been over and over again considered, and over and over again decided, are to be treated as still unsettled, then are we without any stable foundation of law or justice. The evils attendant upon setting legal principles afloat upon a sea of uncertainty and doubt, and causing them to depend upon the fluctuations of individual opinion, are too obvious to need enumeration. Confidence in courts is only to be retained by their exhibiting stability in their own decisions, and a becoming respect for those of other tribunals. It has been so often and so uniformly decided, that corporations are not bound by contracts which are clearly *ultra vires*, that to hold the contrary now would take the legal profession by surprise, and introduce more or less confusion into this important branch of the law.

But, while I protest against considering this as an open question, and insist that it should be treated as settled by authority, I also maintain that the numerous decisions on the subject by both the English and the American courts, rest upon a solid foundation of reason and principle. Much of the apparent force of the arguments used to prove the contrary, is produced by substituting an entirely false basis for those decisions. If they really rested, as has been sometimes supposed, upon the ground that because corporations are artificial beings, having no natural powers, but only such as are conferred upon them by law, they cannot, by possibility, do any act beyond the limits prescribed by their charters; and hence, that no such act, although done by their agents, in their name, and for their benefit, can be considered as a corporate act, but must in all cases be treated as the personal act of such agent, it would, indeed, be easy to show their fallacy. This would be, as is justly said, to attribute to them a degree of perfection that belongs to no earthly existence, whether natural or artificial. To present this as the true foundation of the rule which exempts corporations from liability for their unauthorized acts, is entirely to misapprehend the whole doctrine on the subject.

No court has ever held, that the defence of *ultra vires* rested upon any such ground, as that the contract sought to be enforced could not be considered as an act of the corporation. The object of the distinction, so frequently drawn, between natural persons and corporations as mere artificial existences, with no powers or faculties except such as are derived from their charters, is simply to show that the latter cannot legitimately and rightfully exercise any powers but those with which they are endowed by the law which creates them, and not that they may not wrongfully exceed the just limits of those powers. The case of *Barry v. Merchants' Exchange Company* (1 Sandf. Ch. 280) will serve to illustrate the force and application of the distinction. The question in that case was, whether a corporation, created for the purpose of erecting a building to be used as a public exchange, in the city of New York, had power to borrow money to enable it to accomplish the object of the incorporation, no

provision conferring this power being contained in the charter. The Vice-Chancellor, in deciding this question in the affirmative, said: "Every corporation, as such, has the capacity to take and grant property, and to contract obligations *in the same manner as an individual*." This remark presents one theory in regard to the nature of corporations, which is, that unless specially restrained, they have the same power to bind themselves by contract as any natural person. The distinction referred to stands opposed to this theory, and is designed to show, that as corporations have no existence independent of their charters, they can, of course, have no powers except such as are specifically conferred.

When a corporation, sued for a breach of contract, sets up as a defence its own want of power to enter into the contract, two questions are involved: first, whether the contract was, in truth, beyond the corporate powers; and, secondly, if so, whether this is available as a defence. It is only in reference to the first of these questions, and to prove that the contract was really *ultra vires*, that the argument has been resorted to that a corporation has no natural powers. The excess of power being established, the question, whether this constitutes a valid defence, depends upon entirely different considerations.

The assumption, therefore, that the doctrine, which declares the unauthorized contract of a corporation to be void, rests in any degree upon the theory that a corporation can never be said to have done anything but what it had a legitimate right to do, is wholly unwarranted; and, hence, the irresistible logic with which it is shown that corporations must necessarily partake of the imperfection which attaches to all created things, is wholly without force in its application to the present case. Corporations, as well as natural persons, may, no doubt, err; they may exceed their powers and violate their charters, and may be held responsible for so doing. Were it otherwise, they could never be made liable for a tort; nor could they be proceeded against by *quo warranto*. The statute which authorizes the attorney-general to file an information in the nature of a *quo warranto* against an offending corporation (2 R. S. 583, § 39), assumes that corporations may transgress the limits prescribed by their charters. Subdivision 5 of the section referred to provides, that the proceeding may be instituted "whenever it [the corporation] shall exercise any franchise or privilege not conferred upon it by law."

The real ground upon which the defence of *ultra vires* rests, and the only one upon which it has ever, to any extent, been judicially based, is, that the contracts of corporations, which are unauthorized by their charters, are to be regarded as illegal, and therefore void. There are three classes of illegal contracts, viz.: those which are *mala in se*, i. e., which embrace something which the law deems, in and of itself, criminal or immoral; 2d, those which violate the provisions of some statute, and are hence called *mala prohibita*; and,

3d, those which contravene some principle of public policy. Corporations may make contracts falling within either of the two first of these classes, and such contracts are, no doubt, subject to the same rules as if made by individuals. Of course, where the only objection to the contract of a corporation is, that it exceeds the corporate powers, it cannot be considered as *malum in se*; and although, in this State, where we have a statute (1 R. S. 600, § 3), expressly enacting that no corporation shall exercise any corporate powers, except such as their charters confer, the contrary might, with much plausibility, be contended, I shall, nevertheless, concede, for the purpose of this case, that such contracts do not belong to the class styled *mala prohibita*.

But the contracts of corporations which are not authorized by their charters are illegal, because they are made in contravention of public policy. That contracts which do in reality contravene any principle of public policy are illegal and void, is not and cannot be denied; the doctrine is universal; there is no exception. Although the unauthorized contract may be neither *malum in se* nor *malum prohibitum*, but, on the contrary, may be for some benevolent or worthy object, as to build an almshouse or a college, or to purchase and distribute tracts or books of instruction, yet, if it is a violation of public policy for corporations to exercise powers which have never been granted to them, such contracts, notwithstanding their praiseworthy nature, are illegal and void. Those, therefore, who hold that corporations are liable upon their contracts, notwithstanding they were made without authority, are forced to contend that no principle of public policy is violated by such contracts. This is the ground which they do take, and which, it is obvious, they must necessarily take, in order to sustain their position; here, then, we have an issue made up, which, if I am right, is decisive of the question under consideration.

What, then, is the argument, by which it is sought to be shown, that there is no principle of public policy involved in this question of the liability of corporations for their unauthorized acts? It is said, that a private corporation is simply a chartered partnership, possessing certain attributes conferred by its charter for the purpose of enabling it the more conveniently to transact its business; that, even in unincorporated partnerships, the articles of copartnership always specify the objects of the association; and that, when such associations choose to become incorporated, those objects are, for the same reason, specified in the charter; that the charter simply takes the place, in this respect, of the articles of agreement, in the case of an unincorporated partnership; that, as the objects of such associations, although incorporated, are of a private nature, there is no question of public policy involved; and that no public interest requires that the transactions of the corporation should be kept within its chartered limits.

If we admit the soundness of this argument, and assume that the directors of a corporation are not under any public obligation to keep within their chartered powers, but are to be regarded simply as the agents of the corporators, so that any excess of power on their part amounts simply to a breach of trust towards their principals, it would not follow, that the corporation is liable upon its own unauthorized contracts. But I apprehend, there are serious objections to this view of the nature of corporations, and of the effect of their charters. In the first place, if there is no public interest involved, how is it possible to justify the creation of private corporations at all? Such corporations are endowed with valuable franchises and privileges, which give them great advantages over mere private citizens, whether individual or associated. The grant of such privileges upon the principles for which some of my associates contend, would be a pure piece of legislative favoritism, which should be indignantly condemned. In this country, if in no other, it is held to be the duty of government, to protect the people in the enjoyment of *equal* rights and privileges, and not to use its power for the special benefit of its favorites. Every privilege or advantage given to one man or set of men is necessarily at the expense of others; and it is against the fundamental principles of our government, that this should be done, unless required by interests of a public nature. No doubt, these principles are frequently violated, and corporate powers and privileges are conferred which no public interest demands; but, nevertheless, such interest is the ostensible reason for the grant, in every case.

Take, for instance, the very class of corporations in question here, viz., railroad corporations, which are mere private associations, organized by their members with a view to their personal profit and emolument; and yet their creation is considered so much a matter of public interest as to invoke the power of eminent domain, by which the property necessary for their purposes is forcibly taken from its owners as for a public use. The same is true of telegraph and plank-road incorporations. But, although the interest of the public in the creation of corporations of this class is made a little more obvious by the necessity which exists of taking from others property which is specific and tangible, for the purposes of the corporation, yet the same principle applies to all corporations; for, in all, some value, corporeal or incorporeal, is taken from a portion of the community and given to the corporators.

Will it be said that, although the public have an interest in the creation of corporations, it has none in the precise extent of the powers conferred, and that no public policy is concerned in their being strictly confined to the exercise of such powers? It is, obviously, impossible to support such a position. The franchises and privileges given to corporations belong to the public; and it would be just as reasonable, and just as logical, to contend, that, under a

patent for one hundred acres of land, the patentee might take possession of two hundred, without infringing any public interest. Every additional power given to, or usurped, by, a corporation, extends its advantages over persons unincorporated; if a bank is permitted to trade in merchandise, it comes in competition with others so employed; if a railroad company is allowed to build and sail ships, it comes in competition with those engaged in commerce; and so of every other branch of business.

The importance of limiting corporate bodies to the exercise of those powers, and the enjoyment of those privileges and franchises, which have been specifically conferred upon them, must, I think, be obvious. They are rapidly multiplying; their privileges give them decided advantages over mere private, unincorporated partnerships; they have large capitals and numerous agents, and are capable of entering into combinations with each other; they are not only formidable to individuals, but might even, under some circumstances, become formidable to the state. They are, or should be, created, as we have seen, for public reasons alone; and the Legislature is presumed, in every instance, to have carefully considered the public interest, and to have granted just so much power, and so many peculiar privileges, as those interests are supposed to require. This reasoning is confirmed by the action of the Legislature, in expressly prohibiting corporations from exercising any powers not granted to them (1 R. S. 600 § 3, *supra*). By making this principle of the common law the subject of an express and positive enactment, the Legislature has shown that it considered this restriction upon corporations to be a matter of public interest and importance.

The fact that a mere excess of power on the part of a corporation, by the assumption of privileges not conferred, affords ground for a *quo warranto*, is, in itself, proof that the public has an interest in keeping such bodies within the limits of their charters. But it is said, that the proceeding by *quo warranto* is of a purely civil nature, designed solely to try a mere civil right, and that it in no manner assumes that any public right or interest has been infringed; upon this position, I take issue. In the first place, the assertion derives no support from, if it is not in direct conflict with, the legislative enactments on the subject. Not one of the provisions of the section by which the attorney-general is authorized to institute proceedings in the nature of a *quo warranto*, contemplates injury to any private right as the ground of the proceeding. He is authorized to act in the following cases, viz.: Whenever a corporation shall — “1st, Offend against any of the provisions of the act or acts creating, altering, or renewing such corporation; or, 2d, Violate the provisions of any law, by which such corporation shall have forfeited its charter by misuser; or, 3d, Whenever it shall have forfeited its privileges and franchises by non-user; or, 4th, Whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges,

and franchises; or, 5th, Whenever it shall exercise any franchise or privilege not conferred upon it by law" (2 R. S. 583, § 39).

Not one of these subdivisions contemplates a case of injury to the private interests of stockholders; they all, without exception, relate to violations, not of individual rights, but of public law. These provisions, therefore, strongly, and, as I think, conclusively, repel the idea, that a *quo warranto* is a mere civil remedy, the object of which is to redress or prevent a private injury. The proceeding is not only public and *quasi* criminal in form, but is not in its nature adapted to the enforcement of any mere private right. The rights of stockholders in corporations are abundantly protected against every unauthorized assumption of power, or any breach of trust on the part of their managing officers. If the violation of duty or breach of trust is only threatened, a court of equity will prevent it by injunction, and if committed, will afford the proper redress. There is neither occasion for, nor propriety in, a resort to the proceedings by *quo warranto*, for any mere private purpose, and I hazard nothing in saying, that such is not the nature of that proceeding. If this conclusion is right, it inevitably follows, that the assumption of any unauthorized power by a corporation is a violation of public policy and public right, and therefore illegal.

This, then, is the true foundation of the defence we are considering. It is permitted upon the same principle and for the same reason that a private individual is permitted to plead his own illegal act, as a defence to a suit brought to enforce a contract which public policy forbids, viz., to discourage and restrain such violations of law. There are, no doubt, cases in which a corporation would be estopped from setting up this defence, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable, not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers.

The same principle is applicable to contracts not negotiable. Where the want of power is apparent, upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law

under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed.

A question analogous to this arises, where public officers who have done something in contravention of the statute under which they act, are afterwards sought to be estopped from setting up that their act was unauthorized. It was insisted by counsel, in the case of *Regina v. White* (4 Ad. & El. N. s. 101), that for public reasons, officers so situated were not estopped; but Lord Denman said, "We have held that this is true only of a statute the contents of which are publicly known; such a statute is to have effect whatever dealings may take place; but when the persons acting, whether trustees for public purposes or not, have done any act which was not known to the parties with whom they were afterwards dealing, such an act cannot prevent the estoppel arising from that subsequent dealing." This doctrine, which was also held in the case of *Doe ex dem. Levy v. Horne* (3 Ad. & El. N. s. 757), will be found, when carefully examined, to sustain the exception which I have suggested in the case of corporations. But, aside from these exceptional cases, it is, in my judgment, not only entirely clear upon principle, but abundantly settled by authority, that the contract of a corporation, if unauthorized by its charter, is an illegal contract, and that the corporation is not estopped from setting up this illegality in defence to an action brought upon it.

In referring to the cases which support these views, I will notice the English cases first. There are three classes of cases in England, in which the question of *ultra vires* arises, viz.: 1st. Cases in which one or more of the shareholders seeks to restrain the officers of the corporation from engaging in transactions unauthorized by the charter. 2d. Actions brought by third persons against corporations to enforce their contracts, in which the defence relied upon is, that in making the contract the corporation exceeded its corporate powers. And 3d. Similar actions, in which the defence is that the directors had exceeded, not the powers conferred upon the entire corporation by law, but those conferred by the shareholders upon the directors or managing officers by deed.

These three classes of cases differ materially in their nature and principles, and if we would avoid confusion, must be kept entirely distinct in investigating the subject; those of the third class have no bearing upon the question we are discussing. There are, in England, a class of corporations organized under general laws, which do not specify the manner in which the objects and purposes of the incorporation are to be effected, but leave this to be arranged by a "deed of settlement" between the incorporators themselves. By this deed, the companies prescribe and limit the powers and functions of their

various officers, so far as they are left uncontrolled by the statute, and the general laws of the kingdom. Now, it is plain, that there is no analogy between an act which merely transcends the limits of this deed of settlement, and one which violates the provisions of the organic act. The deed of settlement is the private act of the shareholders; and its provisions have respect solely to their private interests; it is a mere power of attorney, and bears no resemblance to a law enacted with a view to the interests of the public. There is evidently no question of public policy involved, when the question is, whether the officers have exceeded the authority conferred by this deed. The case of the *Royal British Bank v. Turquand* (5 El. & Bl. 248) is one of this class of cases. By comparing the language of Lord Campbell, in this case, with that used by him upon another occasion, we shall obtain a clear view of the distinction here adverted to. In the case cited, the action was upon a bond signed by two of the directors, and the question was, not whether the giving of the bond exceeded the powers which the corporation itself had a right to assume, but whether it was authorized as between the shareholders and the directors, by the deed of settlement. Lord Campbell, in delivering his opinion, said: "A mere excess of authority by the directors, we think, would not amount to a defence." Of course, by this was meant merely an excess of authority by the directors, as the agents of the stockholders, and not an unauthorized assumption of power, as between the corporation and the public.

In the *Mayor of Norwich v. Norfolk Railroad Company* (4 El. & Bl. 397), the same learned judge fully recognizes the distinction I take, and shows that by the remark just quoted, he by no means meant to say, that corporations were bound by contracts which are *ultra vires*, as between them and the public. He there says: "The mere circumstance of a covenant by directors, in the name of the company, being *ultra vires*, as between them and the shareholders, does not necessarily disentitle the covenantee to sue upon it. . . . But suppose that the directors of a railway company should purchase a thousand gross of green spectacles, as a speculation, and should put the seal of the company to a deed covenanting to pay for these goods, here would be a clear excess of authority on the part of the directors. . . . This would be an *illegal* contract to misapply the funds of the company, and the illegality might be set up as a defence."

The phrase *ultra vires* is applied, in the English cases, both to acts which simply exceed the powers conferred by the deed of settlement upon the officers, as the agents of the shareholders, and acts which transcend the powers conferred by law upon the entire corporation. This indiscriminate use of the phrase is calculated to mislead, unless the distinction referred to is observed. It is evident that the class of cases to which that of *Royal British Bank v. Turquand* belongs, have no bearing upon the question under consideration, and hence they will be no further noticed.

In all the cases belonging to the first class, the object of the action has been, to protect the private right of the shareholders, upon the ground that the action of the directors sought to be restrained would, if permitted, be a breach of trust. It would, no doubt, be a bar to any relief upon this ground, if it appeared that the parties seeking such relief had themselves assented to what the directors were about to do. They clearly could not be entitled, for their own sake, to protection against acts which they had themselves authorized. But the courts, in cases of this kind, have uniformly, and no doubt properly, acted upon the presumption that the shareholders had not assented to a violation of the charter, and have interfered, if at all, for the purpose of protecting them from a breach of trust on the part of the directors.

Still, it has been repeatedly said, even in cases of this class, that there was a question of public policy involved, which would be sufficient of itself to induce the courts to interfere. The case of *Colman v. Eastern Counties Railway Company* (10 Beavan, 1), decided in 1846, was one of this class. It was an equity suit, brought by a shareholder in behalf of himself and the other shareholders, against the corporation and its directors, to prevent the latter from entering into a certain agreement with the Harwich Steam-Packet Company. The bill prayed for a declaration that it would be a breach of trust on the part of the directors to make the proposed contract, and for an injunction; relief was granted. Lord Langdale, before whom the case was heard, speaking of the extensive powers of railway companies, said: "We are to look upon their powers as given to them in consideration of a benefit, which, notwithstanding all other sacrifices, is on the whole hoped to be attained *by the public*." Again, he says: "In the absence of legal decisions, I look upon the acquiescence of shareholders, in these circumstances, in these transactions, as affording no ground whatever for the presumption that they may be, in themselves, legal." Here, then, in one of the earliest cases on the subject, in the English courts, we have the very doctrine for which I contend distinctly recognized and asserted, viz., that the object of every grant of corporate powers is to obtain a *public* benefit; and that the powers granted are the consideration which the *public* pays for the benefit received or expected; and we also have the inevitable consequence stated, that every excess of power by the corporation is *illegal*, although acquiesced in by every shareholder.

Three years afterward the case of *Cohen v. Wilkinson* (13 Jurist, 641) came before the same judge. The complainant was a shareholder in the Direct Portsmouth Railway Company, and the object of the suit was, to restrain the directors from proceeding to construct a portion only of the road authorized by the charter, without any preparation or intention to construct the whole. The judge said: "If it were established, that the companies of this sort had authority, without a view to the whole, or for the purpose of performing the

whole, to complete such part only as they please, or are able, of that which has been called their *contract or bargain with the public*, I think the consequences would be very dangerous *to the public* and to the shareholders, and probably productive of very extensive deception and fraud." In a similar case which arose shortly afterwards, viz., *Solomons v. Laing* (12 Beavan, 339), Lord Langdale said: "Any application of, or dealing with, the capital, or any funds or money of the company, which may come under the control or management of the directors or governing body of the company, in any manner *not distinctly authorized* by the act of Parliament, is, in my opinion, an *illegal* application or dealing."

Thus we find Lord Langdale on three different occasions asserting, in controversies between the shareholders and the corporation, that all acts and dealings of the officers of such corporation which were unauthorized by their charters, were to be regarded not simply as breaches of trust, but as illegal and therefore void. But Lord Langdale is not the only English judge who has held in cases of this class that the unauthorized contracts of corporations are illegal and void as against public policy. In the case of *Beman v. Rafford* (1 Sim. N. S. 550), which was an action brought by a shareholder in a railway company, to restrain the directors from carrying into effect a certain agreement made by them, Lord Cranworth, Vice-Chancellor, after stating his reasons for thinking the contract unauthorized, said: "And if that be the correct view of the law, I am clearly of opinion, on all the authorities and all principle, that it is the province of this court to prevent such an *illegal* contract from being carried into effect; because on the principle that has been so often laid down, this court will not tolerate that parties having the enormous powers which those railway companies have obtained, shall lay out one farthing of the funds out of the way in which it was *provided by the Legislature* that they should be applied."

Now, I understand those who differ with me on this subject to concede the principle of this case: that is, they admit, that for the directors to enter into a contract which their charter does not authorize, would be a violation of their duty to the shareholders, and that the latter may apply to a court of equity, and obtain an injunction restraining the directors from carrying the contract into effect. It would be difficult to deny this. For if we take the same view of the nature of a corporation which they take, and consider the directors merely as the agents of the shareholders, and the charter as nothing more than their power of attorney from the corporators, the latter, as the principals, would have a right to repudiate and prevent the execution of a contract made in their behalf by their agents without authority; inasmuch as every person dealing with such agents must, as is well settled, be presumed to know the extent of the powers which the charter confers.

The position then occupied by some of my associates is this: They

admit that the shareholders in a corporation have a right to restrain its directors or managers, as their trustees or agents, from entering into any contract not authorized by the charter, or from carrying such contract into effect, if made; and yet they hold that the directors are liable, not in their individual, but their corporate character, to the party with whom the contract is made, for not carrying it into effect. It is difficult to see how these two propositions can stand together. The directors are the mere representatives of the corporators; the latter constitute the corporation. Hence, by the two propositions just stated, it is maintained that the corporators have a legal right to enjoin their representatives against the performance of a contract which they themselves are legally bound to perform; in other words, they are liable for damages, because their representatives have not performed a contract, which they had a right to restrain those representatives from performing. This can hardly be; it would seem to be a legal impossibility; one or the other of these propositions must, I think, be false. Either it must be denied that the shareholders can invoke the aid of a court of equity to prevent the performance of a contract, entered into by the directors, which the charter does not authorize, — a principle established by numerous authorities, — or it must be admitted that they are not liable for the refusal or neglect of the directors to perform it. It might be otherwise if it could be shown either that persons dealing with corporations are not presumed to know the extent of the powers conferred by the charter, or that the corporators can be presumed to have authorized the directors to transcend those powers; but the contrary is the rule in respect to both.

It would seem to follow that if we look upon the unauthorized contracts of corporate officers as mere breaches of trust and nothing more, the corporation is not bound by them. This however is not the ground upon which I have been endeavoring to maintain that corporations are exempt from liability upon their contracts which are *ultra vires*; nor is it the ground upon which such defences have in general been sustained in suits brought by third persons against corporations upon such contracts. I shall therefore proceed further to show from the authorities that such contracts are illegal and void for public reasons, entirely irrespective of the fact that they constitute breaches of trust towards the shareholders.

I shall cite but one additional case belonging to the first of the above classes, viz.: *Winch v. Birkenhead, Lancashire and Cheshire Junction Railroad Company* (5 De G. & S. 562.) That was a suit in equity brought by a shareholder to restrain the corporation from entering into an agreement, which amounted to a lease of the defendants' road to the London and North-Western Company. The Vice-Chancellor, Sir J. Parker, in disposing of the case, used the following language: "It seems to me that it is not a question of simple incapacity on the part of the London and North-Western Railway Com-

pany to undertake the working of this line, but that it is against the policy of these acts of Parliament: and I think therefore that the agreement for making over this property to them is an agreement savoring of illegality, which any shareholder in the Birkenhead Company has a right to come to the court to restrain."

The cases thus far noticed were all cases between the shareholders and the directors of the corporation, in which of course the question as to the liability of the corporation to third persons could not arise; and they have been referred to chiefly for the uniform *dicta* they contain, asserting the illegality of all unauthorized corporate contracts. I shall now refer to a class of cases in which the question of the liability of the corporation upon such contracts was directly involved.

The first case of this class to which I will call attention, is that of *East Anglian Railway Company v. Eastern Counties Railway Company* (11 C. B. 775). That was a suit upon a contract made by the directors, and the defence was, that the contract was not warranted by the charter; and the court so held. Jervis, C. J., speaking of the class of cases to which I have previously referred, says: "The cases in equity which have been cited proceeded upon this view of the subject, and were decided, not because the particular act restrained by injunction was a breach of trust, but because it was not within the scope of the directors' authority, was not justified by the statute, and was therefore illegal." Again he says: "If the contract is illegal, as being contrary to the act of Parliament, it is unnecessary to consider the effect of dissenting shareholders." This is a most explicit and emphatic judicial affirmation of the precise doctrine for which I contend, by the Court of Common Pleas in England, in a case in which there was no dissent.

The same doctrine has been held in several later English cases. Upon an application in *The Great Northern Railway Company v. Eastern Counties Railway Company* (9 Hare, 306), for an injunction to restrain the defendants from interfering, contrary to an agreement between the parties, to obstruct the plaintiffs in their use of a part of the defendants' road, which was opposed on the ground that the agreement was *ultra vires*, the Vice-Chancellor said: "If therefore, this cause had rested wholly upon the construction of the agreement between the plaintiffs and the defendants, I should have thought it the duty of the court to interfere to some extent by injunction; but I think there lies at the root of this case a question of public policy, which precludes the interference of the court." These two cases were directly upon the point; and they show the opinion of the Court of Common Pleas and the Court of Chancery.

The next case to which I shall refer, viz.: *McGregor v. Official Manager of the Deal and Dover Railway Company* (18 Q. B. 618), was in the court of Exchequer Chamber. It was an action at law to recover damages for the breach of a contract; and the defence

was, that the contract was *ultra vires*. The judgment of the court was delivered by Baron Alderson, who said: "The Solicitor-General argued that this promise of the defendant was in truth a promise that the South Eastern Company should do an illegal thing, and that the promise was therefore void; and we are of that opinion. This is not like the promise of a party that an act impossible to be done shall be done by the defendant, or by some third person; but it is a promise that an act shall be done contrary to the public law of the country, of which both parties are bound to take notice. The act is therefore illegal, and the promise that it should be done is a void promise." The contract, concerning which this was said, was illegal in no other sense than that it was *ultra vires*.

In the subsequent case of *South Yorkshire Railway v. Great Northern Railway Company*, in the Court of Exchequer (9 Exch. 55), where the questions were, 1. Whether the contract upon which the suit was brought was authorized; and, 2. If not, whether that constituted a defence, — the court gave judgment for the plaintiff, on the ground that the defendants, in entering into the contract, had not exceeded their corporate powers. But no doubt seems to have been entertained, that the contract, if *ultra vires*, would have been void. Barons Martin and Parke expressly so held; and no opinion to the contrary was intimated by the other judges. It is true that Baron Parke, at the close of his opinion, says: "I am happy to find that the law of this case coincides with the honesty of it, and does not sanction the breach by the defendants' company of the solemn contract into which they have fairly entered, and from which they are trying to escape." He had, however, previously laid down the rule as follows: "But where a corporation is created by an act of Parliament, for particular purposes, with special powers, then, indeed, another question arises. Their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear, by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*."

Sir William Erle, one of the justices of the Queen's Bench, appears to be the only one of all the English judges who ever entertained any serious doubt upon this question. In *The Mayor of Norwich v. Norfolk Railway Company* (4 El. & Bl. 397), where the question arose, he combated the doctrine; contending that, in all those equity cases in which corporations had been restrained, at the instance of the shareholders, from entering into certain engagements, the court had proceeded solely upon the ground that the contracts, if made, would have amounted to a breach of trust; and insisted that the contract of corporations were only void at law when expressly prohibited. But, in the same case, Lord Campbell and Mr. Justice Coleridge expressed their entire concurrence in the previous decisions.

The question was finally carried to the House of Lords, in the case of *Eastern Counties Railway Company v. Hawkes* (5 H. L. C. 347); and although the contract in that case was held to be within the powers of the corporation, and, therefore, binding, it was, nevertheless, expressly and fully conceded that, if it had been *ultra vires*, it would have been illegal and void. Lord Chancellor Cranworth, after citing the cases of *The East Anglian Railway Company v. Eastern Counties Railway Company*, and *McGregor v. Official Manager of the Deal and Dover Railway Company* (*supra*), said: "I have referred to those cases, and there are others to the same effect, for the purpose of showing how firmly the law on this subject is established, and of guarding myself against being supposed to throw any doubt upon it. But I do not think the present case comes within the principle on which these decisions have rested." Lord Campbell, in the same case, also fully assents to the doctrine; and yet this case is cited and relied upon to support the views of those of my associates who differ with me upon this question.

But it will be found, upon examination, that even Lord St. Leonards, upon whose remarks they particularly rely, himself concedes the rule. He said: "The opinions of some of the judges in the Norwich case (*Mayor of Norwich v. Norfolk Railway Company, supra*), favor the disposition which I feel to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation and of the contract entered into." To this I agree. So far from denying the principle for which I contend, it concedes it. He afterwards says, speaking of two cases decided by the House of Lords at the same session: "They do not authorize directors to bind their companies by contracts foreign to the purposes for which they were established; but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which cannot clearly be shown not to fall within them; and they further hold companies to be bound by a continued course of dealing by their directors with third persons in relation to their shares, although that mode of dealing is contrary to the regulations of their deed of management." In this extract the judge again recognizes the doctrine, but insists that it should be made clearly to appear that the contract is *ultra vires* before it is applied. His last remark evidently refers to the class of cases already noticed, in which the defence is, not that the directors, in making the contract, exceeded the statutory powers of the entire corporation, but only the powers conferred by the deed of settlement. Those cases, as we have seen, have no bearing upon the question under discussion.

This review of the cases in England leaves no doubt as to the law upon this subject there. The question has been before every judge and every court, has been presented in every possible form, and argued by men of the highest talent, and the result has been uniformly

the same. If it is possible to settle this question by authority, this must settle it at least in that country.

I shall content myself with a brief reference to the American cases, beginning with those in this State. The question was directly presented to, and decided by, the Supreme Court in the case of *Safford v. Wyckoff* (1 Hill, 11). The action was against the defendant, as president of a bank organized under the general law of 1838, upon a bill of exchange or draft drawn by the bank, upon the North American Trust and Banking Company, in favor of one Dodge, and indorsed to the plaintiff. It was held in this case, 1st, that the bank had no authority to issue drafts on time; and, 2d, that this constituted a good defence to the action. This case was prior to the entire series of English cases to which I have referred, and yet our court, without any of the light thrown upon this subject by those cases, placed its decision upon grounds which the courts at Westminster, after the most elaborate discussion and examination, have fully confirmed. The opinion of the court was delivered by Mr. Justice Cowen, who says: "True, there is no nullifying clause in the statute against negotiable notes and bills, in whatever way or form issued, nor any positive prohibition or negative against them. But both are most obviously implied, not only in the general frame and scope of the statute, but more emphatically in its policy." In this sentence the judge met the argument that a contract which is merely unauthorized, but not prohibited, is not illegal. Another argument is answered by the following remark: "We admit the defence is an ungracious one, both as to Dodge and the drawers; it is not, however, for their sake, but for that of the statute and the public that we feel constrained to give full scope to their defence. There would be more difficulty in sustaining it, as to the indorser, were it not to be regarded as an obvious attempt by all parties to violate a principle of public policy."

Here, then, *in limine*, we have the doctrine placed, in this State, upon grounds which subsequent repeated examinations have shown to be just. It is true that this case was reversed by the late Court of Errors (4 Hill, 442). But as this reversal proceeded upon the ground that the bank had power to issue the draft, it in no manner impairs the authority of the decision of the Supreme Court upon the point we are considering. Indeed, the Court of Errors itself confirmed the doctrine in the subsequent case of *McCullough v. Moss* (5 Denio, 567). Of the other cases in this State I will only notice those in this court, the most marked of which is the case of *Leavitt v. Palmer* (3 N. Y. 19). This was an important case, and was elaborately argued. The suit was brought by a receiver of the company, and its object was to cause to be set aside and cancelled, forty-eight promissory notes of £1,000 each, issued by the North American Trust and Banking Company, upon the ground that they had been issued contrary to the provisions of the act of May 14, 1840. The question, therefore, was directly involved, whether a corporation can avoid its own contract

by showing that it was made in contravention of the provisions of a public statute; and the report of the case shows that this question was distinctly presented and argued by the counsel. It was held unanimously by the court that the notes having been issued in violation of the act, were illegal and void, and could not be enforced against the company.

There is this distinction between that case and the present: There the contract which the company had entered into was expressly prohibited; here it is prohibited by implication merely. But the case to which I have referred shows that this does not change the rule. The decisions in those cases all rest upon the ground that the contracts, being within the implied prohibition of the statute, were void as made in contravention of the policy of the law.

No such distinction, however, exists between the case under consideration, and that of *Talmage v. Pell* (7 N. Y. 328). That case involved the validity of three several contracts of the North American Trust and Banking Company, a corporation organized under the general banking law of this State, viz.: 1, a contract to purchase a large amount of State stocks of the State of Ohio; 2, certain certificates of deposit or promissory notes, issued by the company in payment for the stocks; and 3, an assignment of a certain bond and mortgage as security for the notes. Neither of these contracts were expressly prohibited by any law. The only objection to them was that they were not authorized by the act under which the company was incorporated; and this court held the contracts to be illegal and void upon that ground.

These cases show, that in this State, the late Supreme Court and Court of Errors, and this court, have all concurred in holding, in accordance with the numerous English cases to which I have referred, that the contracts of corporations which are *ultra vires*, are void and cannot be enforced. Similar decisions have been made by the courts of other States and of the United States: *Pennsylvania & Delaware Canal Company v. Dandridge* (8 Gill & Johns. 248); *Hood v. New York & New Haven Railroad Company* (22 Conn. 502); *Elmore v. Naugatuck Railroad Company* (23 id. 457); *Mutual Savings, &c. v. Meriden Agency Company* (24 id. 159); *Naugatuck Railroad Company v. Waterbury Button Company* (id. 468); *Bank of Michigan v. Niles* (1 Doug. Mich. 401); *Orr v. Lacey* (2 id. 254); *Root v. Goddard* (3 McL. 102); *Root v. Wallace* (4 id. 8); *Dodge v. Woolsey* (18 How. 331); *Pearce v. Madison & Quincy Railroad Company, and Peru & Quincy Railroad Company* (21 id. 441). I shall not consume time and space by referring to these cases particularly. If principles can ever be settled by authority, if the slightest respect is due to the opinions of other tribunals, it would seem that no court could resist the overwhelming weight of the decisions which have been cited.

The strength of the opposing views consists in the alleged injustice

of permitting a corporation to avoid obligations by pleading its own want of power to incur them. But it should be remembered that this argument is just as applicable to the case of an individual who sets up the illegality of his own contract, and thus shields himself from responsibility upon it, as to that of a corporation. If it be said, that in the case of illegal contracts between individuals, each party is a participator in the guilt, and hence the law will not interpose to protect either; this is equally true in respect to the unauthorized contracts of corporations. Their powers are prescribed by statute, and every one who deals with them is presumed to know the extent of these powers. Where the circumstances are such that this presumption cannot arise, as where the want of power is not apparent upon the face of the statute, but depends upon the existence of some extrinsic fact known to the corporation, but not the party dealing with it, it has been already conceded that the corporation would be estopped from setting up that its contract was *ultra vires*.

But the injustice which can ever accrue to individuals from permitting the defence in question, is trifling, under the law as now settled, compared with the importance to the public of keeping corporations within their chartered limits. It has been repeatedly held by this court, that where corporations, by means of contracts or engagements prohibited by law, *i. e.*, which are unauthorized by their charters, have obtained from other persons any money or other thing of value, while the contract itself is void and can never be enforced, the corporation may, nevertheless, be compelled, in a suit brought in disaffirmance of the contract and founded upon the equities of the case, to restore what it has obtained. This rule removes from corporations all temptation to engage in illegal transactions; and while it tends thus to promote the public policy of the State, it at the same time protects individuals from any gross injustice.

My conclusion, therefore, is, that the contract of the defendants to transport the plaintiffs from Chicago to Toledo, was illegal and void, they having, as we have seen, no power under their charters to enter into the engagement for running their cars on joint account between those two places. It does not follow, however, that they are not liable to the plaintiff in this action. The complaint is founded upon the duty which rested upon the defendants, growing out of the relation in which they stood to the plaintiff, to take care that he should not be injured by their negligence. If this duty could only arise out of some contract between the parties, then the conclusion arrived at would be fatal to the recovery. The contract actually made by the defendants to transport the plaintiff, can form no part of the plaintiff's case, and he must recover, if at all, irrespective of that contract.

It is said that if the contract was *ultra vires*, and the corporation is protected from all responsibility for its violation on that ground, it must be equally free from responsibility for an injury inflicted while attempting to perform it. But this, I apprehend, by no means follows,

though it is probably true so far as the duty to observe due care grew out of the contract. The plaintiff's claim, however, rests not upon his contract, but upon the right which every man has to be protected from injury through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or who has been run over by a train of cars when crossing the railroad track. The duty to observe care in these cases arises, not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, so to conduct themselves as not through their negligence to inflict injury upon others.

It is unnecessary to cite authorities to show that corporations are liable for the culpable negligence of their servants or agents while engaged in the business of the corporation, in the same manner as individuals are liable for the negligence of themselves or their servants. It will scarcely be doubted that if the defendants' cars, through the carelessness of their employees, had run over the plaintiff, while passing upon a highway across the track of any portion of the road used by them, the corporation would have been liable. They could not set up that having no power to run their cars beyond the limits prescribed by their respective charters, all acts outside of those limits must be regarded as the acts of the individuals performing them, and not of the corporation. We have already seen that corporations may exceed their powers and may perform unauthorized acts, and incur responsibilities thereby. There is no doubt that all that was done under the arrangement between the defendants, found by the referee, unauthorized and contrary to law, is nevertheless to be treated as done by the corporations themselves. The business was carried on under the direction of their managing officers, with their property and for their benefit, and they cannot now be heard to deny that it was done by them. It follows that at least in respect to all persons with whom they had no conventional relations, their responsibilities would be precisely the same as if the business in which they were engaged was lawful.

To test the liability of the defendants, therefore, in this case, it is necessary to inquire what would be the responsibility of railroad companies in general towards persons sitting in their cars, but whom they have made no contract to transport. This must depend upon the circumstances under which the individuals had entered the cars. If they were there as mere trespassers, without shadow of right, the company would not, perhaps, be responsible for any injury they might sustain, through the negligence of its servants. But if, on the other hand, the entry into and remaining in the cars was with the assent, express or implied, of the company, and injury should result from the negligence of the latter or its agents, the company would, I think, be responsible. It was held by this court in the case of *Nolton v. Western Railroad Corporation* (15 N. Y. 444), that when a railroad

company voluntarily undertakes to carry a passenger upon their road, although without compensation, if such passenger is injured by the culpable negligence of the agents of the company, the latter is liable, in the absence of any express agreement exempting it. The principle of that case is applicable to this. Although here, if we lay aside the contract, there was no undertaking to transport the plaintiff, either with or without compensation; yet this can make no difference, as the liability in such cases arises, not from any contract express or implied, but from the universal obligation of all persons to avoid injury to others through their negligence.

Suppose, while standing upon your own premises, you accidentally, but through sheer carelessness, discharge a gun and wound a person walking upon the highway, you are clearly liable for the injury. If the person injured, instead of being upon the highway, were in your own house with your assent, would not your liability be the same? No one can doubt it. Suppose, then, instead of being in a house with the owner's assent, the individual is in the car of a railroad company with the consent of the company, would he not have the same right to immunity from injury through the negligence of the company or its agents? This is self-evident. The company might not be liable in such a case for the careless discharge of a gun by one of its servants, because using the gun would be no part of the servant's duty to his employers. But if, through the carelessness of the engineer, the boiler of the engine should burst, and injury should ensue, the liability of a company would be clear. So, if the injury arose from a collision, running off the track, or any such cause.

It will be seen, therefore, that the question of responsibility for injury sustained from negligence, when the person injured is within the domain or upon the premises of the party guilty of the negligence, turns upon the inquiry whether he is there lawfully or as a trespasser. It is true that when the negligence occurs in the course of the performance of some gratuitous service by the party guilty of the negligence, for the party injured, the former is only liable for gross negligence; but no question on this subject arises in the present case, as the proof in that respect will be presumed to have been such as to support the judgment, since nothing appears to the contrary.

Was the plaintiff, then, in the defendants' cars as a mere trespasser, or was he there lawfully, as between him and the defendants? To this question there can be but one answer. The defendants can never allege that the plaintiff was in their cars as a trespasser, when he was there by their express assent. The contract between him and the company, it is true, for reasons of policy could not be enforced. The defendants might at any time have repudiated it, and required the plaintiff to leave the cars; and if he refused might thereafter have treated him as a trespasser. But neither his entry into the cars, nor his remaining there until required to leave, could ever be regarded by the defendants as an infringement upon their legal rights.

It may be said that the plaintiff by consenting to travel in the defendants' cars, became a participator in their unlawful conduct, and hence is not entitled to recover; but for this position there is not a shadow of authority. The law offended against by entering into the illegal contract in this case, is a law of restriction upon the defendants, and not upon the plaintiff. The implied prohibitions which were violated rested solely upon them. There was no law prohibiting the plaintiff from travelling in their cars. I have already adverted to the rule that where the illegality of the contract consists in the violation of some law, the prohibitions of which are aimed at one of the parties only, the other party is to be treated as comparatively innocent, and may have relief against the more guilty party, even in an action *ex contractu*. If, then, he is entitled to enforce a mere equity against the other party, *a fortiori* may he claim redress for injuries consequent upon their *tortious* acts. He is so far regarded as *particeps criminis*, that he forfeits the whole benefit of his contract. He could not recover for any failure of the company to transport him in due time or to transport him at all, whatever damages he might thereby sustain; but he cannot be said, like an outlawed felon, to have *caput lupinum*, and thus to be liable to be knocked on the head like a wolf, or to have his limbs broken with impunity, (4 Bl. Com. 320). Upon these grounds I think the recovery was right, and that the judgment should be affirmed.

CLERKE, J., delivered an opinion for affirmance on the ground last stated by SELDEN, J.; DENIO, J., was for reversal; all the other judges were for affirmance, but without passing upon the questions discussed by COMSTOCK, C. J., and SELDEN, J.

Judgment affirmed.

STATE BOARD OF AGRICULTURE v. RAILWAY COMPANY.

(47 Ind. 407. 1874.)

DOWNEY, J. :—

The question presented for our consideration and decision in this case is whether the complaint, to which a demurrer was sustained in the court below, is sufficient or not. The action was commenced November 21, 1868.

The complaint alleges that the Citizens Street Railway Company was, and is, a corporation, owning and running a street railway in the city of Indianapolis, Indiana, and to Crown Hill, etc.; that two of the streets on which cars are run extend to near the north boundary of the city, and one of the routes three miles beyond and near the grounds set apart for the holding of state fairs by the said State Board of Agriculture, a corporation having its principal office in Indianapolis; that the holding of said fairs is a source of great profit

to the said street railway company, to wit, to the amount of six thousand dollars at each fair, etc.; that, for the purpose of increasing the profits of said street railway company, and to further its interests, the said company desired to procure the State Board of Agriculture to hold state fairs upon the ground near the northern boundary of the said city, although it would occasion expense to the said Board of Agriculture; and for that purpose the said company, with the approval of the stockholders, in March, 1868, entered into an agreement with the plaintiffs, in writing, etc., as follows:—

“As an inducement to the Indiana State Board of Agriculture to locate the Annual State Fair upon the State Board of Agriculture’s fair ground, north of the city of Indianapolis (Camp Morton) for each of the years 1868, 1869, 1870, each of the undersigned hereby agrees to pay to the said State Board of Agriculture the amount set opposite his name, to be paid in three equal annual payments, on the 1st day of September, 1868, 1869, 1870, each of the subscribers to be responsible to the amount of his own subscription, but no further; and subscriptions are upon the express condition that the State fairs shall be located and held for the three years above stated. Said amounts to be paid without benefit from valuation laws.

“March 18th, 1868.”

Signed. “Citizens Street Railway Company, one thousand dollars.”

The said plaintiff, not doubting the power of said railway company to make said subscription and contract, has performed all the conditions in said contract to be performed by her up to this time, and on the faith of said subscription by said company and others, expended twenty thousand dollars in fitting up said grounds. Yet the defendant has not paid, but wholly refuses to pay, her one third of one thousand dollars due September 1st, 1868, by the terms of said agreement, although demanded, etc., to the plaintiff’s damage six hundred dollars; wherefore, etc.

There are three acts relating to street railways. The act of June 4, 1861, Acts Special Session 1861, p. 75; the act of March 6, 1865, Acts 1865, p. 63; and the act of February 28, 1867, Acts 1867, p. 162.

To these acts we must look to ascertain the extent of the powers and capacities of the appellee.

The first section of the act of June 4, 1861, authorizes the formation of a corporation of this character, “for the purpose of constructing, owning, and maintaining street or horse railroads, switches, or side tracks, upon and through the streets of the cities or towns within the State.”

The third section provides:

“The said company shall be capable of purchasing, holding, and conveying any real or personal property whatever necessary for the construction and equipment of the road, switches, and side tracks, and for the erection of all necessary buildings and yards, and may buy,

own, and sell any kind of property that may be necessary to properly conduct or carry on the business of such road."

Section 6 of the same act authorizes the company to "borrow such sums of money as may be necessary for completing or operating their railroad," and authorizes the corporation to raise the money by issuing bonds secured by a mortgage of its corporate property and franchises.

The act of March 6, 1865, authorizes such companies to extend their roads beyond town and city limits, and authorizes them to use public highways, upon the conditions and subject to the regulations therein prescribed.

The act of February 28, 1867, authorizes such companies to raise funds to discharge the indebtedness of such companies, by making a *pro rata* assessment against stockholders, and to make needful rules in relation thereto, etc.

The objection to the complaint urged by the counsel for the appellee is, that the contract on which the action is founded is void for the want of power in the street railway company to make the same.

The modern doctrine is to regard corporations as possessing the powers expressly conferred upon them by law, and such implied powers as are necessary to enable them to exercise the powers expressly granted, and no others.

The State fair has generally been held at Indianapolis, though not always. The State Board of Agriculture owned the ground on which the fair was afterward located under the contract in question. If that place was made the location for the fairs, it was so near to the city that the street railway company, by making a short additional line of road, could connect the fair ground with its whole system of roads in the city, could obtain the carrying of passengers from all parts of the city into which its road extended, convey them to the fairs, and return them to the city again, thus making the arrangement one of great profit to the company.

Counsel say: "There is nothing in the charter of the appellee that warrants the assumption that it is authorized to embark in the enterprise, however praiseworthy it may be, of developing the agricultural and mechanical interests of the State, by aiding in establishing and maintaining State and county fairs, or any of the other plans that may be suggested by the ingenious and public-spirited. It will be difficult to imagine anything more foreign to the objects for which the appellee was incorporated, than the exhibition of live stock, agricultural productions, and mechanical implements, and the giving of premiums to successful competitors for excellence."

We hardly think the motive with the street railway company was the development of the agricultural and mechanical interests of the State, so much as it was to build up, increase, and make more profitable the business in which it was engaged. That this latter was the object which it had in view, we think, is quite clear.

Counsel for the appellant submit —

That the contract on which the action is predicated is within the incidental powers of the corporation; that it has the power to make all contracts that are necessary and usual as means to carry out the objects of its creation, unless prohibited by law; that with this limitation it may deal precisely as if it were a natural person, to promote its legitimate objects. It is urged that it is usual for railroad companies to aid in establishing picnic and camp-meeting grounds, etc., on their lines, as means of increasing the business of their roads, and making money for the company; and, that a corporation is estopped to plead *ultra vires* when money has been invested on the faith of its contract.

Without deciding the law of the first position assumed by counsel for the appellant, we have examined more particularly the law with reference to the second.

A distinction may, perhaps, be well made between the case where an act of a corporation is done in violation of an express prohibition in its charter, or in some other law relating thereto, and the case where there is simply a defect of power in the corporation to do the act. So it appears that there are acts of corporations which strictly are *ultra vires*, and for the doing of which the State may proceed against the corporation, and yet the acts of the corporation, under the particular circumstances, be binding upon the corporation.

There appears also to be a distinction between the rights of the parties to a contract which remains wholly executory, and the rights of parties to a contract when it has been wholly executed by the party dealing with the corporation.

In Angell & Ames, Corp. 240, note a, 9th ed., it is said: —

"The courts of New York have gone very far in enforcing contracts made by corporations, although they are not justified by their charters; and the law in that State now appears to be that such a contract, which is purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation, should not be enforced, but that the executed dealings of corporations must be allowed to stand for and against both parties, when the plainest rules of good faith so require. *Parish v. Wheeler* (22 N. Y. 494); *Bissell v. The Michigan, etc. R. R. Co.* (22 N. Y. 258); *DeGross v. Amer. L. Thread Co.* (21 N. Y. 124)."

In Sedgw. Stat. & Const. Law, 73, 2d ed., it is said: —

"It must be further borne in mind, that the invalidity of contracts made in violation of statutes is subject to the equitable exception that, although a corporation, in making a contract, acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest

degree inequitable and unjust to permit the defendant to repudiate a contract the fruits of which he retains. And the principle of this exception has been extended to other cases. So, a person who has borrowed money of a savings institution upon his promissory note, secured by a pledge of bank-stock, is not entitled to an injunction to prevent the prosecution of the note, upon the ground that the savings bank was prohibited by its charter from making loans of that description."

In *Township of Pine Grove v. Talcott* (19 Wall. 666) this statement of the law is copied into his opinion by Swayne, J., and, although the case was decided upon another point, it was stated by the learned judge, that "the authorities referred to sustain the text."

The Steam Navigation Company v. Weed (17 Barb. 378), was an action to recover money loaned, and the defence was, that the corporation had no power to loan the money, and it was held that the defendant was not at liberty to avail himself of the defence. The court drew a distinction between the violation of an express statute, and the mere want of power to make the contract. The doctrine was stated as laid down by Mr. Sedgwick above. The learned judge, after examining a number of authorities, concludes his opinion as follows:—

"I am happy to come to the conclusion that the law will not sustain this most unconscionable defence. It ill becomes the defendants to borrow from the plaintiff one thousand dollars for a single day, to relieve their immediate necessities, and then to turn around and say, I will not return you this money, because you had no power, by your charter, to lend it. Let them first restore the money, and then it will be time enough for them to discuss with the sovereign power of the State of Connecticut the extent of the plaintiff's chartered privileges. We shall lose our respect for the law, when it so far loses its character for justice as to sanction the defence here attempted."

The following cases are cited and examined in the opinion, and relied upon in support of the ruling: *Silver Lake Bank v. North* (4 Johns. Ch. 370); *The State of Indiana v. Woram* (6 Hill, N. Y. 33); *The Chester Glass Co. v. Dewey* (16 Mass. 94); *Steam Boat Co. v. McCutcheon* (13 Penn. St. 13); *Palmer v. Lawrence* (3 Sandf. 161); *Potter v. The Bank of Ithaca* (5 Hill, N. Y. 490); *Suydam v. The Morris Canal and Banking Co.* (5 Hill, N. Y. 491, note a); *The Sacket's Harbor Bank v. The Lewis County Bank* (11 Barb. 213).

We refer, in support of the rule, to the following additional authorities, which we have examined: *Mott v. The U. S. Trust Co.* (19 Barb. 568); *Bank v. Hammond* (1 Rich. 281); *Southern, etc. Co. v. Lanier* (5 Fla. 110); *The San Francisco Gas Co. v. The City of San Francisco* (9 Cal. 453); *Argenti v. City of San Francisco* (16 Cal. 255); *Little v. O'Brien* (9 Mass. 403).

It is not claimed in the case under consideration that there was

any statute by which the street railway company was prohibited from entering into the contract in question, or in other words, that in making the contract that company violated any statute by which the act was prohibited. All that is claimed is, that there was a want of power on the part of the corporation to bind itself by the contract. It is fully shown on the part of the plaintiff, that the State Board of Agriculture performed the contract on its part. The street railway company has thus received the benefits and advantages of the contract, but seeks to avoid paying the consideration promised, because it had not the legal power to contract for the benefits which it has actually received. In our opinion, the street railway company is not at liberty to assume this position. It has received the profits resulting from the compliance of the plaintiff with the contract. These profits, we are at liberty to presume, have gone to swell the dividends of the stockholders in that corporation. It would be unjust for their company now to escape performance of the contract by which these profits have been realized. We have not examined to see what the present state of the law is on this subject in the English courts. We have considered the case without reference to the allegation in the complaint that the contract was made with the assent of the stockholders of the street railway company. If the street railway company has incurred a forfeiture of its chartered rights by the act done, that is a question for it to settle with the State.

No question is discussed or decided relating to the validity of the contract, except so far as relates to the power of the street railway company to bind itself thereby, under the circumstances.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

BUSKIRK, C. J., dissents.

INSURANCE COMPANY *v.* McCLELLAND.

(9 Colo 11. 1885.)

APPEAL from the District Court of Larimer County.

STONE, J. :—

The sole question in this case is whether the appellant can avail itself of the *ultra vires* of the contract upon which its liability, if any, arises, as a defence to the action. The complaint of appellee, the plaintiff below, is as follows :—

Plaintiff states that the defendant is a corporation duly organized and incorporated under the laws of the State of Colorado, and doing business in Larimer County in the State of Colorado as a general fire and hail insurance company.

"Plaintiff, for cause of action, states: 1. That on or about the 12th day of June, 1882, plaintiff was the owner of certain growing crops, situate on the east half of the northeast quarter and the north half of the southeast half of section 2, township 6, range 69 west, and southwest quarter section 35, township 7, range 69 west, in Larimer County, State of Colorado.

"2. That on the said 12th day of June, 1882, the defendant in its said capacity of an insurance company contracted and agreed with the plaintiff, for and in consideration of the sum of \$61.03, \$3 of which said sum was then and there paid by plaintiff to defendant, and the balance of which said sum, amounting to \$58.03, was then and there evidenced by a promissory note made due and payable on the 1st day of November, 1882, executed and delivered by plaintiff to defendant, and by defendant accepted, to insure the plaintiff in the sum of \$1,935 against loss or damage to the aforesaid growing crop by reason of injury to or destruction thereof by hail, and did then and there by its certain policy of insurance dated on the said 12th day of June, 1882, duly signed by Archie C. Fisk, its president, and R. P. Goddard, its secretary, and countersigned by Jesse Harris, its duly authorized agent, and by defendant delivered to plaintiff, insure plaintiff for the term of one year from the date of said policy against loss or damage to his said growing crops by reason of the destruction thereof or any injury thereto that might be caused by hail, and did by the terms and stipulations contained in said policy, and for and in consideration of the said sum of \$61.03, promise and agree to make good unto the plaintiff all such immediate loss or damage as might occur by reason of hail to the aforesaid growing crops from the said 12th day of June, 1882, to the 12th day of June, 1883, in the sum of \$1,935, to be paid sixty days after due notice and proof of such loss or damage.

"3. That said insurance covered and applied to plaintiff's said growing crops as follows, to wit: On sixty-five acres of wheat not to exceed, in case of loss, \$15 per acre, or \$975. On six acres of oats not to exceed, in case of loss, \$15 per acre, or \$90. On one hundred and twenty acres of wheat, not to exceed, in case of loss, \$6 per acre, or \$720. On one acre of strawberries, not to exceed, in case of loss, \$150 per acre.

"4. That by the terms and conditions of said policy of insurance, the defendant contracted and agreed that in the event of injury, loss, or damage to plaintiff's said growing crops or any part thereof, not amounting to a total destruction thereof, such damage or injury should be appraised by disinterested and competent persons to be mutually agreed upon by plaintiff and defendant, unless the amount of such damages should be agreed upon between the plaintiff and defendant.

"5. That on the 19th day of June, 1882, plaintiff's said growing crops were injured and damaged by hail to the amount of \$1,500,

and the plaintiff sustained damage and loss thereby in respect of his said growing crops in the said sum of \$1,500.

"6. That on the 19th day of June, 1882, plaintiff gave defendant due notice of plaintiff's said loss and damage.

"7. That on the 22d day of June, 1882, plaintiff rendered to defendant a particular account of said loss and damage verified by the affidavit of plaintiff.

"8. That said crops not being totally destroyed by said hail, and the plaintiff and defendant not being able to agree upon the amount of said damages so sustained by plaintiff, the plaintiff and defendant mutually agreed upon W. F. Watrous and Charles Warren, two disinterested and competent persons, as appraisers to assess and appraise the amount of damages and loss so sustained by plaintiff.

"9. That the said W. F. Watrous and Charles Warren did then and there, on the 22d day of June, 1882, appraise the damage and injury to plaintiff's said crops caused by the injury thereto by hail as aforesaid, at the sum of \$1,500 as follows, to wit: —

"To plaintiff's said sixty-five acres of wheat hereinbefore mentioned as insured for \$975, said appraisers assessed and appraised the damages at the sum of \$780. To plaintiff's said six acres of oats hereinbefore mentioned as insured at and for \$90, said appraisers assessed and appraised the damages at \$90. To plaintiff's said one hundred and twenty acres of wheat hereinbefore mentioned as insured for \$720, said appraisers assessed and appraised the damages at \$480; and to plaintiff's said one acre of strawberries hereinbefore mentioned as insured for \$150, said appraisers assessed and appraised the damages at \$150; which said appraisal represented the true damage and injury done to plaintiff's said growing crops by said hail.

"10. That said appraisers, on the 22d day of June, 1882, made out and delivered to defendant a statement or report in writing, verified by their affidavits, setting out in detail their said appraisal of the damages aforesaid as herein averred and set forth.

"11. That more than sixty days have elapsed since the aforesaid notice and proof of plaintiff's loss and damage were received by defendant at its office, and that defendant has wholly failed, neglected, and refused to pay plaintiff the said sum of \$1,500, or any part thereof, and has failed and refused to make good or pay plaintiff for his said loss and damage, or any part thereof.

"Wherefore plaintiff prays judgment for \$1,500, together with interest and costs of suit, and for general relief."

The amended answer of the appellant company, the defendant below, "denies that on the 19th day of June, 1882, or at any other time, plaintiff's growing crops were injured or damaged by hail to the amount of \$1,500, or any other amount, or that plaintiff sustained damage or loss thereby in respect of his growing crops in the said sum of \$1,500, or any other sum.

"Denies that the plaintiff and defendant mutually agreed upon W. F. Watrous and Charles Warren, or either of them, or any other person or persons, as appraisers to assess or appraise the amount of damage or loss so pretended to be sustained by plaintiff, or that said pretended appraisers acted by any authority whatever, but avers that all and each part of said pretended appraisement, and each and every act of said pretended appraisers in the behalf mentioned in said complaint, were without authority, irregular, illegal, and void.

"Defendant for a second and separate defence to the complaint herein states that it is a corporation duly incorporated under and by virtue of the laws of the State of Colorado, and doing business in said county of Larimer; . . . that said articles of incorporation were duly filed and recorded in the office of the secretary of State of Colorado on the 26th day of August, A. D. 1881, and were duly filed and recorded in the office of the county clerk and recorder in and for said Larimer County long before the 12th day of June, A. D. 1882, and long before the alleged contract between plaintiff and defendant was made.

"Defendant further states that, by virtue of said articles of incorporation, neither the said The Denver Fire Insurance Company, its directors, stockholders, or officers, had or have any right, power, or authority to enter into or make any contracts with plaintiff or any one by which said company could insure growing crops of any kind against loss or damage by hail, but that all and each of the several acts of the said The Denver Fire Insurance Company, its directors, stockholders, and officers, which are alleged and set forth in the complaint herein in reference to the making of said alleged contract with plaintiff, and to the insurance and making of the alleged policy of insurance to plaintiff, and all other acts with reference to the terms of the said policy, and the alleged agreement to arbitrate any loss of plaintiff, and the alleged appointment and finding and appraisement of said alleged arbitrators, are absolutely null and void, each and every act being beyond the scope and power vested by the said articles of incorporation in defendant, its directors, stockholders, and officers.

"Defendant further states that it is willing to return all that it has received from plaintiff by reason of said alleged policy of insurance, to wit, \$3; and plaintiff's said promissory note for \$58.03. Wherefore defendant asks to be discharged with costs."

The articles of incorporation are set out in full in the foregoing answer, that portion which is material to the question before us being as follows:—

"Know all men by these presents, that we, Archie C. Fisk, Samuel S. Griswold, and Frederick Michel, residents of the State of Colorado, have associated ourselves together under the name and style of The Denver Fire Insurance Company, for the purpose of becoming a body corporate and politic, under and by virtue of the laws of the State of

Colorado, and in accordance with the laws of the said State. We hereby make, and execute, and acknowledge three hundred original certificates, in writing, of our intention to become a body corporate under and by virtue of said laws.

"1. The corporate name and style shall be The Denver Fire Insurance Company.

"2. The objects for which this company is formed are to become a body corporate and politic, with power to sue and be sued, to insure buildings of all kinds erected or in process of erection, goods, wares, and merchandise, machinery, mills, factories, smelters, foundries, machine shops, breweries, and personal property of every description, whether in store, transit, or use, from loss or damage by fire, and generally do and transact all business necessary to effectually secure indemnity from loss or casualty by fire or lightning, and all other business transacted by fire insurance companies, — to borrow and loan money, take mortgages, trust deeds or other securities, and to pledge the property and franchise of the company, both real and personal; to acquire by purchase, leases, entry, grant, devise, or gift, or otherwise, real estate or other property, and to dispose of said property at pleasure, and to perform any and all lawful acts which the directors or stockholders may deem necessary for the successful prosecution of the business of the company."

Appellee demurred to this second defence. The demurrer was sustained, and the appellant electing to stand by the answer, the damages were assessed by a jury, who returned a verdict for \$1,265.50, and judgment therefor was thereupon rendered by the court. The errors assigned go to the sustaining of the said demurrer and the judgment rendered.

The authorities cited on both sides of the case are very numerous. Questions touching the *ultra vires* of corporations have been before the courts of probably every State in some shape, and various phases of the question have been considered by the Federal courts, while standard text-books are full of research and discussion upon the entire subject. We have examined these authorities with care, but a review of them would be unnecessary labor, since both English and American authorities have been collated and discussed fully in many of the leading cases cited by counsel in their briefs filed in the case. In respect to the precise question before us, there is apparently much conflict of opinion in the decisions of the courts, such conflict being in many cases apparent only, and in others squarely antagonistic. It is quite well settled as a general rule that a corporation possesses only such lawful powers as are expressly conferred by its charter, and such as are clearly incidental or impliedly requisite for carrying out the declared objects and purposes of its creation.

On the one hand, it is held by some authorities that acts of a corporation in excess of the powers limited by the foregoing rule are illegal, that any contract made in such excess of lawful authority is

void and not enforceable, and that neither party to an action founded thereon is estopped to plead the *ultra vires* of the contract in bar of such action.

On the other hand, it has come to be the settled doctrine of several States that a corporation may be estopped to deny its authority to enter into a contract which has been executed, and from which it has derived the benefit which it thereby sought. There seems to be a growing tendency to this doctrine in modern decisions in this country, and it is also supported by the authority of English cases.

As is said in *Parish v. Wheeler* (22 N. Y. 494), a leading case upon this subject in the United States: "The executed dealings of corporations must be allowed to stand for and against both parties where the plainest rules of good faith require."

Mr. Waterman, in his late excellent treatise upon the specific performance of contracts, says that it is now settled that a corporation cannot avail itself of the defence of *ultra vires*, when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract (Sec. 226). So if the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation.

In the case before us the contract, as made by the parties, appears to have been fully executed on the part of the appellee, so far as his right of action when brought was affected by it. He had paid a small portion of money on the amount of the premium agreed to be paid, and had given a promissory note for the balance. This was all he had agreed to do; all that had been exacted of him by the insurance company, and this he had performed. It matters not that the note had not been paid, for it was not due when his right of action accrued and when he brought his suit.

It is not contended that the payment of the note was a condition precedent to his right of action against the company, since, at the time of bringing the action, the note lacked two months of maturity, and there was nothing to be done or performed by him under the contract. The performance already made by the appellee had been accepted by the appellant company, and so far as it was concerned, the execution of the note was the same as a cash payment in full of the amount; the company had the benefit thereof. It is argued on behalf of the appellant that the courts ought in all such cases to sustain the defence of *ultra vires*, here interposed, on the ground of public policy, that the public which confers the corporate powers upon such companies has an interest in the protection of innocent stockholders and creditors of such companies by confining the exercise of corporate powers strictly within their authorized limits, and this is given in the books as the chief reason for the rule of decision in the cases which sustain the defence of *ultra vires*.

That the public has such an interest is quite true, but whether to afford such protection the defence of *ultra vires* is always necessary in such cases is another thing. Stockholders are but one portion of the public; another portion, with equal rights of protection, is that with whom these multiform corporations deal in the daily exercise of their assumed powers. And it seems illogical to assume that the interests of the public would be best subserved by a public policy which will allow a corporation, any more than an individual, to violate the principles of common honesty and claim exemption from the obligation of its contracts by pleading its own wrong-doing. Such policy would rather seem to offer a premium for dishonest dealing.

Besides, both the State which grants these corporate powers, and the stockholders for whose benefit such powers are exercised, have their remedies, the former by interfering to revoke the charter, and the latter by an action to restrain the unauthorized undertakings. While courts are inclined to maintain with vigor the limitations of corporate actions, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. If the other party proceeds to the performance of the contract, expending his money and labor in the production of values, which the corporation appropriates, such corporation will not be excused on the plea that the contract was beyond its powers. *Bradley v. Ballard* (55 Ill. 413).

Corporations have the capacity to do wrong, and may overstep the limits placed by the law to their powers, and when they violate their charters in this respect their acts are illegal, but not necessarily void. *Bissell v. Mich., &c. R. R. Co.* (22 N. Y. 258).

The plea of *ultra vires* is not to be understood as an absolute and peremptory defence in all cases of excess of power without regard to other circumstances and considerations. The plea is not to be entertained where its allowance will do great wrong to innocent third persons. *Bissell v. Mich., &c. R. R. Co.* (22 N. Y. 258). Where a certain act is prohibited by statute, its performance is to be held void because such is the legislative will. So where the consideration of a contract is by law illegal, as where the cause of action arises *ex turpe*. But where the act is not wrong *per se*, where the contract is for a purpose lawful in itself, has been entered into with good faith, and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the benefit of the contract is an unconscionable defence, which may not be set up to exempt from liability the party so pleading it. And such, we think, is the case before us.

The answer of the insurance company does not deny the aver-

ment in the complaint that the company "was doing business in Larimer County, in the State of Colorado, as a general fire and hail insurance company." It does not deny that it entered into the contract of insurance with the appellee in the manner and form as alleged in said complaint, nor that the contract was executed as averred. The sole defence upon which the appellant company relies here is its want of authority to insure against hail. By offering to insure the property of appellee against damage by hail, and by entering into the contract of insurance therefor, it claimed to possess the power so to do. It took the appellee's money and assumed the risk and obligation of paying the damage, much or little, that might occur, or of having nothing at all to pay, if the contingency of damage should not happen within the time covered by the policy.

A loss having occurred, the company seeks exemption from the obligation it entered into by denying that it had any authority to do what it asserted the right to do when it voluntarily assumed the undertaking.

We are aware that the courts have been very slow to concede that a defendant setting up as a defence the *ultra vires* of a contract, where said contract was clearly not authorized, should be held liable on the contract, since this would appear to sustain the enforcement of an unauthorized contract, and therefore the cases show that whenever the courts could avoid this seeming inconsistency by resting the recovery upon some other ground, they have done so. This has often led to equal inconsistency in other directions. The true ground would seem to be that of equitable estoppel, whereby the defendant is not permitted to rely upon or show the invalidity of the contract. In such case, the contract is assumed by the court to be valid, the party seeking to avoid it not being permitted to attack its character in this respect.

The point was strongly insisted upon by counsel for appellant in argument, that one dealing with a corporation is bound to know the extent of its powers to contract, that the corporate name itself indicates the scope of its business, and the record of its charter or articles of incorporation furnishes notice of the extent and limitation of its corporate powers and authority to contract.

While as a general proposition this is true, yet it must be conceded that this constructive notice is of a very vague and shadowy character. Every one may have access to the statutes of the States affecting companies incorporated thereunder, and to their articles of incorporation, but to impute a knowledge of the probable construction the courts would put upon these statutes and articles of incorporation to determine questions raised upon a given contract proposed, is carrying the doctrine of notice to an extent which can only be denominated preposterous. It was in answer to the same point that Chief Justice Comstock observed, in his opinion in a leading

case upon this question, that "a traveller from New York to Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations." *Bissell v. M. S. & N. J. R. R. Co.* (22 N. Y. 258). It was urged in argument on behalf of appellant that the State, which created these corporations for public good, has such an interest in their existence and perpetuity, that public policy should be interposed to keep them within the legitimate exercise of their powers. This may be true to a certain extent, and the State may interpose to revoke their charters for an abuse thereof; but we take it that it is no more the public policy of the State to protect the business of private corporations than that of its individual citizens; and to invoke public policy in a case like the one at bar, in order to prevent a corporation from doing wrong, by punishing the other party, would differ little from asking a court, on the ground of public policy, to prevent the obtaining money or goods through false pretences by holding that the party defrauded should be punished by the loss of his money or goods.

While such wrong may be prevented by interference on the part of the State, or stockholders of the company, it cannot well be said that to cure the evil it is necessary in every case to exempt the company from the liability of its unauthorized engagements.

The principle of estoppel by conduct is the same principle which is applied by courts in holding that the statute of frauds, by which, under the general rule, a contract would be void, is never to be used for the protection of a fraud.

The essential elements of an estoppel by conduct are laid down by this court, in *Griffith v. Wright* (6 Colo. 248) to be that: 1. There must have been a representation or concealment of material facts. 2. The representations must have been made with knowledge of the facts, unless the party representing was bound to know them, or that ignorance thereof was the result of gross negligence. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that the other party should act upon it; but gross and culpable negligence on the part of the party sought to be estopped, the effect of which is to make a fraud on the party setting up the estoppel, supplies the place of intent. 5. The other party must have been induced to act upon it. The case before us seems to be fairly brought within the foregoing rules and definitions. The insurance company, through its agents, not only concealed the want of authority to insure against hail, which it now sets up, but its open notorious acts in soliciting policies of this character throughout the country impliedly held out and represented its authority for such business.

Such agent was certainly bound to know the extent of the authority of the company he represented, and if his acts in the prem-

ises were not done with full knowledge of the facts, his ignorance in this respect was gross and culpable negligence.

That the appellee was ignorant of the truth of the matter of want of authority in the company is not denied by the appellant company, except by an inference which, it is argued, is to be drawn, that the articles of incorporation and the record thereof furnished constructive notice of the extent of authority of said company. But it seems to us that such an inference is rebutted by the presumption fairly arising from the nature of the transaction; that the appellee would not have paid his money for the performance of a promise which he knew was void, that its performance could not be enforced, and that his money would be utterly thrown away.

That the offer of the appellant to insure, and the representations made to induce the appellee to enter into the contract of insurance, were made with the intent that the appellee should act thereon, is self-evident from the nature of the transaction, and the acceptance by the appellee of the offer so made by the appellant; and that the appellee was induced to act upon the offer and representations so made is equally apparent, for the act was an obvious sequence of the inducement.

It was strenuously contended by counsel for appellant in the oral argument of this case that whether the contract in a case of this kind is executed or not is immaterial; that the true grounds of liability depend upon, and should be placed upon, the fact of whether the elements of estoppel exist, — whether the conduct of one party has been such as that the other party would be defrauded or injured thereby unless the contract should be enforced.

However this may be in respect to the other cases, or as a general rule, we are quite willing to assent to this view in the particular case before us, and to rest our decision upon the ground of estoppel by the conduct of the appellant company.

We do not say that the directors or acting officers of such company may act in excess of their legitimate powers against the interests and contrary to the will of the stockholders of such company, but while admitting the excess of proper authority, we think, on principle and the weight of modern decisions, that if the stockholders, whose business it is to see that their own managing officers act within the proper scope of their powers, either expressly, or by silence impliedly, assent to acts done on their behalf in excess of authority, they should be held estopped to deny that such acts were authorized.

The appellant company here offered to pay back the money and return or cancel the note given for the policy, and counsel urgently contended that this is all that legally can or rightfully ought to be exacted. This would not place the appellee *in statu quo*. Every insurance company would be ready and willing to do that much after the loss had occurred, on condition of exemption from payment of the loss. The damage to appellee is the loss of his crops

against which the appellant undertook to secure him. After the loss it was too late for appellee to insure in another company having unquestioned authority to insure against such loss.

We therefore conclude that since the contract of insurance, though it may have been beyond the scope of the proper object and purposes of the company as expressed and conferred by their articles of incorporation, was neither by statute nor by their charter expressly forbidden, nor in its nature illegal or improper, and since the conduct of the company in soliciting the insurance and entering into the contract therefor under the circumstances disclosed by this case, was such that to exempt it from its engagements thereunder would result in injuring and defrauding the appellee, who in good faith dealt with the company under the belief of its rightful authority in the premises, the defence of the appellant company interposed against its liability on the contract is inequitable, unconscionable, and should not be allowed.

It is admitted that a contract is not enforceable when prohibited by statute; when not so prohibited, however, and when not illegal or immoral in its nature, nor contrary to sound public policy, a contract even *ultra vires* may be enforced, when, under the circumstances of its execution, every consideration of justice requires it. This is the ground of decision in most of the cases relied upon by the appellee in the case.

As is said by the Supreme Court of the United States in the case of *Zabriskie v. Cl., Col. & Cin. R. R. Co. et al.* (23 How. 400), — “A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claim their own conduct has superinduced.”

Among the many authorities examined in support of our views in this case, we cite the following: *Parish v. Wheeler* (22 N. Y. 503); *Bissell v. M. S., etc. R. R. Co.* (id. 258); *Bradley v. Ballard* (55 Ill. 413); *Whitney Arms Co. v. Barlow* (63 N. Y. 69); *Darst v. Gale* (83 Ill. 141); *State B'd of Agr. v. Citizens' Street R'y Co.* (47 Ind. 407); *Oil Cr., etc. R. R. Co. v. Pa. Trans. Co.* (83 Pa. St. 166); *Argenti v. City of San Francisco* (16 Cal. 255); *State of Ind. v. Woram* (6 Hill, 37); *Converse v. Norwich & N.Y. Trans. Co.* (33 Conn. 180); modifying the doctrine in the case of *Hood v. N. Y. & N. H. R. R. Co.* (22 Conn. 502); *Chicago Build. Soc. v. Crowell* (65 Ill. 453); *Ward v. Johnson et al.* (95 Ill. 215-240); *Zabriskie v. Cl., Col. & Cin. R. R. Co. et al.* (23 How. 398-401); *Hitchcock v. Galveston* (96 U. S. 341-351); *Nat. Bank v. Matthews* (98 id. 621); *Manville v. Belden M. Co.* (McCrary, J. U. S. Cir. Ct.) (3 Col. Law, 558); Green's *Brice's Ultra Vires*, 371, and cases cited; Sedgwick's *Stat. and Const. L.* 90; Waterman's *Specific Perf. Cont.* (cited *supra*).

The judgment of the court below is affirmed.

Affirmed.

BECK, C. J., and HELM, J., concurring : —

Private corporations are creatures of statute, and derive their powers solely therefrom. Upon weighty considerations of public policy, and of private equity as well, the principle has been universally recognized that the charters or general laws through which these corporations derive their existence absolutely control their action; that a contract made or an act done by them which is not in any manner authorized by some express provision of the charter or law of incorporation, or which may not be clearly implied therefrom, is *ultra vires*; and that such usurpation of power may be relied upon as a complete defence to a suit growing out of the unauthorized act or contract.

But, for the purpose of avoiding the infliction of manifest injustice in given cases, many courts of the highest respectability have seen fit to recognize an exception to the foregoing doctrine. This exception, when admitted, is always based upon principles largely analogous to those supporting equitable estoppels. The decisions recognizing it hold that where a corporation receives and retains the full benefit of a contract, and a failure to perform on its side would result in palpable injustice to the other contracting party, it is estopped from escaping liability thereunder through a plea of *ultra vires*.

We are inclined to the opinion that cases sometimes arise wherein this exception, properly understood and limited, should be held applicable. If a private corporation has accepted and retained the full benefits of a contract which it had no power to make, the same having been performed by the other party thereto; and if the transaction is of such a nature that the party thus performing will suffer manifest injustice and hardship unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, we think the defence of *ultra vires* may be disallowed. This, however, does not do away with the objectionable character of the unauthorized contract. It admits the legal wrong committed by the usurpation of power, but denies the equitable right of the corporation to profit through such wrong at the expense of parties contracting with it; the corporation, having received and retained the benefit of the contract, is denied the privilege of invoking the illegality of its act, and thus avoiding consequences naturally flowing therefrom.

The circumstances attending and surrounding the transaction now before us, in our judgment, render this an appropriate case for the application of the foregoing equitable doctrine. For this reason we concur in the conclusion arrived at by Mr. Justice Stone, who writes the principal opinion.

Affirmed.

WHITE v. FRANKLIN BANK.

(22 *Pick.* 181. 1839.)

By an agreed statement of facts, it appeared, that on the 10th of February, 1837, the plaintiff deposited with the defendants the sum of \$2,000, and received from them a book containing the following words and figures, to wit:—

“Dr. Franklin Bank, in account with B. F. White, Cr., 1837, Feb. 10th. To cash deposited, \$2,000. The above deposit to remain until the 10th day of August. E. F. Bunnell, Cashier.”

It further appeared, that on the 7th of July, 1837, the plaintiff brought this action against the bank to recover the money so deposited by him, declaring on the money counts, and on an account stated.

If the Court should be of opinion, that the action could be maintained, the defendants were to be defaulted and judgment rendered for the sum of \$2,000 with interest; otherwise the plaintiff was to become nonsuit.

WILDE, J., delivered the opinion of the Court:—

The first ground of the defence is, that the action was prematurely commenced. The entry in the book given to the plaintiff by the cashier of the bank, is undoubtedly good evidence of a promise to pay the amount of the deposit on the 10th day of August; and if this was a valid and legal promise this action cannot be maintained. But it is very clear, that this promise or agreement that the deposit should remain in the bank for the time limited, is void by virtue of the Revised Stat. c. 36, § 57, which provides that no bank shall make or issue any note, bill, check, draft, acceptance, certificate, or contract, in any form whatever, for the payment of money, at any future day certain, or with interest, excepting for money that may be borrowed of the Commonwealth, with other exceptions not material in the present case.

The agreement that the deposit should remain until the 10th day of August amounts in law, by the obvious construction and meaning of it, to a promise to pay on that day. This, therefore, was an illegal contract and a direct contravention of the statute. Such a promise is void; and no court will lend its aid to enforce it. This is a well-settled principle of law. It was fully discussed and considered in the case of *Wheeler v. Russell* (17 Mass. R. 281), and the late Chief Justice, in delivering the opinion of the Court, remarked, “that no principle of law is better settled, than that no action will lie upon a contract made in violation of a statute or of a principle of the com-

mon law." The same principle is laid down in *Springfield Bank v. Merrick* (14 Mass. R. 322), and in *Russell v. De Grand* (15 Mass. R. 39). In *Belding v. Pitkin* (2 Caines's R. 149), Thompson, J., said, "It is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful." The same principle is fully established by the English authorities. In *Shiffner v. Gordon* (12 East, 304), Lord Ellenborough laid it down as a settled rule, "that where a contract which is illegal remains to be executed, the Court will not assist either party, in an action to recover for the non-execution of it."

It is therefore very clear, we think, that no action can be maintained on the defendants' express promise, and that, if the plaintiff be entitled to recover in any form of action, it must be founded on an implied promise.

The second objection, and that on which the defendants' counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that where money has been paid by one of two parties to the other, on an illegal contract, both being *participes criminis*, no action can be maintained to recover it back. The rule of law is so laid down by Lord Kenyon, in *Howson v. Hancock* (8 T. R. 577), and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely *malum prohibitum*, the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases. The rule as stated by Comyns, in his treatise on Contracts, will reconcile most of the cases which are apparently conflicting. "When money has been paid upon an illegal contract, it is a general rule that if the contract be executed, and both parties are *in pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of indebitatus assumpsit for money had and received. And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover." 2 Com. on Contr. 109.

The rule, with these qualifications and distinctions, is well supported by the cases collected in Comyns and by later decisions. The question then is, whether, in conformity with these principles, upon the facts agreed, this action can be maintained.

The first ground on which the plaintiff's counsel rely, in answer to the defendants' objection is, that there was no illegality in making the deposit, and that the illegality of the transaction is confined to

the promise of the bank, and the security given for the repayment, that alone being prohibited by the statute.

The leading case on this point is that of *Robinson v. Bland* (2 Burr. 1077). That was an action on a bill of exchange given for money lent and for money won at play. By the St. 9 Anne, c. 14, it was enacted that all notes, bills, bonds, judgments, mortgages, or other securities for money won or lent at play, should be utterly void. The Court held, that the plaintiff was not entitled to recover on the bill of exchange, but that he might recover on the money counts for the money lent, although it was lent at the same time and place that the other money for which the bill was given was won. The same principle was laid down in the cases of *Utica Ins. Co. v. Scott* (19 Johns. R. 1); *Utica Ins. Co. v. Caldwell* (3 Wendell, 296), and *Utica Ins. Co. v. Bloodgood* (4 Wendell, 652). In these cases the decisions were, that although the notes were illegal and void as securities, yet that the money lent, for which the notes were given, might be recovered back. The principle of law established by these decisions is applicable to the present case. The only doubt arises from the meaning of the word "contract," in the prohibitory statute. But taking that word in connection with the other words of prohibition, we think it equivalent to the promise of the bank, and that the intention of the Legislature was to prohibit the making or issuing of any security in any form whatever, for the payment of money at any future day.

The next answer to the objection of the defendants is, that although the plaintiff may be considered as being *particeps criminis* with the defendants, they are not *in pari delicto*. It is not universally true, that a party, who pays money as the consideration of an illegal contract, cannot recover it back. Where the parties are not *in pari delicto*, the rule *potior est conditio defendentis* is not applicable. In *Lacaussade v. White* (7 T. R. 535), the Court say, "that it was more consonant to the principles of sound policy and justice, that wherever money has been paid upon an illegal consideration it may be recovered back again by the party who has thus improperly paid it, than, by denying the remedy, to give effect to the illegal contract."

This principle however, is not by law allowed to operate in favor of either party, where the illegality of the contract arises from any moral turpitude. In such cases the court will not undertake to ascertain the relative guilt of the parties or afford relief to either.

But where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, he may be compelled to refund. This is not only consonant to the principles of sound policy and justice, but is now so settled by authority, whatever doubts may have been entertained respecting it in former times.

In the case of *Smith v. Bromley* (2 Dougl. 696, note), it was decided, that the plaintiff was entitled to recover in an action for money

had and received, for money paid by the plaintiff to the defendant for the purpose of inducing him to sign the certificate of a bankrupt, the plaintiff's sister. Lord Mansfield laid down the doctrine on this point, which has been repeatedly confirmed. "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subjects against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover." And this doctrine was afterwards adhered to and confirmed by the whole Court, in the case of *Jones v. Barkley* (2 Dougl. 684).

On this distinction it has ever since been held, that where usurious interest has been paid, the excess above the legal interest may be recovered back by the borrower in an action for money had and received. So money paid to a lottery-office keeper as a premium for an illegal insurance, is recoverable back, in an action for money had and received. *Jaques v. Golightly* (2 W. Bl. 1073.) But in *Browning v. Morris* (Cowper, 790), it was decided, that where a lottery-office keeper pays money in consequence of having insured the defendant's tickets, such contract being prohibited by the St. 17 Geo. 3, c. 46, he cannot recover it back, though the premium of insurance paid by the insured to the lottery-office keeper might be. The distinction, on which this case was decided, is very material in the present case. Lord Mansfield referred to the determination in *Jaques v. Golightly*, where it was said, "that the statute is made to protect the ignorant and deluded multitude, who, in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office keepers." And he adds, "It is very material, that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side; upon the office keeper. The man who makes the contract is liable to no penalty. So in usury there is no penalty upon the party who is imposed upon." The same distinction is noticed and enforced by Lord Ellenborough, in *Williams v. Hedley* (8 East, 378). In that case it was decided, that where money was paid to a plaintiff to compromise a *qui tam* action for usury, it might be recovered back in an action for money had and received; because the prohibition and penalties of the St. 18 Eliz. c. 5, attached only on "the informer or plaintiff, or other person suing out process in the penal action, making composition, etc." It was argued for the defendant in that case, "that as the act of the defendant co-operated with that of the plaintiff in producing the mischief meant to be prevented and restrained by the statute, it was so far illegal, on the part of the defendant himself, as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object; and that if he was not therefore to be considered as strictly *in pari delicto*

with the plaintiff in the *qui tam* action, he was at any rate *particeps criminis*, and in that respect not entitled to recover from his co-delinquent, money which he had paid him in the course and prosecution of their mutual crime." This argument was overruled, and Lord Ellenborough fully approved the doctrine laid down by Lord Mansfield in *Smith v. Bromley*, and the decisions in the several cases in which that doctrine had been confirmed. The same distinction has been recognized in other cases, and was adopted by this Court in *Worcester v. Eaton* (11 Mass. R. 376), in which Parker, C. J., after referring to the above cases, said: "This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption, as a principle of the common law in this country."

The principle is, in every respect, applicable to the present case, and is decisive. The prohibition is particularly levelled against the bank, and not against any person dealing with the bank. In the words of Lord Mansfield, "the statute itself, by the distinction it makes, has marked the criminal." The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter. To decide that this action cannot be maintained would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary and of those who may have no actual knowledge of the existence of the prohibition of the statute, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank.

There is still another ground on which the plaintiff's counsel rely. This action proceeds in disaffirmance of an executory illegal contract, and was commenced before the money which the defendants contracted to pay was by the terms of the contract payable; the plaintiff therefore had a right to rescind the contract, or rather, to treat it as a void contract, and to recover back the consideration money.

It was so decided in *Walker v. Chapman* (Lofft, 342), where money had been paid in order to procure a place in the customs, but the place had not been procured; and in an action brought by the party who paid the money, it was held that he should recover, because the contract continued executory. This case was cited with approbation by Buller, J., in *Lowry v. Bourdieu* (2 Dougl. 470); and the distinction between contracts executed and executory, he said, was a sound one. The same distinction has been recognized in actions brought to recover back money paid on illegal wagers, where both parties were *in pari delicto*. The case of *Tappenden v. Randall* (2 Bos. & Pul. 467) was decided on that distinction. Heath, J., said: "It seems to me that the distinction adopted by Mr. Justice Buller between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature

too grossly immoral for the court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of the kind occurs, I think there ought to be *locus pœnitentiæ*, and that a party should not be compelled against his will to adhere to the contract." The same distinction is recognized in several other cases. 5 T. R. 405; 1 H. Bl. 67; 7 T. R. 535; 3 Taunt. 277; 4 Taunt. 290.

In the case of *Aubert v. Walsh* (3 Taunt. 277) the authorities were considered, and the law was definitely settled as above stated; and it does not appear that it has ever since been doubted. In *Utica Ins. Co. v. Kip* (8 Cowen, 20) the same principle is recognized, although the case was not expressly decided on that point. The distinction seems to be founded in wise policy, as it has a tendency in some measure to prevent the execution of unlawful contracts, and can in no case work injustice to either party.

It is, however, denied by the defendant's counsel that the contract in question was executory, within the true intent and meaning of these decisions and the doctrine now laid down. This question has not been much discussed, and it is not necessary to decide it in the present case, the Court being clearly of opinion that the plaintiff is entitled to recover on the other grounds mentioned. We have considered the question as to the distinction between executory and executed contracts, because it may be of some importance that the law in that respect should not be supposed to be doubtful in our opinion, which might be inferred, perhaps, if we should leave this question unnoticed.

The only remaining question is, whether the plaintiff was bound to make a demand on the bank before he commenced his action. The general rule is, that where money is due and payable, an action will lie without any previous demand. But where money is deposited in a bank in the usual course of business, we should certainly hold that a previous demand would be requisite. But if money should be obtained by a bank by fraud, or, as in the present case, by means of an illegal contract, the bank claiming to hold it under such contract, there can be no good reason given why the bank should be exempted from the operation of the general rule. In *Clark v. Moody* (17 Mass. R. 145) it was held, that if a factor should render an untrue account, claiming a greater credit than he was entitled to, the principal would have a right of action without a demand.

If the defendants had sold to the plaintiff a post-note payable at a future day, it could hardly be doubted that an action would lie to recover back the consideration money, without any previous demand; and there seems to be no substantial distinction between such a case and the one in question.

Judgment on default.

NORTHWESTERN PACKET COMPANY v. SHAW.

(37 Wis. 655. 1875.)

APPEAL from the Circuit Court of La Crosse County.

The complaint alleges that the plaintiff is, and since May 1, 1870, and before, has been, a corporation created and organized pursuant to the laws of the State of Iowa, and is, and ever since its organization has been, engaged in the business of a common carrier on the Mississippi River and its tributaries, and also in the business of purchasing, selling, and dealing in wheat and other kinds of grain and produce; that at Lansing, in the State of Iowa, in June, 1870, the plaintiff, by its duly authorized agent entered into a contract with the defendant to purchase of the latter 4,000 bushels of wheat, to be delivered from the mill of the defendant at that place into the barge of the plaintiff, immediately, and paid the defendant \$1,000 on account of such purchase; and that the plaintiff furnished a suitable barge for said wheat on the day the contract was made; but that the defendant, although requested to do so, failed to deliver the wheat to the plaintiff, or to repay the \$1,000 so advanced to him. The complaint also contains averments that the plaintiff detained the barge thus furnished for several days, and that the market price of wheat advanced immediately after the contract was made. Judgment is demanded for: 1. The \$1,000 paid on account of the contract; 2. A specific sum as damages for the breach of contract by the defendant; and 3. A specific sum for the value of the use of the barge while so detained.

The defendant admits in his answer the making of a contract with the plaintiff to sell and deliver to it 4,000 bushels of wheat, the payment by the plaintiff of \$1,000 on the contract, and the non-delivery of the wheat. The answer also contains allegations to the effect that it was the fault of the plaintiff that the wheat was not delivered, and a counterclaim for damages suffered by the defendant by reason of the failure of the plaintiff to perform the contract on its part.

On the trial of the action, the circuit judge held that the plaintiff had no power to make the contract stated in the pleadings; and the jury, under the direction of the judge, found for the defendant. A motion for a new trial was denied, and judgment for the defendant entered pursuant to the verdict; from which judgment the plaintiff has appealed.

Cameron and Losey, for the appellant, argued, that admitting that the contract was void, the company could recover back the money paid upon it. *Chitty on Con.*, 367; *Brown v. Timmany* (20 Ohio, 81); *Roll v. Raguet* (4 id. 400). *Greenman v. Curtis* (6 Mass. 381); *Sampson v. Shaw* (101 id. 145); *McKee v. Manice* (11 Cush. 357);

Roscoe on Ev., 232. The defendant, being a party to the contract, and having received its benefits, is estopped from denying the power of the company to make it. *Glass Co. v. Dewey* (16 Mass. 94); *Welland Canal Co. v. Hathaway* (8 Wend. 480); *Burns v. R. R. Co.* (9 Wis. 450). The defendant is precluded from setting up such defence. *Farmers' & Millers' Bank v. The Railroad Co.* (17 id. 372); *Bissell v. R. R. Co.* (22 N. Y. 258); *Parish v. Wheeler* (id. 494); *Bank v. North* (4 Johns. Ch. 370); *Navigation Co. v. Weed* (17 Barb. 378); *State of Indiana v. Woram* (6 Hill, 37); *Steamboat Co. v. McCutcheon* (13 Pa. 14); *Palmer v. Lawrence* (3 Sandf. 170); *Potter v. Bank* (5 Hill, 490); *Suydam v. Banking Co.* (id. 491); *Bank v. Bank* (11 Barb. 213). This case is distinguished from *Madison Plankroad Co. v. Watertown Plankroad Co.* (7 Wis. 59). That suit was brought to enforce the executory contract which was held void. Here the suit is to recover money paid on a contract alleged to be *ultra vires*.

Wing and Prentiss, for respondent, to the point that the contract was *ultra vires*, cited *Perrine v. Canal Co.* (9 How. (U. S.) 172); *M. Plankroad Co. v. W. Plankroad Co.* (7 Wis. 59); *Rock River Bank v. Sherwood* (10 id. 230); *Janesville Bridge Co. v. Stoughton* (1 Pin. 667); Angell & Ames on Corp. §§ 111, 256. They further argued upon the evidence tending to support the counterclaim, and readiness of defendant to perform on his part, that, conceding the contract to be valid, the plaintiff could not recover.

LYON, J. :—

The articles of incorporation of the plaintiff were read in evidence on the trial of the cause, and it appears therefrom that the plaintiff was organized under and by virtue of chapter 52 of the revision of 1860 of the laws of Iowa, entitled "Corporations for pecuniary benefit." The statute was not put in evidence, and we cannot take judicial notice of its provisions. The articles set forth the purposes for which the plaintiff was organized as follows :—

"It is agreed, first, that the name of the corporation shall be the 'Northwestern Union Packet Company,' and that the general nature of the business shall be, to purchase, charter, buy, build, own, and control vessels to be propelled in whole or in part by steam or otherwise, for the purpose of using them in transportation of persons and property on the Mississippi River and its tributaries; to erect, purchase, lease, maintain, and own docks, wharves, warehouses, and any and all kinds of buildings, structures, or fixtures necessary and useful for carrying on the business of navigation, freighting, forwarding, storing, or transporting property or persons, or for the purpose of building, rebuilding, or repairing vessels of any and every kind. And it is agreed, further, that the corporation shall have power to lease, transfer, assign, convey, and sell any and all of its vessels, steamboats, barges, wharves, warehouses, docks, and all of its property of every description, and to do any and all acts and things

which may be necessary to an economical and successful prosecution of their said business; and, amongst other powers not hereinbefore enumerated, it is agreed that it shall have power to borrow money in its corporate capacity and name, and in such capacity to make, execute, and deliver to any person or persons, or body corporate or politic, any and all writings, notes, bonds, mortgages on real estate or personal property, or other security of whatsoever name or kind; to enter into any arrangement, agreement, or contract with any person or persons, association, co-partnership, or corporation, in reference to the storing, forwarding, or freighting of any kind of property, by this corporation, or to any and all business incidental to or arising from the transportation of persons and property."

No other or further purpose of the organization is stated in the articles, and no other or different business than is mentioned in the foregoing extract is authorized therein.

In determining the legal functions of the plaintiff, the terms of the articles of incorporation must necessarily control; and unless these specify or by necessary implication include the buying of grain, the contract stated in the pleadings is *ultra vires* on the part of the plaintiff.

It seems very clear that the articles contemplate that the business of the plaintiff should be confined to that of a common carrier of persons and property. Of course, as a common carrier, the plaintiff has power to make all contracts necessary, perhaps convenient, to the carrying on of that business. Possibly it might lawfully purchase grain and other produce for storage and shipment, for the purpose of keeping its warehouses and boats employed, which but for such purchase would have been unemployed; although such power, even under such circumstances, may well be doubted. But there is nothing in the pleadings or testimony tending to show that the contract under consideration was made for any such purpose, or that any such contingency had arisen. Hence the question to be determined is, whether the plaintiff can lawfully buy and sell the produce of the country in the same manner and to the same extent that a natural person may.

We think this question must be answered in the negative. There is no necessary connection between the business of a common carrier and that of buying and selling the commodities which the carrier transports. Neither is the latter business necessarily or usually dependent upon the former. The two are as essentially distinct as the business of the carrier and that of the producer. It will scarcely be claimed that the plaintiff is authorized, under its articles of incorporation, to purchase large tracts of land on which to raise grain and other produce to be stored in its warehouses and shipped over its lines. If it may not do this, it is not perceived on what principle it may purchase the commodities instead of raising them. We think the principle is the same in both cases. Moreover, in view of the

fact that the transportation of the products of the country is mainly controlled by powerful corporations, representing immense aggregations of capital, there are reasons, if not of public policy, certainly reasons which should have much weight with the Legislature, for confining common carriers to their legitimate business as carriers. At least no forced construction of their charters should be sanctioned to enable them to become producers or purchasers of such products. By confining them to the proper business of common carriers, the temptation to make unjust discriminations in the transportation of their own property, to the manifest injury and oppression of persons having like property for transportation, can only be avoided. Hence, while it is conceded that the Legislature may confer upon a corporation common carrier the right of a natural person to buy and sell the commodities which it transports, it must be held that until so conferred the right does not exist.

We conclude that the contract set forth in the pleadings, as to the plaintiff, is *ultra vires*, and that no claim for damages resulting from a breach thereof can be successfully asserted by either party. This disposes of the counterclaim of the defendant, and of all claims of the plaintiff except the claim to recover the \$1,000 paid on account of the attempted purchase of the wheat.

But the question remains whether the plaintiff is entitled to recover the \$1,000. If it can recover it, no good reason is perceived why it may not do so in this action. The complaint states all the facts essential to be averred in an action to recover the same, except that the plaintiff had no power to make the contract, and that omission may be supplied by amendment. Such an amendment cannot prejudice the defendant, for, in the progress of the case thus far, he has constantly asserted such want of power as a defence.

An extended discussion of the question will not be profitable. There are many adjudications in this country and in England, bearing upon it, some of which are cited in the brief of counsel for the plaintiff. The cases have been carefully examined, and we think the rule may fairly be deduced from them, that when money has been paid upon an executory agreement, which is free from moral turpitude, and is not prohibited by positive law, but which is invalid by reason of the legal incapacity of a party thereto, otherwise capable of contracting, to enter into that particular agreement, or for want of compliance with some formal requirement of the law (as that the contract shall be in writing, and the like), the money so paid may, while the agreement remains executory, be recovered back by the party paying it, in an action for money had and received.

Many of the cases go farther, and sustain the action when some of the foregoing conditions are wanting. But the exigencies of this case do not require us to determine how far the rule may be extended, or what conditions may be omitted therefrom without defeating the action. The rule is here stated most favorably for the defendant;

and yet it is clear that under it the plaintiff may maintain an action to recover the money paid on the invalid agreement. A contract to buy wheat is an innocent one; no statute has prohibited it; and this particular agreement is invalid only because of the accident, that the purchaser is a corporation instead of a natural person, and happens to lack authority to make this particular contract.

In addition to the cases on this subject cited by counsel, the following will be found to sustain the views above expressed: *Bagott v. Orr* (2 Bos. & Pul. 472); *Lowry v. Bourdieu* (Doug. 468); *Aubert v. Walsh* (3 Taunt. 277); *Busk v. Walsh* (4 id. 290). In *Thomas v. Sowards* (25 Wis. 631), the rule above stated was applied. See also *Brandeis v. Neustadt* (13 id. 142). But it is argued by the learned counsel for the defendant, that the case of *The M. W. & M. P. R. Co. v. The W. & P. P. R. Co.* (7 Wis. 59) is an authority fatal to the plaintiff's right to recover. That was a mortgage given to secure the performance of an agreement which the court held to be *ultra vires*. It was, as Chief Justice Whiton said in the opinion, an action founded on the agreement and on it alone. The contract failing, the action failed as a matter of course. In strict obedience to the authority of that decision, we hold in this case, that so far as the action is founded on the void agreement, it cannot be maintained. Had that been simply an action to recover the amount paid by the plaintiff for the use of the defendant, it might have been decided differently. But it was not such an action, and the court did not determine whether such an action could be maintained. The case is not, therefore, an authority against the plaintiff's right to recover his advances on account of the void executory agreement.

By the Court: — The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

A motion for rehearing was denied.

BRADLEY v. BALLARD.

(55 Ill 413. 1870.)

APPEAL from the Circuit Court of Cook County.

MR. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court: —

This was a bill in chancery brought by Bradley against Ballard and others, for the purpose of enjoining the prosecution of a suit pending in the Circuit Court of Cook County, against a corporation called "The North Star Gold and Silver Mining Company," in which complainant was a stockholder, upon certain promissory notes given by said company, and also to cancel certain other notes not yet in suit. The

Court sustained a demurrer to the bill, and the complainant not asking to amend, a decree of dismissal was entered.

It appears by the averments in the bill that various persons associated themselves together in the city of Chicago in the year 1866, and filed their articles of organization in the Circuit Court of Cook County, under the general incorporation law, whereby they became incorporated under the title above stated. The statute requires the certificate to state the town and county in which the operations of a company thus incorporated are to be carried on, and the certificate of this company stated that their operations were to be carried on in the city of Chicago, in the county of Cook and State of Illinois. It further appears from the bill that the company thus organized engaged in mining in the Territory of Colorado, and in the prosecution of that work borrowed large sums of money, for which the notes described in the bill were given, except some that are alleged to have been given for official salaries. It is not claimed that they were not given for a full and fair consideration, but their cancellation is sought upon the ground that they were given for money borrowed to enable the company to prosecute a business which it had no power to prosecute, and that this purpose was known to the lenders of the money. It is insisted that, although the business of the corporation was mining, yet, by the terms of its certificate, it had no power to prosecute that business beyond the limits of the city of Chicago, or certainly not beyond the limits of this State.

Whether this is the proper construction of the statute is a question we do not find it necessary to decide. Conceding that it is, and that this corporation had no power to engage in mining in Colorado, we are still of opinion the complainant has not, by his bill, entitled himself to relief. He became a stockholder to the extent of \$25,000, and from the name and character of the company he must have known it was organized for the purpose of mining beyond the limits of this State. He subsequently became one of the directors of said company, and it is a legitimate inference from the bill that at least a part of these debts were created while he was thus participating in the control of the company. There is no pretence in the bill that he ever, in any mode, objected to the mining operations of the company, in Colorado, or to the borrowing of money therefor, and the fair, and, indeed unavoidable inference, from the nature of the company, the connection of complainant with it, and the silence of the bill in this regard, is that he did not object. On what ground, then, can he ask a court of equity to enjoin the collection of these notes?

It is said by counsel for complainant, that a corporation is not estopped to say, in its defence, that it had not the power to make a contract sought to be enforced against it, for the reason, that if thus estopped, its powers might be indefinitely enlarged. While the contract remains unexecuted on both sides, this is undoubtedly true; when, under cover of this principle, a corporation seeks to evade the

payment of borrowed money, on the ground that, although it had power to borrow money, it expended the money borrowed in prosecuting a business which it was not authorized to prosecute, it is pressing the doctrine of *ultra vires* to an extent that can never be tolerated, even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers, and that his money would be used in such business, provided the business itself was free from any intrinsic immorality or illegality.

Neither is it correct to say that the application to corporations of the doctrine of equitable estoppel, where justice requires it to be applied, as when, under a claim of corporate power, they have received benefits for which they refuse to pay, from a sudden discovery that they had not the powers they had claimed, can be made the means of enabling them indefinitely to extend their powers. If that were true, it would be an insuperable objection to the application of the doctrine, even for the purpose of preventing injustice in individual cases. But it is not true. This doctrine is applied only for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act *ultra vires* has been accomplished. But while a contract remains executory, it is perfectly true that the powers of corporations cannot be extended beyond their proper limits, for the purpose of enforcing a contract. Not only so, but on the application of a stockholder, or of any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. So too, if a contract *ultra vires* is made between a corporation and another person, and, while it is yet wholly unexecuted, the corporation recedes, the other contracting party would probably have no claim for damages. But if such other party proceeds in the performance of the contract, expending his money and his labor in the production of values which the corporation appropriates, we can never hold the corporation excused from payment, on the plea that the contract was beyond its power.

Take, for example, the case of a corporation chartered to build a railway from Chicago to Rock Island. Under such a charter, the company would have no power to build steamboats for the purpose of running a line of such vessels between Rock Island and St. Louis. But suppose the company, notwithstanding the want of power, should make a contract for the building of a vessel, and it is built by the contractor, and accepted and used by the railway. Could any court permit the corporation, when sued for the value of the vessel, to excuse itself from payment, on the ground that, although it has and uses the steamer, it had no authority to do so by its charter? Or, suppose that instead of having a vessel built by a contractor it employs a superintendent to build it, and hires mechanics by the day. Could it escape the payment of their wages, on the ground that it had employed them in a work *ultra vires*?

In cases of such character, courts simply say to corporations: You cannot in this case raise the question of your power to make the contract. It is sufficient that you have made it, and by so doing have placed in your corporate treasury the fruits of others' labor, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter.

We are aware that cases may be cited in apparent conflict with the principles here announced, but the tendency of recent decisions is in harmony with them. While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. This is demanded by the plainest principles of justice (2 Kent, 11 Ed. p. 381, note), *Zabriskie v. C. C. & C. R. R. Co.* (23 How. U. S. 381); *Bissell v. M. S. & N. I. R. R. Co.* (22 N. Y. 258); *Cary v. Cleveland & Toledo R. R. Co.* (29 Barb. 35); *Parish v. Wheeler* (22 N. Y. 494); *Graff v. Am. Lin. Th. Co.* (21 N. Y. 124); *Argenti v. San Francisco* (16 Cal. 255); *McCluer v. Manchester & L. R.* (13 Gray, 124); *Chapman v. M. R. & L. R. R. Co.* (6 Ohio, 137); *Hall v. Mut. Fire Ins. Co.* (32 N. H. 297); *Railroad Co. v. Howard* (7 Wallace, 413).

If the complainant in this case had, as a stockholder, asked a court of chancery to enjoin this corporation from mining in Colorado, it would have examined the charter, and if it had arrived at the conclusion that such mining was beyond the powers derived from filing the certificate in question, under our statute, would have issued the injunction. But this he did not do. On the contrary, he has participated in the work, and so long as there was hope of gain, he was willing the money should be borrowed by which the work was to be carried forward. The borrowing of the money was not, in itself, an act *ultra vires*, nor was the giving of the notes. The money was not borrowed to be used for an illegal or immoral purpose. The lenders have been guilty of no violation of law, nor wrong of any kind. The corporation has received their money and used it for a purpose, which, whether *ultra vires* or not, was unquestionably the sole purpose for which the corporators associated themselves together, and for which this complainant became a stockholder. Justice requires the corporation to repay the money it has thus borrowed and expended.

What we have said applies only to private corporations, organized for pecuniary gain. If, to increase their profits they embark in enterprises not authorized by their charter, still, as to third persons, and when necessary for the advancement of justice, the stockholders will be presumed to have assented, since it is in their power to restrain their officers when they transgress the limits of their chartered authority. But municipal corporations stand upon a different ground.

They are not organized for gain, but for the purpose of government, and debts illegally contracted by their officers cannot be made binding upon the taxpayers, from the presumed assent of the latter.

There are some vague charges in the bill of conspiracy between the holders of the notes upon which suit has been brought and some of the directors, but no facts are alleged showing, or tending to show, any wrongful or fraudulent intent. The alleged conspiracy seems merely to be an understanding between the holders of the notes and the majority of the directors, by which the latter will allow the former to obtain judgment on their notes, and we do not perceive why they should not. If the complainant has had the misfortune to associate himself with persons of less pecuniary responsibility than himself for the purpose of carrying on a hazardous business, in which heavy debts have been incurred, it is a misfortune of which the courts cannot relieve him, merely on a vague and general charge of conspiracy against his fellow stockholders or directors. No facts are alleged in this bill which can be made the foundation of relief. As before remarked, the counsel of appellant has presented his case simply on the question of corporate power. We are of opinion the demurrer was properly sustained to the bill. *Decree affirmed.*

MR. JUSTICE SCOTT dissents.

WHITNEY ARMS COMPANY *v.* BARLOW.

(63 N. Y. 62. 1875.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff entered upon a verdict. (Reported below, 6 J. & S. 554.)

This action was brought against defendants as trustees of the American Seal Lock Company, a corporation organized under the general manufacturing act (chap. 40, Laws of 1848), to enforce the statutory liability to pay the debts of said corporation because of an alleged failure to make, publish, and file annual reports.

Said corporation was organized in May, 1871. Its capital stock was \$300,000, all of which was issued to pay for certain patent rights purchased by the company. No report was made and filed until January 19, 1872, when a report was made, verified, and filed, containing the following statement:—

“The amount of the capital stock of this company, and which has been issued for the purchase of patent rights and which has not been paid in cash, is \$300,000; amount of existing debts, \$45,393.88.”

A report, similar as to the statement of capital stock, was filed January 18, 1873. On the 6th October, 1871, said corporation entered into a contract with plaintiff by which the latter agreed to

manufacture and deliver 20,000 railroad locks to be paid for sixty days after delivery. Plaintiff made and delivered 10,000 locks under the contract when, by mutual agreement, the contract was suspended as to the residue. The evidence as to the time of delivery was conflicting and uncertain, but the balance of testimony was to the effect that a few were delivered in December, 1871; the greater portion in January, and a few in February, 1872. Two notes were given by defendant's company for the purchase-price at two months, one dated January 24, 1872, the other January 31, 1872.

Plaintiff is a corporation organized in the State of Connecticut, as declared by its charter "for the purpose of manufacturing every variety of fire-arms and other implements of war, caps, cartridges, balls, and like munitions of war applicable to the use of fire-arms, and all kinds of machinery adapted for the construction thereof and otherwise."

The court directed a verdict for the plaintiff for the amount of the indebtedness, which was rendered accordingly.

ALLEN, J. :—

But a small, if any, portion of the debt for which a recovery was had accrued prior to the making and publishing of the report by the corporation in January, 1872, and if that document was in conformity to the statute requiring annual reports by manufacturing corporations, and a substantial compliance with the requisition of the act, the appellants are entitled to a reversal of the judgment.

The trustees of a manufacturing corporation are chargeable with the debts of the company, upon failure of the corporation within twenty days from the first day of January in each year to make, publish, and file, as prescribed by the act, a verified report, "which shall state the amount of capital and of the proportion actually paid in, and the amount of its existing debts." Laws of 1848, chap. 40, § 12. At the time of the enactment of this law payment of the capital stock of this class of corporations was required to be in money. By a subsequent statute (Laws of 1853, chap. 333) trustees of such corporations were authorized to purchase mines and other property, and to issue stock to the value thereof in payment therefor. The same statute enacted that in all statements and reports of the company to be published, the stock so issued should not be stated or reported as being issued for cash paid into the company, but should be reported in this respect according to the fact. The form of the report, as prescribed by the twelfth section of the original act (*supra*), was that thus modified in all cases where the whole or part of the capital stock was issued in payment for property purchased instead of for cash. The reports should in all essential particulars comply with these statutes. The facts need not necessarily be stated with technical or grammatical precision and accuracy, but they must substantially appear and be verified by the oath of the president and a majority of the trustees, and so distinctly stated that, if untrue, per-

jury could be assigned or an action maintained by any one sustaining legal injury from the misstatement.

The reports of corporations should receive a reasonable interpretation and excessive nicety or exactness should not be exercised in bringing them to the test of the statutes.

It cannot be denied that the report made by the American Seal Lock Company in 1872 is ambiguous, and it is very plausibly urged that it is entirely consistent with a capital stock greatly in excess of the amount stated as having been issued on the purchase of patent rights, as well as with the other fact that there was capital stock of the company for which cash had been paid in. The argument is that, leaving out the first copulative, the statement is, in terms, that the amount of the capital stock which had been issued for the purchase of patent rights, and which had not been paid in cash, was \$300,000, and that such statement would have been literally true if the capital stock had been \$1,000,000 and all but the \$300,000, had been paid in cash, or had not been paid for at all. It is then said that the insertion of the copulative "and," so as to make it read that the capital stock of the company and which had been issued for the patent rights, etc., does not alter the sense upon any grammatical interpretation, or as it would be understood by the casual or ordinary reader, or those for whose benefit and protection the report and publication are required.

But the statute is in one sense and for some purposes, as adjudged by this court, of a penal character, in so far as it subjects the trustees to liability for the debts of the corporation for their neglect to make the report; and while it is also remedial, as it confers upon the creditor a remedy for his debt and takes from the governing body of the corporation the shield and protection of the corporate organization, and holds them to a personal liability for debts contracted, the reports and statements of the corporation, made and published professedly in compliance with the statute, should receive a liberal interpretation, and the benefit of any doubt as to the true sense and meaning of the document be given to the trustees sought to be charged. This is a reasonable rule, in the absence of any evidence, in or out of the report, of an intent to evade the statute and put forth a report false or deceptive; and when the report, read and interpreted as claimed by the trustees, is true in fact. The court is of the opinion that the report now under review, notwithstanding the criticism to which it is fairly subject, should, in the application of these principles and in view of the fact that the entire capital of the corporation was, at the time it was made, but \$300,000, and the whole amount had been issued in payment for patent rights, be deemed a fair and full compliance with the statute, thus saving the forfeiture which the trustees, upon any other interpretation, would have incurred. In any view of the report, it did not exaggerate the resources and condition of the company.

As it is left in doubt whether some portion of the debt did not accrue during the default of 1871, and as other questions may arise, it is necessary to consider the other objections taken by the appellant to the judgment.

It must be conceded that the manufacturing and vending of "rail-road locks" is not within the purposes for which the plaintiff was incorporated, or within the powers conferred by its charter. Neither is such business incidental to the purposes of the incorporation, or in any way necessary to, or, as far as appears, even an aid in the exercise of the powers conferred upon the plaintiff by its constitution, so that it could be regarded as among the implied powers granted by the Legislature and assumed by the corporators.

Did the question now made arise upon an application by the stockholders and corporators to restrain the corporate agents from applying the corporate funds to purposes foreign to the corporation, or engaging in business outside of that for which the company was formed, or on proceedings by the sovereign power to annul the charter for an abuse of the powers granted, or in a proceeding to enforce and for the performance of an executory contract, where, upon a rescission or annulling the agreement, both parties would have the same position as if no contract had been made, the rules of decision would be different from those which must prevail in the present action. In either of the cases suggested it is very likely the courts would be compelled to give full effect to the objection, and hold the business unauthorized and a violation of the charter and a forfeiture of the chartered rights, and the contract null, and refuse to perform it or give effect to it. The manufacture of the locks, or contract to sell them to the Seal Lock Company, were not acts immoral in themselves or forbidden by any statute, neither *mala in sese* nor *mala prohibita*, so as to make the contract illegal and incapable of being the foundation of an action, — such a contract as the law will not recognize or enforce, but applying the maxim *ex facto illicito non oritur actio*, leave the parties as it finds them.

When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created. *Earl of Shrewsbury v. North Staffordshire R. Co.* (L. R. 12, 1 Eq. 593); *Taylor v. Chichester and Midhurst R. Co.* (L. R. 2 Exch. 356); *Bissell v. Mich. C. R. Co.* (22 N. Y. 258).

Whether the contract as originally made was *ultra vires* is not a very important inquiry at this time. If it was, the State under whose sovereignty it dwells and by whose act and favor it exists, has no interest in arresting its action for the recovery of moneys equita-

bly due upon a contract fully executed and a work fully accomplished, whatever may be its right to annul its charter. The shareholders, whose confidence has been abused and whose funds have been diverted from their proper use, have a direct interest in reclaiming and restoring to proper custody and applying to legitimate uses the funds which have been diverted and improperly used for purposes *dehors* the legitimate business of the corporation. The idea of *ultra vires* should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong.

Here, as between two corporations, the debtor and creditor corporation, the contract has been fully performed by the creditor, the plaintiff in this action, and the Seal Lock Company has received the full consideration of its promise to pay. The plaintiff has parted with its property to the latter corporation, and unless a legal liability exists on the part of the latter to pay, the plaintiff can neither reclaim the property or recover compensation, and under this technical plea a great wrong will be perpetrated. A purchaser who acquired by contract, and, under an agreement to pay for it, the property of a corporation, cannot defeat the claim for the purchase-price by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration of his engagement to pay money, either in services or property, cannot avail himself of the objection that the contract thus fully performed by the corporation was *ultra vires*, or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defence to prevail in an action by the corporation.

It is now very well settled that a corporation cannot avail itself of the defence of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail. The same rule holds *e converso*. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation. *Ex parte Chippendale* (4 De G. M. & G. 19); *In re National P. B. Build. Soc.* (L. R. 5 Chy. Appeals, 309), *In re Cork, etc. R. C.* (4 id. 748); *Fishmongers' Co. v. Robertson* (5 McG. 131).

The only justification for such a plea by an individual sued upon a contract with a corporation is, that the obligation is not mutual, as the other party, the corporation, would not be bound by it. The objection to such a defence in an action upon an executed contract is given by Tindal, C. J., in the case last cited, in these words: "Upon the general ground of reason and justice, no such answer can

be set up. The defendants having had the benefit of the performance by the corporation of the several stipulations into which they entered, have received the consideration for their own promises; such promise by them is, therefore, not *nudum pactum*; they never can want to sue the corporation upon the contract in order to enforce the performance of their stipulations which have been already voluntarily performed, and therefore no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them on the ground of inability of the corporation, which suit they can never want to sustain."

The same principle was adjudged in *R. and B. R. Co. v. Proctor* (29 Vt. 93), Ch. J. Redfield saying: "The only wrong in the directors is in having exceeded their powers; the transaction with the defendants, so far as it goes, will tend to restore a portion of the money to its rightful proprietor, and of this the defendants ought not to complain as they are confessedly solicitous to bring the directors of the plaintiff's company back to their legitimate functions." See also, *Farmers' and Millers' Bank v. D. and M. R. Co.* (17 Wis. 372).

The same equitable principle was intimated by Ch. J. Kent, in *Silver Lake Bank v. North* (4 J. Ch. 370). *Parish v. Wheeler* (22 N. Y. 494) proceeds and was adjudged upon this general rule, Ch. J. Comstock enunciating the doctrine that "the executed dealings of corporations must be allowed to stand for and against both parties, where the plainest rules of good faith require."

Palmer v. Lawrence (3 Sandf. Sup. Ct. R. 161) lays down the proposition in more comprehensive terms. Judge Duer, speaking for the court, says: "The general rule which is fairly deducible from all the cases on this subject is, that a defendant who has contracted with a corporation *de facto* is never permitted to allege any defect in its organization as affecting its capacity to contract or sue." The proposition may not be true in respect to contracts executory and wholly unexecuted; we do not pass upon that. It was decided in the *Steam Navigation Co. v. Weed* (17 Barb. 378), that when it was a simple question of capacity to contract arising either on a question of regularity of organization or of powers conferred by the charter, a party who has had the benefit of the contract cannot be permitted, in an action founded upon it, to question its validity. Judge Parker's opinion, to which nothing need be added, is well fortified by the many cases to which he refers, and which, aside from the argument of the learned judge, abundantly sustain the judgment. Among the cases referred to and commented upon by Judge Parker, are *Silver Lake Bank v. North* (*supra*); *State of Indiana v. Woram* (6 Hill, 37); *Chester Glass Co. v. Dewey* (16 Mass. 94); *Steamboat Co. v. McCutcheon* (13 Penn. St. R. 13).

It is very evident, as well upon principle as upon authority, that had this action been against the debtor corporation the objection that the contract was not authorized by the charter of the plaintiff would

have been untenable and the plaintiff would have been entitled to recover.

Does the defendant and appellant stand in a different position, or can he avail himself of a defence to the original cause of action of which the corporation could not? There may be defences personal to the defendant, but objections which go to the foundation of the claim and demand against and the obligation of the corporation are not personal to one sued as trustee upon the statutory liability. The debt must be proved by evidence competent against the defendants. The facts upon which the debt is founded must be proved. The naked admissions of the corporation or judgment against the corporation are not evidence against the trustees. They are *res inter alios acta*; but when facts are proved which would establish the existence of a debt against the corporation, the liability of the trustees for the debt follows upon the proof of the other facts upon which the liability is made by statute to depend. A debt necessarily results from the acts of the corporation; and whether such acts are such as, in themselves, create or constitute an obligation, or such as will at law estop the corporation from denying its liability, is not important. The trustees are, by the statute, made privies to the acts and doings of the corporation in the transaction of its business resulting in a pecuniary debt or liability. When it is proved that the corporation has received property from others under a promise to pay, under circumstances which the law would adjudge sufficient to charge the corporation for the purchase-price, a debt is established which the trustees cannot dispute, although perchance the corporation might, for any reason, have refused to accept the property; and had it done so no legal liability would have resulted.

In *Jones v. Barlow* (decided in June last, not yet reported), we held that the liability of a trustee, upon the failure of the corporation to make the annual report called for by the statute, was co-extensive and concurrent with that of the corporation, *quoad* the debt which was sought to be fixed upon him; that there must be not only an existing debt against the corporation, but a debt presently due, and for the recovery of which an action would lie against the corporation; and that if the corporation was not suable by reason of a novation or renewal of the debt, an action would not lie against the trustee. We gave the defendant the benefit of that rule. Applying the same principles here, and for the reasons assigned in the prevailing opinion there given, we are constrained to hold, that if a valid debt exists against the corporation, to which there is no good defence at law or equity in behalf of the corporation, it must be adjudged and held a valid debt where the trustee is sought to be charged with its payment. This necessarily follows as the converse of the decision in *Jones v. Barlow*. The first step is taken in establishing the liability of the trustees where the facts proved would entitle the plaintiff to a judgment against the corporation for the debt in suit. That

establishes the existence of a debt against the corporation; and upon proof of the other facts, viz., the trusteeship and default in making the report, the liability of the trustee is proven and judgment must go against him. Other questions may arise in respect to the report of 1873, and we do not pass upon that.

The judgment must be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

SLATER WOOLLEN COMPANY v. LAMB.

(143 Mass. 420. 1887.)

CONTRACT, upon an account annexed, for goods sold and delivered. At the trial in the Superior Court, before Bacon, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which were disallowed by the presiding judge. The defendant filed a petition in this court to prove his exceptions. The case was referred to a commissioner, who made his report; and the case was argued on the question whether the exceptions alleged were true, and also on the question whether, if they were true, they should be sustained. The facts material to the point decided appear in the opinion.

FIELD, J. : —

If we assume that the truth of the exceptions has been established, we think that they must be overruled. The substance of the defendant's contentions is, that the Slater Woollen Company, having been incorporated "for the purpose of manufacturing fabrics of wool and worsted or of a mixture thereof with other textile materials," could not, by and in the name of persons who were in fact keeping a store as its agents, but whose agency was undisclosed, sell groceries, dry goods, and other similar articles to the defendant, who was not employed by the company, and then maintain an action against him to recover either the price or the value of the goods sold.

If the goods were the property of the plaintiff, and were sold by its agents, the plaintiff can sue as an undisclosed principal.

It was said of *Chester Glass Co. v. Dewey* (16 Mass. 94) in *Davis v. Old Colony Railroad* (131 Mass. 258, 273), that "The leading reason assigned was, 'the Legislature did not intend to prohibit the supply of goods to those employed in the manufactory;' in other words, the contract sued on was not *ultra vires*. That reason being decisive of the case, the further suggestion in the opinion, 'besides, the defendant cannot refuse payment on this ground; but the Legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused,' was, as has been since pointed out, wholly *obiter dictum*." But the weight of authority, we think, supports the last reason given, in its application

to the facts of the présent case. There is a distinction between a corporation making a contract in excess of its powers, and making a contract which it is prohibited by statute from making, or which is against public policy or sound morals; and there is also a distinction between suing for the breach of an executory contract and suing to recover the value of property which has been received and retained by the defendant under a contract executed on the part of the plaintiff.

If it be assumed, in favor of the defendant, that the contracts of sale in the case at bar were *ultra vires* of the corporation, they were not contracts which were prohibited, or contracts which were void as against public policy or good morals; the defect in them is, that the corporation exceeded its powers in making them. The defendant, under these contracts, has received the goods, and retained and used them. Either the corporation must lose the value of its property, or the defendant must pay for it; in such an alternative, courts have held, on one ground or another, that an action can be maintained when the sole defect is a want of authority on the part of the corporation to make the contract. We think that the corporation can maintain an action of contract against the defendant to recover the value of the goods. The defendant is not permitted to set up this want of authority as a defence; and, as the form of the transaction was that of contract, such should be the form of the action.

We are not required to determine whether an action can be maintained to recover the price, as distinguished from the value of the goods, as no exception has been taken to the measure of damages. *Chester Glass Co. v. Dewey* (*ubi supra*); *Whitney Arms Co. v. Barlow* (63 N. Y. 62); *Woodruff v. Eastern Railroad* (93 N. Y. 609); *Nassau Bank v. Jones* (95 N. Y. 115); *Pine Grove Township v. Talcott* (19 Wall. 666, 679); *National Bank v. Matthews* (98 U. S. 621); *National Bank v. Whitney* (103 U. S. 99.) See *Whitney v. Leominster Savings Bank* (141 Mass. 85); *Bowditch v. New England Ins. Co.* (141 Mass. 292); *Wright v. Pipe Line Co.* (101 Penn. St. 204).

Exceptions overruled.

DAY v. SPIRAL SPRINGS BUGGY COMPANY.

(57 Mich. 146. 1885.)

ASSUMPSIT. Plaintiff had judgment.

COOLEY, C. J.:—

This action is brought to recover the value of thirty-two tons of the article called "Excelsior," which had been received by the defendant of the plaintiff.

The defendant is a corporation, organized, as its articles of association state, "to purchase material for, and manufacture and sell,

carriages and carriage and harness hardware; also for the disposing of the right to manufacture on royalty the spiral buggy-spring, Smith's patent." In the manufacture of carriages excelsior is used for upholstering seats and backs, but for no other purpose. The place of business of defendant is Grand Rapids, Michigan.

It was shown on the trial that in April, 1883, defendant contracted with one Hulz, of Chicago, to sell and deliver to him in Chicago one hundred and seventy-four tons of excelsior, the delivery to be made at the rate of two car-loads a month, and the price to be fourteen dollars a ton. For the purposes of this contract defendant then bargained with the plaintiff that she should manufacture the requisite quantity of excelsior and deliver it on board cars or boat at Grand Rapids, billed to Hulz at Chicago. The price to be paid by defendant was eleven dollars and fifty cents a ton, which, after paying costs of transportation, would leave to defendant a profit on the sale to Hulz. It was known to plaintiff, when she contracted for the manufacture, that the defendant was not procuring the article for use in its business, but for the purpose of a sale at a profit in Chicago, where the defendant had no place of business, and the delivery to be made by her was to be made from time to time as required by the Hulz contract. The plaintiff was therefore fully aware that the contract of the defendant with her was purely one of speculation, and had no connection with its legitimate corporate business.

The excelsior was delivered by the plaintiff under the contract from time to time until about June 15, 1883, and was shipped to Chicago under defendant's contract with Hulz. At the time last mentioned the market value of the article had considerably advanced, and plaintiff declined to deliver any more at the price agreed upon. Part payment had been made for the quantity received, and defendant refused to pay further unless plaintiff should go on in completion of her contract. This suit was accordingly instituted.

The claim of the plaintiff is that the contract she entered into with the defendant was void in law; that therefore she was at no time under obligation to perform it; that, in so far as the defendant had received excelsior from her, she is entitled to recover the value, not exceeding the price agreed upon; and having shown that the value was equal to that price, she now claims to recover it in this suit. The defendant, on the other hand, insists that the plaintiff was estopped by the contract from disputing the capacity of the defendant to enter into it; and that when she refuses to perform, she becomes liable in damages. These damages the defendant seeks to recover from the claim of the plaintiff.

The circuit judge was of opinion that the contract made by the defendant with Hulz, not being for a corporate purpose, was *ultra vires* and void, and the contract made with the plaintiff for the purpose of meeting its requirements was void also. For the excelsior actually received by the defendant the plaintiff was held entitled to

recover, as if the void contract had not been entered into; but a claim to recoupment must necessarily assume the validity of the contract, and was therefore inadmissible. The judge, therefore, gave judgment for the plaintiff for the value of what had been received, deducting such payments as had been made. The defendant brings error.

It is scarcely denied in this court that the contract of the defendant on which it now relies was *ultra vires*. Its corporate purposes were specified in its articles, and it was without legal power to go beyond them. The contract was one of speculative dealing, and was as much foreign to the purposes of corporate organization as would have been a contract for dealing in grain on the produce exchange, or in shares in the stock market. The State had not by law consented that its manufacturing corporations should be at liberty to make such contracts, but for reasons of sound public policy had withheld from them the power to do so. Neither had the corporators of the defendant consented that their interests might be put in jeopardy by such dealings.

But defendant relies here, as it did in the court below, upon the plaintiff's being estopped by her contract from raising the question of *ultra vires*. She has certainly admitted the power of the defendant to make the contract, and if the elements of an estoppel are to be found in this mere admission, or in this admission coupled with such action as has taken place under it, then the defendant should be entitled to recoupment.

There are some decisions which give plausibility to the position of the defendant, but we know of none that is adequate to the exigencies of this case. Parties entering into contracts with an association of persons, who are *de facto* exercising corporate powers, are not suffered to dispute the corporate authority which their contracts admit. *Swartwout v. Mich. Air-line R. Co.* (24 Mich. 389); *Wilcox v. Toledo, &c. R. Co.* (43 Mich. 584); but this is on the principle that a usurpation of corporate authority concerns only the State, and it is supposed the State will move on its own behalf to have the usurpation punished or restrained when it is found to exist, if the occasion seems to call for it. The case before us is not one of that description. The defendant's possession of corporate powers is conceded, and though the particular act was done without authority, the State was not the only party interested in questioning it. Every stockholder was entitled in his own interest to insist on its being repudiated, for he had not consented to put his share of the capital at the risk of any such venture. There are some cases, also, in which parties by false representations have induced others to act upon invalid contracts as if they were valid, and to make payments, deliver property, or otherwise change their positions in reliance upon the contracts, under such circumstances that nothing but the enforcement of the contracts will do complete justice; and in such cases the doc-

trine of estoppel may well be applied. But this is not such a case. No false representations are alleged, and it is not disputed that all parties were fully aware of all the facts. They must therefore be supposed to have understood that the contract in its inception was *ultra vires*. And the power on the part of such a corporation to enter into contracts of speculation, being withheld on reasons of public policy, for the protection of shareholders and the general good of the community, the act neither of one party nor of both in entering into it can work an estoppel against setting up the invalidity. A rule of law established for the public good cannot be thus defeated. A corporation cannot, by the mere act of individuals, be given a power which the state for general reasons has withheld from it. *Pennsylvania, &c. Nav. Co. v. Dandridge* (8 Gill & J. 248, 319).

Parties may also be estopped, in some cases, from disputing the validity of a corporate contract when it has been fully performed on one side, and when nothing short of enforcement will do justice. To quote the language of Comstock, C. J., in *Parish v. Wheeler* (22 N. Y. 494, 508): "The executed dealings of corporations must be allowed to stand for and against both the parties, when the plainest rules of good faith so require." But this is not such a case. The contract has only been performed in part. The defendant has received a portion of the property bargained for, and we may justly assume that what has been received has passed into the hands of Hulz and been paid for, so that the defendant will lose nothing but the anticipated profits on the remainder if the contract is not enforced in its favor. Those profits it had no right at any time to count upon; and, in contemplation of law, there can be no injustice in depriving it of profits which the law would not permit it to bargain for. No valid ground for estoppel is therefore found to exist in the case.

The defendant, then, if the plaintiff has established a valid demand, is not entitled to recoup damages for refusal to make complete performance, because to allow recoupment would be indirectly to enforce the contract.

Whether the plaintiff is entitled to recover for the goods delivered and not paid for is the remaining question. The defendant has had the goods, and there is no want of equity in requiring it to make payment. They were delivered under a contract which bound neither party, and though the plaintiff is the party who now refuses to go on with it, the defendant was at liberty to do the same, and we cannot know that it would not have done so if the change in market value had been such as to make it for its interest. But however that may be, if the defendant pays for the property received, the parties will have justice meted out to them as nearly as is now possible.

It is to be observed that the contract, though void in law, involved no element of criminality, and nothing of an immoral nature. The case is not, therefore, one in which the law will leave the parties

without redress for the consequences of criminal or immoral action. The plaintiff had a right to sell her manufacture, and to be paid for it; the defendant has received something of value from her, and there is manifest equity in its being required to make payment, notwithstanding it exceeded its powers in the purchase.

The cases of *Pratt v. Short* (79 N. Y. 437), *Northwestern Union Packet Co. v. Shaw* (37 Wis. 655), *Harriman v. Baptist Church* (63 Ga. 186), are in point, and fully sustain the judgment. The principle involved is considered at length in *Whitney Arms Co. v. Barlow* (63 N. Y. 62), and is supported by *Thomas v. Railroad Co.* (101 U. S. 71), *In re Cork & Y. Ry. Co.* (L. R. 4 Ch. App. 748), *In re National, &c. Society* (L. R. 5 Ch. App. 309), and many other cases. No doubt it results in a degree of hardship in some cases, when a party fails to obtain all that has been bargained for; but the loss of anticipated advantages, as an incident to unauthorized dealings, is one for which the parties themselves are responsible, not the law.

The judgment must be affirmed.

The other justices concurred.

In re CORK AND YOUGHAL RAILWAY COMPANY.

(L. R. 4 Ch. App. 748. 1869.)

THIS was an appeal from an order of the Vice-Chancellor Malins, the question raised being as to the validity of bonds in the form called Lloyd's bonds, given by the Cork and Youghal Railway Company.

The Cork and Youghal Railway Company was incorporated by act of Parliament, and empowered by several acts to raise altogether £365,000 by shares, and to borrow altogether £131,000 upon mortgage or bond.

In April, 1861, the company had borrowed from David Leopold Lewis, who was called the financial agent of the company, sums of money amounting to £25,534, which had been received by the company, and applied by them partly in payment to contractors, partly in payment for rolling-stock and other goods, partly in payment of interest, partly in payment of the salaries of the officers of the company, and partly in payment for land. For the advances so made Lewis drew bills upon the company at short dates, which he from time to time procured to be discounted and again renewed by the company, charging a commission upon each renewal. The company afterwards borrowed further sums from Lewis, for which he drew bills in the same manner as before. In June, 1862, the whole of the share capital of the company (except £7,435, which was soon after-

wards raised) had been raised and spent; the company had issued mortgages or the whole of the £131,000 which they were empowered to raise; the advances made by Lewis to the company amounted to £101,149, and the railway was not completed.

In August, 1862, Lewis represented to the directors that he had great difficulties in renewing the company's bills, and that if the company would issue to him bonds in the form called Lloyd's bonds he would be able to raise money upon them with greater facility, and would be able to supply the company with funds. At the half-yearly meeting of the company, held in August, 1862, a statement of accounts was read and adopted, showing that the company had then spent £109,520 beyond the amount authorized to be raised by the acts; and resolutions were passed to the effect that, as the company had obtained from Lewis large sums of money to pay for land, rolling-stock, and the construction of the line, the directors were authorized to issue bonds to be given to Lewis as security for the debt due to him.

The directors accordingly issued and gave to Lewis bonds for various sums, amounting in the whole to £120,000, the bonds being in the following form:—

CORK AND YOUGHAL RAILWAY.

No. 456 B.

Bond.

£1000.

Know all men by these presents, that we, the Cork and Youghal Railway Company, are held and firmly bound unto David Leopold Lewis, of No. 11, George Yard, Lombard Street, London, Esq., in the sum of £1000, to be paid to the said David Leopold Lewis, his certain attorney, executors, administrators, or assigns, on the 20th day of August, 1865, with lawful interest thereon at 5 per cent per annum from the date hereof until payment, for which payment we hereby bind ourselves and our successors this 20th day of August, 1864.

Whereas the above-bounden company is justly and truly indebted to the above-named D. L. Lewis in the sum of £1000 for work done and goods and material supplied to the said company for the purposes of their undertaking, by the means and procurement and at the cost of the said D. L. Lewis, and at the request of the company, as they hereby acknowledge. And whereas the said D. L. Lewis hath applied to the said company for payment of the said sum of money, but hath, at the request of the said company, agreed to forbear payment of the same until the 20th day of August, 1865, on the said company becoming bound by this application for securing the payment of the said principal sum on the day last aforesaid. Now, therefore, the condition of this obligation is, that if the said Cork and Youghal Railway Company, their successors or assigns, do and shall pay to the said D. L. Lewis, his executors, administrators, and assigns, the said sum of £1000 on or before the said 20th day of August, 1865, and do and shall pay interest thereon at the rate of £5 per cent per annum until payment, such interest to be paid half-yearly, the first payment to be made at the expiration of six calendar months from the date hereof, and for any fraction of a half-year to be paid on the day of payment of the said principal sum, then the above obligation to be void, otherwise to remain in full force and effect.

Given under the common seal of the said Company the 20th day of August, 1864.

Meetings of the directors were held from time to time, and at most of the meetings the further liabilities of the company were represented to the directors by the secretary, and resolutions were passed requesting Mr. Lewis to provide for the same. The money appeared to have been required for different purposes connected with the railway, and in two instances at least Lewis was requested to find the money required for the payment of specific debts due from the company to contractors. Further bonds were delivered to Lewis, on account of the loans made by him, to the amount of £45,000, making a total of £165,000, and this was stated at a meeting of the shareholders held in February, 1863. From time to time when the bonds became due they were returned, and new bonds were issued in their place. Further sums were advanced by Lewis, and the same course of proceeding was followed until March, 1865, when Lewis became bankrupt. In the mean time Lewis had deposited bonds with different persons in order to raise money on them, and ultimately it appeared that he had so deposited bonds to the amount of £224,000, and himself held bonds to the amount of £145,000.

It appeared that the company always employed their own contractors, and that Lewis never entered into any contracts on behalf of the company, but that in two instances the specific sums advanced by him had been at once paid to creditors, and that in other instances he had advanced sums to meet specified debts.

By an Act, 29 & 30 Vict. c. cxxiv., after reciting that the company might have incurred debts to a considerable amount beyond their mortgage debt, which they had not the means of paying, and that it would be of advantage to the public that the company's railway should be sold to the Great Southern and Western Railway Company, and that the company were desirous that their affairs should be wound up and they be dissolved, and that the purchasing company were willing to purchase the railway for a sum of £310,000 of the ordinary stock of the purchasing company, and that claims had been made on the selling company by persons who alleged that they were creditors of the company, the validity of whose claims was denied by the company, and it was expedient that provision be made for ascertaining whether and how far the claims against the company were valid or not, — it was enacted that, in consideration of £310,000 ordinary stock of the purchasing company, the undertaking, works, etc., of the selling company should be vested in the purchasing company, freed from all debts of the selling company. Provisions were then made for winding up the selling company, and for the appointment of an official liquidator, who should administer the £310,000 stock. And it was enacted by section 12, that "the net proceeds of the sale of the stock shall be applied, with the sanction of the court, by the official liquidator as follows; that is to say: —

"First. In payment of the costs of this act, by this act provided to be paid by the company.

"Secondly. In payment of the compensation and expenses for completing, whether in the name of the company or in the name of the purchasing company, the purchases of lands taken by the company, and of all sums which may be found due from the company with relation to lands for the taking of which notice has been given by the company.

"Thirdly. In payment of the principal and interest lawfully due on the mortgages of the company lawfully created under the powers of the company's Acts, and according to their respective rights and priorities as existing on the 1st day of January, 1866.

"Fourthly. In payment of the costs, charges, and expenses incurred by the company after the 15th day of March, 1865, in and about actions and suits and legal proceedings against them, and the negotiations between them and the purchasing company with respect to the arrangement effected by this Act, and also in payment of the necessary office expenses, salaries, and wages due at the time of such payment.

"Fifthly. The surplus shall be subject to all the rights, equities, priorities, claims, and demands, whether of preference or ordinary shareholders, bondholders, or others, to which the property would, in case this Act had not been passed, have been subject, and shall be applied accordingly."

The sale to the Great Southern and Western Railway Company was completed, and the £310,000 stock was transferred to the official liquidator, of which, after the payments directed by the first four clauses of the 12th section of the Act, £150,000 remained.

The official liquidator of Overend, Gurney & Co., Limited, claimed the benefit of this surplus in respect of bonds for £191,000 held by that company, and the official liquidator of the London, Hamburg, and Continental Exchange Bank, Limited, claimed in respect of bonds for £40,000. Vice-Chancellor Malins, before whom the applications came, made a declaration that so much of the moneys advanced by D. L. Lewis as was secured by Lloyd's bonds and applied for the benefit of the Cork and Youghal Railway Company, constituted a debt in equity and was payable out of the assets of the company before any of the shareholders took any part of the surplus; and his Honor directed an inquiry how much (if any) of the money purported to have been advanced by Lewis, and to be secured by the bonds, was applied for the benefit of the company; and directed the costs of all parties to be taxed and paid by the official liquidator of the railway company.

Mr. H. R. Pick, a first-class preference shareholder in the company (who had liberty to attend on behalf of himself and other preference shareholders) appealed.

LORD HATHERLEY, L. C.:—

It appears to the Lord Justice and myself that the order, as it now stands, is not exactly the order which the exigencies of the case re-

quire, but that, on the other hand, it would be most improper to hold that under and by virtue of the 12th section of the act, by which this company has been put an end to, and has been, in effect, bought by another company, the money should be distributed to the shareholders without making any provision whatever in respect of the payments that have been made by moneys procured from Mr. Lewis. The transaction was, no doubt, of an irregular character. The company, having expended the whole of its capital, and reached the extent of its borrowing powers, found itself heavily embarrassed with debts, many of which appear to have been legally payable, being due to contractors and others for rolling-stock and so forth, and these debts the company had not the means of paying. A contention has been raised by Mr. Jessel, against which it may not be necessary to decide on the present occasion, but it is one which, I conceive, would not be sustainable. He contends that when a railway company is formed with a certain amount of capital, and is authorized to execute certain works, then, unless the works can be executed with exactly the prescribed amount of capital, no further work can be done at all; in other words, that no contractor who has entered into an engagement to make the two or three miles of line required for the purpose of completing the work, would be able to recover in respect of the money, labor, and work expended by him on the company's behalf. That, I apprehend, would not be law, and the very point did arise in the case of *White v. Carmarthen Railway Company* (1 H. & M. 786), which, as far as I recollect, was not appealed from. There a contractor was willing to give his services, and to take his chance of being paid, with such remedies as he could insist upon by bringing an action against the company and recovering judgment. In that case I held that the company were authorized in giving him a bond acknowledging the amount of the debt. On the other hand, it is equally clear, or it has been made clear if it was not clear before, by the case of *Chambers v. Manchester and Milford Railway Company* (5 B. & S. 588), and the very able and lucid judgments there given, that where a company is authorized only to raise a given amount of capital by shares, and a certain other sum by debentures or mortgages, then the company cannot issue any debenture or loan-note, or any security of that description, for the mere purpose of raising money, and I apprehend that any such instrument so issued would be just as void in equity as at law, being contrary altogether to and absolutely forbidden by statute. And I entirely adopt the view which was taken by the learned judges in that case, that everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden, and absolutely void to all intents and purposes whatsoever. Accordingly they held that the bonds in that case, called Lloyd's bonds, were not, in effect, issued in respect of debts actually due, but were simply issued for the purpose of raising money, and were instruments to which no legal validity could be attributed; nor,

as I apprehend, could any validity be given to them in this court any more than in a court of law. The learned judges there proceeded upon this ground, that the Act 7 & 8 Vict. c. 85, whilst it preserved the rights of those who at that time had advanced money to railway companies on the security of loan-notes or other instruments, proceeded to enact that from and after the passing of that act, any railway company issuing any loan-note, or other negotiable or assignable instrument purporting to bind the company, as a legal security for money advanced to the railway company otherwise than under the provisions of some act or acts of Parliament authorizing the railway company to raise such money and to issue such security, should for that offence forfeit a certain sum of money. The judges held that the penalty imposed by that act indicated plainly that the course of procedure in respect of which the penalty was imposed was forbidden by law, and that therefore no recovery could be had upon any such instrument in a court of law. Of course I need hardly say that if a thing be forbidden expressly by act of Parliament, that act can no more be contravened by this court than by any other court of judicature in the kingdom.

In that case a distinction is drawn by Mr. Justice Blackburn, which appears to me to be very plain and clear. He says, 5 B. & S. 611, that these instruments "are on their face the acknowledgment of a debt to some particular person, with a covenant to pay it. Such instrument may be useful in this way, — when a company are indebted it may be convenient to make a bond pointing to a particular portion of the debt actually due; it would facilitate the assignment in equity of the debt thus acknowledged to be due, and possibly throw upon the company the onus of showing the non-existence of the debt; but if there be no debt existing, such an instrument cannot create one, nor put the assignee in a better position than the original obligee or covenantee, and the person holding it could not recover upon it if it were shown that it were given gratuitously, or was not authorized by statute."

That being the state of the law, we have to consider the circumstances of this particular case. It is shown, I think, that as regards some of the moneys which have been raised through the medium of Mr. Lewis, some small portions were paid directly to persons who were actual creditors of the company, and so far, I apprehend, there could be little or no dispute as to the right of Mr. Lewis, or of a person claiming through him, to stand in the place of the original debtor, whose debt, being a valid debt, had been so paid.

But with regard to the other debts, they seem to stand in this position: As far as we can see, there were debts for which the company was liable; these debts having to be paid, and the shareholders, in truth, having full and distinct notice that there were these debts, and that there was a large sum to be provided for, the directors proceeded to issue the bonds in question, sanctioned, so far as it could be done,

by the shareholders. I do not think that the direct and special sanction of the company, such as there would be at meetings, would have much to do with the matter, because it would rather depend upon the acquiescence of the company in the steps taken, and the benefit which they derived from the money raised, than upon any direct sanction which they could give to that which was otherwise beyond the powers of the directors.

It appears that Lewis found the money from time to time for the company, first of all by means of bills, and then by these bonds. He stated that he should find greater facilities in raising money by way of bonds, and he was accordingly furnished with these instruments, acknowledging that money was due to him for work and labor done, and with them he raised money. The money it is said was applied first of all in paying off bills, and not directly in paying off the particular debts due to Lewis, but the bills which had been given in respect of debts, or some of them. Then other bonds appear to have been given to pay off those bonds which had been so applied in paying off the bills, until, ultimately, we reach the set of bonds which are in the hands of the present holders.

Then comes the question, whether the present holders can be said to be entitled, under any circumstances, to claim payment upon these bonds. Now, first, it was said by Mr. Jessel that, taking these bonds at the best as a chose in action, even taking them to be that which they really are, a mere acknowledgment of a debt due apparently on a legitimate ground, those who took them must be exactly in the same condition as Mr. Lewis, the original holder, was in; and, therefore, if Mr. Lewis, the original holder, could not recover, on account of the position in which he was placed, with a full knowledge of all the circumstances, and of the manner in which the company had proceeded for the purpose of raising money, then no more could the holders of these choses in action be able to recover, nor could they be entitled to place themselves in a better position than he was in. That would be so if, as between Mr. Lewis and the company, there were really no debt at all, or that this was all a mere sham, and that the directors had not in any way borrowed the money, or authorized the borrowing of the money, and had not been in any way parties to the transaction, or that the company had been in no way parties to the transaction. But if the money was really applied for the legitimate benefit of the company, can it be possible that the company can hold this money as a surplus which is directed to be paid to them under the act, and treat these bonds as constituting no debt whatever by which they are in any way to be affected? They knew that there was a large sum of money which must be raised by some means, and for which the borrowing powers and subscription powers were not adequate, and although the bonds themselves may not be the proper instruments or mode by which that money ought to be raised, still they are instruments issued for the express purpose of inducing

others to give faith and credit to Mr. Lewis, as being a person to whom money was owing for the legitimate purposes of the company. And the money having been *de facto* so applied to the legitimate purposes of the company, is it possible that the company should be allowed to derive the benefit of all the expenditure which has been thus incurred, and claim the surplus for the benefit of the shareholders? Can the shareholders be allowed to say to the bondholders, "It is true that the debts have been cleared off by means of your money; but you are not the persons who have cleared them off, and you are not to receive the benefit of it, for we are the persons to receive the benefit?" The proper course to be taken seems to me to be this: that so far as the company have adopted the proceedings of their directors by allowing these moneys to be raised on the issue of these debentures, and so far as the money raised by the issue of the debentures has been applied in paying off debts which would not otherwise have been paid off, those who have advanced the moneys ought to stand in the place of those whose debts have been so paid off. It is not simply that the bondholders stand as assignees of the debts, which no doubt have not actually been assigned, but it has been represented by the directors that the persons who lent their money on these acknowledgments were lending their money for the purpose of clearing off the debts; in fact, that they were to be put in the position of assignees of the debts.

Therefore, what we propose to do is to make this order: Let the order of the Vice-Chancellor be varied, and declare that the receipt and expenditure by the directors of the company, in payment of any sums recoverable from the company of moneys advanced on or procured by means of the deposit of the alleged bonds, was *pro tanto* an adoption by the company of the transactions; and having regard to the representations contained in the alleged bonds, the moneys so expended constituted debts owing from the company. Inquire whether the company had the benefit of any, and what, expenditure in payment of any sums recoverable from the company, of any and what sums advanced on or procured by means of any and which of the deposits of the alleged bonds, and whether any and which of the sums so expended still remain unpaid by the company. The costs to be as in the original order. No costs of this application, except that the official liquidator will take his costs out of the estate.

SIR G. M. GIFFARD, L. J.: —

I think it of importance to state clearly in this case that it is not intended by the court to throw the slightest doubt on the decision come to in the case of *Chambers v. Manchester & Milford Railway Company* (5 B. & S. 588); and from the course which the matter took in the court below, I think it is also important to say that there is no ground whatever for the argument that a contract or instrument which fails in a court of law by reason of its illegality, can nevertheless be enforced in equity, because money has been paid and received

in respect of that contract. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract, as the price of the relief he asks ; but as to any claim sought to be actively enforced on the footing of an illegal contract, the defence of illegality is as available in a court of equity as it is in a court of law ; and it is for that reason, among others, that the declaration made by the court below has been varied.

Now, as regards the present case, I am of opinion that the evidence was quite sufficient to throw on the company the onus of proof that there was fraud ; but there has been no attempt to give evidence of fraud.

That being so, what the case amounts to is this : Documents were given under the seal of the company. Those documents represented that the company was indebted to Mr. David Leopold Lewis in the amount there stated ; they were given for the purpose of being deposited by him as security for advances to be made ; and if the representations in them had been true, those who advanced their money on the deposit would have been assignees of the debts actually owing from the company to Lewis, and the transaction would have been perfectly legal.

Now, in this case the representations in the alleged bonds are either true or false, or partly true and partly false. In so far as they are true, the transactions are legitimate ; for Mr. Lewis could assign his debt or debts. On the other hand, in so far as they are false, there was fraud on the part of the directors of the company. The representations on the face of the alleged bonds purported to be representations by the company, and induced the loans, and were made in order that the loans might be obtained. In so far, therefore, as the company has had the benefit of those loans for its legitimate purposes, it must be taken to have adopted the transaction. It cannot be heard to say the contrary, and to that extent must be held liable. For these reasons I concur in the order which the Lord Chancellor has read.

Mr. Jessel applied for his costs of the appeal, as his client represented a class, and had been selected in order to obtain a decision, which was absolutely necessary for the administration of the estate.

Their Lordships refused to give the costs, as the appeal had only succeeded in part.

In re NATIONAL BUILDING SOCIETY.

(L. R. 5 Ch. App. 309. 1869.)

THIS was a motion made by special leave of the Court of Appeal to discharge an order of the Master of the Rolls, whereby the National Permanent Benefit Building Society was ordered to be wound up.

The company was formed under the Benefit Societies Act, 6 & 7 Will. 4, c. 32, and commenced business in February, 1865.

The principal object of the company, as stated in the affidavit of Mr. W. Richardson, the secretary, was to provide a safe mode of investment for the funds of another society, called the National Savings Bank Association.

The rules contained the usual provisions for advancing money to members who held shares, and also contained powers of investing money in the hands of the directors; but there was no power to borrow money.

The prospectus, which was issued after the rules had been certified, contained the following announcement: "The directors have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before the time for it regularly arrives, such members of course paying interest on the sums lent, until their turn arrives."

In September, 1865, the Building Society borrowed £400 from the Savings Bank Association, which was forthwith advanced by the directors of the Building Society to a member, on mortgage security; and the mortgage deed was deposited with the Savings Bank, and the contributions of the member paid into the Savings Bank. In January, 1866, the Building Society borrowed a further sum of £900, which was applied in advances to members, and secured in like manner. Shortly afterwards the Savings Bank stopped payment, at which time they had advanced £1300 to the Building Society. The Savings Bank Association was subsequently ordered to be wound up.

On the 13th of July, 1867, the Master of the Rolls made an order to wind up the Building Society as an unregistered company, under Part 8 of the Companies Act, 1862. The order was made on the petition of the official liquidator of the Savings Bank Association, who claimed to be a creditor for £1300 due to that association.

A proof for that sum was afterwards admitted against the estate of the Building Society, and an order for a call was made upon the contributories for payment of it. From this order J. W. Williamson and others, who had been settled on the list of contributories, appealed.

When the appeal was opened before the Lord Justice Giffard, it

appeared that there was no debt due from the Building Society except the £1300 on which the winding-up petition was founded; and as the ground of the appeal was that this debt was invalid, the Lord Justice directed notice of motion to be given to discharge the winding-up order. This having been done, the two applications came on together.

The principal promoters of the Building Society were also promoters of the Savings Bank Association, and J. W. Williamson and some others of the appellants were directors or otherwise office-bearers in both companies.

SIR G. M. GIFFARD, L. J. : —

In point of form, this is an appeal from an order of the Master of the Rolls; but in reality, the point on which I am about to determine this case was never brought fairly or argued before him, and therefore the matter is very similar to an original hearing before me.

The case, when it is examined, is a perfectly simple one: but before I go into it I will dispose of what Sir Richard Bagge said as to the parties who are making this application, and as to the delay. I quite agree that in many cases delay may be of very great importance, — especially if it has been shown that there have been sales of property or other dealings. I do not find in this case that anything of that description has taken place. Then, as regards parties, the nature of the case is such that I do not consider these parties personally disabled from bringing forward the case; more especially as they are not the only contributories on the list, — they being about nine out of a number of thirty-six. But although I think the winding-up order ought not to have been made, I certainly shall give them no costs.

The matter itself is a very simple one. This company is what is called a benefit building society. Until the recent decision of the court in *Laing v. Reed* (L. R. 5 Ch. 4), it was doubted whether, even if you put a limited borrowing power among the rules of a society of this sort, that particular rule would be legal. But what we have here is a limited benefit building society without any power to borrow, and the rules and very nature of that society show that it would be contrary to its constitution to borrow money so as to bind the company, or to make the individual members of the company, as members, liable for borrowing money; because the whole constitution of the society is that the members are to make certain monthly payments, and in consideration of these monthly payments and the fines provided by the rules, they are to receive certain loans.

After the rules had been certified and published, and the nature of the company had been fixed, a prospectus was issued; and by that prospectus the directors chose to say "that they have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before the time for it regularly arrives, such members of course paying interest on the sum lent until their turn

arrives." If we look at the nature of the company, that can only amount to this: that the directors have chosen to pledge their personal liability. It is not a statement that the company were liable, or that any person who was a member of the company was at all bound or was personally made liable in respect of any debt of the company.

This being so, let us see on what ground this winding-up order was made. It was made upon the petition of a creditor, and in order to support that petition the petitioner must have made out that he was a creditor, either legal or equitable; either character would be sufficient. I have already said that this benefit building society could not incur a debt by borrowing money upon loan. Indeed, the contrary has hardly been argued. It could not do so any more than a mining company or any other of the companies which have not authority or power to bind their members by borrowing money. There was no legal debt; and if no legal debt, the next thing to inquire is, whether there was an equitable debt. A class of cases has been referred to on that subject, the principal of which are *In re German Mining Company* (4 D. M. & G. 19), and *In re Cork and Youghal Railway Company* (L. R. 4 Ch. 748); the latter of which was before the Lord Chancellor and myself a short time ago. I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle recognized in old cases, beginning with *Marlow v. Pitfield* (1 P. Wms. 558), where there was a loan to an infant, and the money was spent in paying for necessaries; and in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held that although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a court of equity and stand in the place of those creditors whose debts had been so paid; that is the principle of those cases. It is a very clear and definite principle, and a principle which ought not to be departed from.

Then it is said that the present case is brought within that principle. I do not think it necessary to go through the evidence. Suffice it to say that there is no proof whatever that one sixpence of this money went in payment of any debt which was recoverable against the company. In truth, all this money went for the purpose of loans to members of this company. It is not for me to say whether the Savings Bank Association that lent the money have or have not any right, either as against the property of this company, which was pledged to them, or as against the persons to whom this money was lent. If they had any such rights, they can only be asserted by filing a bill and taking a very different proceeding from that which has been taken here.

I am therefore of opinion that there is no legal or equitable debt. The winding-up petition is in the nature of an execution against the company. Whether the parties may or may not themselves be personally liable, or however much I may disapprove of their conduct, they are not to be precluded from showing that the title of the creditor to sustain a winding-up petition totally fails, as it does in this case. The consequence is, that the winding-up order, the proof of the debt, and the order for the call must all be discharged. But, as I said before, the conduct of these parties has been such as to disentitle them to any costs.

WENLOCK v. THE RIVER DEE COMPANY.

(*L. R. 19 Q. B. Div. 155. 1887.*)

APPLICATION to vary the report of a special referee.

The facts were as follows: An action has been brought by the plaintiffs as executors of the late Lord Wenlock, deceased, to recover from the defendants the amount of moneys advanced by the testator to them. The defence set up was in substance that the moneys had been borrowed by the company *ultra vires*. It appeared that the testator had advanced large sums of money to the defendant company. He had also paid off a previous advance of £56,000 from the Rock Insurance Company to the defendants, taking an assignment of that debt and a fresh covenant for repayment to himself by the defendants. The judge at the trial gave judgment for the plaintiffs for the full amount of the advances by the testator to the defendants. Upon appeal the Court of Appeal varied his judgment, and, by order dated May 9, 1883, ordered that judgment should be entered for the plaintiffs for the amount of £25,000 (that sum being the full amount which the company had power to borrow) and interest; and also that in addition thereto the plaintiffs should recover judgment for so much and so much only of the sums advanced as was employed in payment of any debts or liabilities of the company properly payable by them, and interest from the respective dates of such employment; and that it should be referred to a special referee to inquire as to and report the amount of the interest payable on the said sum of £25,000 as aforesaid, and the amount of the parts of the said sums so employed as aforesaid and the interest thereon. On appeal to the House of Lords they affirmed the decision of the Court of Appeal (10 App. Cas. 354). The special referee held an inquiry under the above order, upon which inquiry counsel were heard and witnesses examined, and he thereupon made a report. The plaintiffs now applied to the Court of Appeal to decide certain questions of law raised by such report, and to vary the report in certain respects;

and there was a cross application to vary such report by the defendants. Various questions arose on the report with regard to items allowed or disallowed by the referee, which the plaintiffs claimed to have allowed, under the order of May 9, 1883, but which the defendants contended should be disallowed.

The questions raised were briefly as follows: In addition to the portions of the moneys advanced which had been applied to the payment of debts or liabilities of the company existing at the time of the respective advances, the referee allowed, subject to the opinion of the court, items in respect of portions of the moneys advanced which had been applied in payment of debts and liabilities of the company which arose subsequently to the respective advances, whereas the defendants contended that he should have disallowed such items, and allowed only items in respect of moneys advanced which had been applied in payment of debts and liabilities existing at the date of the advances.

Further questions also arose as after mentioned: Certain debts and liabilities of the defendant company had been paid by their bankers. The sums so paid by the company's bankers were paid to them out of the sums advanced by the Rock Life Insurance Company or Lord Wenlock. The plaintiffs claimed to be allowed by the referee the amounts so paid, whether the debts or liabilities accrued before or after the advances by the bankers or those by the Rock Company or Lord Wenlock.

A portion of the sums advanced to the defendants by the Rock Company or by Lord Wenlock had been paid over by them to a Mr. Green, who was a managing director and agent of the company, out of which he had made disbursements for the company in the course of their business, e. g., for wages, work done, etc.; some of such disbursements being in respect of debts incurred before, and some in respect of debts incurred after the receipt of the money by Green. The plaintiffs also claimed, under the order of May 9, 1883, to be allowed the amount of the sums so disbursed.

The plaintiffs further claimed to be entitled to be allowed under the order, in addition to the £25,000 for which they had judgment as being validly borrowed, the amount of all debts and liabilities of the company paid out of that sum of £25,000.¹

Rigby, Q. C. and R. O. B. Lane, for the plaintiffs. The terms of the order of May 9, 1883, include all debts or liabilities of the company paid out of the advances of the plaintiffs' testator whether existing at the date of the advances or not. The doctrine of equity by which the lender or *quasi*-lender of money borrowed by a company *ultra vires* is subrogated to the rights of a creditor of the company whose debt has been paid off out of the money so borrowed, is not confined to cases where the debt was in existence at the time of the

¹ A part of the report is omitted.

advance, but applies to all debts and liabilities of the company paid off out of the money so borrowed whether accruing before or after the advance. The principle upon which this equity depends is discussed in the case of *Blackburn Building Society v. Cunliffe, Brooks & Co.* (22 Ch. D. 61; also 9 App. Cas. 857, not on this point), and in the judgments in that case there is no trace of the limitation of the doctrine suggested by the defendants. If the company have had the benefit of the money so advanced, by its application to debts or liabilities validly incurred by the company and which they were bound to meet, the person who has advanced the money is then subrogated to the rights of the creditors so paid off. The principle is that equity will follow the money, which remains in equity the property of the *quasi*-lender, and wherever it can find any security or piece of property representing the money the *quasi*-lender is entitled thereto; and therefore, so far as the money has been applied for the benefit of the company, it is to be treated in equity as existing in the coffers of the company, and must be repaid, not as money borrowed, but as money which still belongs in equity to the lender. The test is, whether the transaction has added to the liabilities of the company, and, so far as the advance has been applied to debts or liabilities which the company has validly incurred, whether before or after the advance, the company's liability is not increased.

The same principle applies to the cases where debts and liabilities of the company were paid by the company's bankers, and the bankers were paid or repaid the amounts so paid by them out of the moneys advanced by the plaintiffs' testator, whether such debts and liabilities accrued before or after the advances by the plaintiffs' testator or the advances by the bankers. The bankers would have an equitable right to be subrogated to the rights of the creditors so paid off, and such equitable right is a liability of the company which would come within the terms of the order of May 9, 1883, and the doctrine above alluded to. The same reasoning covers the sums paid to Green out of the advances by the plaintiffs' testator. These sums were applied to meet liabilities of the company, and the company's liabilities were not thereby increased; equity will follow the money into debts or liabilities of the company whether its application to such debts or liabilities is direct or through many hands and steps. It is further contended that by the express terms of the order of the 9th May the plaintiffs are entitled to any portion of the £25,000 validly advanced which has been applied to the payment of debts and liabilities of the company, in addition to their judgment for the £25,000 as money legally borrowed.

[They cited *In re Blackburn Benefit Building Society* (24 Ch. D. 421); *Walton v. Edge* (10 App. Cas. 33); *Blackburn Benefit Building Society v. Cunliffe, Brooks & Co.* (29 Ch. D. 902); *Knatchbull v. Hall* (13 Ch. D. 696).]

Sir Horace Davey, Q. C., and A. R. Kirby, for the defendants. The

order of May 9, 1883, must be construed with reference to what the court may consider to be the correct doctrine of equity as to subrogation in such cases. It is contended that the view of the doctrine on the subject contended for on behalf of the plaintiffs is far too wide and sweeping. The argument for the plaintiffs amounts to this: viz., that the rule which forbids borrowing money *ultra vires* is practically abrogated wherever it can be shown that money so borrowed was applied to the purposes of the corporation, that is to say, that as between the directors and the shareholders it was not misapplied. The doctrine of *Blackburn Benefit Society v. Cunliffe, Brooks & Co.* (22 Ch. D. 61), only applies to debts and liabilities existing at the time of the advance which have been satisfied out of it. So far as such debts and liabilities are concerned, it is clear that there has been no increase of the liability of the company. It is merely a substitution of one creditor for another. Altogether different considerations arise when the money borrowed is applied to payment of a liability subsequently incurred; and which might never have been incurred if the money had not been borrowed. The extension of the equitable doctrine now sought to be made would have the most dangerous effects, as enabling companies practically to borrow without limit.

[LORD ESHER, M. R. : — But even if the doctrine be limited to debts previously incurred, the company have only to postpone the borrowing until after they have incurred the liability.]

The true principle is, that there is supposed to have been an assignment of the debt paid out of the advance to the person making the advance; that the *quasi*-lender really pays his money to the creditor and takes an assignment from him of the debt; but that supposed assignment is only applicable to the case of debts in existence at the time of the advance. In the previous cases on the subject the question arose with regard to existing debts.

[They cited on this point *In re Cork and Youghal Ry. Co.* (L. R. 4 Ch. 748); *In re German Mining Co.* (4 D. M. & G. 19).]

With regard to the other matters, viz., the moneys paid by the defendants' bankers in respect of debts of the company, and repaid out of Lord Wenlock's advances and the moneys paid to Green, similar questions arise. It is contended with regard to these items that the equity relied upon by the plaintiffs is confined to sums directly applied by the company, or their agent, out of the moneys borrowed, in satisfaction of existing debts or liabilities of the company. An equity that the bankers might have in respect of sums advanced by them for the payment of debts or liabilities is not a debt or liability within the order of May 9, 1883. It is submitted, also, that the equity to be subrogated to the rights of a creditor cannot be carried beyond persons to whom the money is directly paid in the first instance by the company or their agent; and that, unless such person is a creditor, the equity does not arise. Consequently the amounts disbursed by Green in respect of debts accruing after the

receipt of the money by him must be disallowed, on the ground that, when the money was received by him, Green was not a creditor of the company in respect of these amounts. It would lead to endless inquiries and difficulties if the money had to be traced through several persons to see whether it ultimately was applied to the company's purposes.

It is clear that the plaintiff's contention as to the debts paid out of the £25,000 validly borrowed cannot be right, for the plaintiffs would be getting the same thing twice over if it were; and the terms of the order rightly construed exclude such contention. The money, being validly borrowed, was, when it got into the defendants' hands, the defendants' own money, and the equity to subrogation to the rights of the creditor cannot apply, for it depends on the doctrine that equity will treat the money borrowed as still remaining the *quasi-lender's* property, which only applies when the money is borrowed *ultra vires*.

Cur. adv. vult.

The judgment of the Court, (LORD ESHER, M. R., FRY and LOPES, L. J.J.) was delivered by

FRY, L. J. : —

The questions which now require determination in this case arise from the application of the order of this court of May 9, 1883, to the facts as found by Mr. Robertson, the special referee named in the order.

By that order it was directed that judgment should be entered for £25,000 and interest, and in addition thereto for so much and so much only of the sums advanced to the defendant company by the Rock Life Assurance Company and Baron Wenlock as was employed in the payment of any debts or liabilities of the defendant company properly payable by them, with interest from the respective dates of such employment. It appears that some of the moneys were applied in payment of debts and liabilities properly payable by the company at the date of the advances, and some in payment of debts and liabilities which arose or became properly payable at dates subsequent to the advances. The defendants contend that only the advances employed in payment of debts and liabilities actually payable at the date of the advance can be brought within the operation of the direction in the order. The plaintiffs contend that all these advances are within the direction, and that the date of the accruer of the liability is immaterial. We are of opinion that the plaintiffs' contention ought to prevail. We are not at liberty to travel beyond or review the declaration contained in the order of May 9, 1883, which is binding on us not only as a decision of this court but by reason of its affirmation by the House of Lords; and in our opinion the order rightly bears the wider construction. It is silent as to any limit of time within which the liabilities are to accrue, or within which they are to be paid; and by fixing the respective dates of the

employment of the sums as the periods of time from which interest is to run, it seems to indicate that the date of the employment, and not of the advance, is the material one. If the court had intended any such limitation of the inquiry as that now contended for by the defendants, we think that it would have found expression, if not in the formal order, at any rate in the oral judgments, but we can find no trace of it.

But we go further and say that in our judgment the equity in question knows of no such limitation as that suggested. This equity is based on a fiction, which like all legal fictions, has been invented with a view to the furtherance of justice. The court closes its eyes to the true facts of the case, viz., an advance as a loan by the *quasi*-lender to the company, and a payment by the company to its creditors as out of its own moneys; and assumes on the contrary that the *quasi*-lender and the creditor of the company met together, and that the former advanced to the latter the amount of his claim against the company and took an assignment of that claim for his own benefit. There is no reason that we can find for supposing that this imaginary transaction between the *quasi*-lender and the creditor was confined to the day and hour of the advance of the money to the company; in the coffers of the company the money really advanced as a loan is still thought of by the court as the money of the *quasi*-lender; and the court, as the author of the benevolent fiction on which it acts, can fix its own time and place for the enactment of the supposed bargain between the two parties, who have met and contracted together only in the imagination of the court. The true limit of the doctrine we conceive to be stated by Lord Selborne, L. C., in delivering the judgment of this court in the case of the *Blackburn Building Society v. Cunliffe, Brooks & Co.* (22 Ch. D. 61, at p. 71). "The test," said he, "is, has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is merely for the convenience of payment a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity: and, if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing." Now the payment of *bona fide* liabilities arising or accruing subsequently to the actual date of the advance has in no way really added to the liabilities of the company, and therefore in no way

transgresses the boundaries of the doctrine as laid down by this court in the case to which we have referred. Sir Horace Davey forcibly warned us of the danger of the proposition which we have laid down, and said that it would afford to companies a facile means of evading the limit of their borrowing powers. But the danger appears to us imaginary. We do not think that capitalists will be found knowingly and willingly to advance money in the hope of recovering it on the ground of some future subrogation to the future rights of some future creditor. The doctrine has rarely, if ever, done more for any one than snatch a few brands from the burning. In the present case the utmost extension of the doctrine will leave the plaintiffs heavy losers.

The next question arises in this way. Certain creditors of the company were paid by the bankers of the company; these bankers were paid by the advances of the Rock Company or Lord Wenlock: are the plaintiffs entitled to be subrogated to the rights of these creditors? It appears to us that they are entitled to be so subrogated; that the right of the bankers, which they obtained by subrogation from the creditors whom they paid, was an equitable liability of the company; and that for the purposes of this inquiry it is immaterial whether the rights of the creditors accrued before or after the advances by the bankers, or the Rock Company, or Lord Wenlock.

A similar question was discussed as to a Mr. Green, who was a managing director and agent of the company, and to whom payments were made by the company out of which he made disbursements for the company. It was argued that the inquiry must stop at the first payment by the company. But we can find no ground for this contention. To follow the money into a debt or liability of the company does not add to the liabilities of the company, whether that pursuit be through one or more hands and by one or many steps.

It is conceded that under the order of May 9, 1883, the plaintiffs are entitled to the £25,000, and to so much of the sums advanced beyond the £25,000 as was expended in satisfaction of the debts and liabilities of the company. The plaintiffs contend that they are entitled, in addition to all this, to so much of the £25,000 itself as was so expended. They contend that this is given to them by the express terms of the order, and that the point, therefore, is not open to further consideration. We do not so read the order; for it appears to us that the £25,000 is dealt with separately, in the first place, and that the rest of the order deals with sums in every respect outside of and beyond the £25,000. The words in the order "in addition" exclude, in our opinion, all further consideration both of the borrowing of the £25,000 and of its application. And in our opinion this is right in point of reason and principle: for the £25,000, having been validly borrowed, became part of the moneys of the company as much as the original subscriptions of the members or the produce of sales of its lands; and no application by the company

of its own moneys to the payment of its own debts can be conceived of as a transaction between a *quasi*-lender to the company and the creditors of the company, or lead to a subrogation of the creditors' rights to the stranger. If the plaintiffs were to be subrogated to the rights of those creditors who were paid with the £25,000, we do not see why they should not be subrogated to the rights of every creditor paid by the company with its own moneys from any source whatever.

The matter must be referred back to the referee with the following declarations, and the costs of the hearing, which has led to partial success and failure on each side, must be costs in the cause. [Then followed formal declarations as to the mode of taking the account under the order of May 9, 1883, in accordance with the principles laid down by the judgment of the court. The substance of such declarations, so far as material to this report, was that the plaintiffs were entitled to credit in respect of all debts and liabilities of the company which had been paid out of the sums advanced by the Rock Insurance Company or by Lord Wenlock, whether such debts and liabilities existed at the time of or accrued subsequently to the dates of the respective advances; that the plaintiffs were entitled to credit in respect of all debts and liabilities of the company which, having been paid by Messrs. Herries & Co., (the defendants' bankers) or others, had been paid or ultimately repaid to them out of any sums advanced by the Rock Insurance Company or by Lord Wenlock, whether such debts or liabilities existed at the time of or accrued subsequently to the dates of the respective advances by the Rock Insurance Company or Lord Wenlock, or the dates of the payments by Messrs. Herries & Co. or others; that the plaintiffs were entitled to credit in respect of all debts and liabilities of the company paid by Green out of moneys paid to him by the company, whether such debts or liabilities existed at the time of or accrued subsequently to the receipt by him of the moneys out of which he paid them; and that the plaintiffs were not entitled to be allowed anything in respect of debts or liabilities of the defendants paid out of the £25,000 validly borrowed.]

Judgment accordingly.

AMERICAN UNION TELEGRAPH COMPANY v. THE UNION PACIFIC RAILWAY COMPANY.

(1 *McCrary*, 188. 1880.)

MOTION for injunction.

McCRARY, CIRCUIT JUDGE: —

By act of Congress, approved July 1, 1862, and acts amendatory thereof, the Union Pacific Railroad Company was created a corpora-

tion with power to "lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph, with appurtenances," from the Missouri River, through Nebraska and Wyoming, to a junction with the Central Pacific Railroad in Utah. Under this authority the said railroad company built, and early in 1869 completed, its railroad and telegraph over said route. The plaintiff is a corporation organized under the laws of the State of New York.

On the first day of September, 1866, the plaintiff and said Union Pacific Railroad Company entered into a contract, whereby, among other things, the railroad company agreed to demise and lease to plaintiff "all its telegraph lines, wires, poles, instruments, offices, and all other property by it possessed, appertaining to the business of telegraphing, for the purpose of sending messages and doing a general telegraphic business; to have and to hold for and during the whole term of the charter of the party of the first part (the railroad company) and any renewals thereof, subject to the rights of the United States as set forth in the charter of the railroad company, and on the condition that the plaintiff would faithfully and fully perform all the duties imposed or to be imposed upon the railroad company by its charter or by the laws of the United States."

On the twentieth day of December, 1871, a supplemental agreement was entered into between said parties, by which certain changes were made in the original contract. Among other things, it was provided in said contracts that the railroad company should receive from plaintiff, in consideration for the same, 17,800 shares of the capital stock of the plaintiff corporation (the Atlantic and Pacific Telegraph Company), which stock the railroad company received and applied to its own use. Said contracts were duly performed on both sides until the twenty-seventh day of February last, when the railroad company assumed, of its own motion, to rescind the same, and to resume possession and control of the property; for which purpose its agents cut the wires running from the general offices of plaintiff, for commercial business, at Omaha, and severed said offices from the main line. It is charged in the bill that this was done for the purpose of giving the business of said line at Omaha, and all the advantages thereof, to the defendant, the American Union Telegraph Company, a competitor and rival of plaintiff in the business of telegraphing.

The Union Pacific Railroad Company, by consolidation with another company, has become the Union Pacific Railway Company, by which name it is sued.

The prayer of the bill is, among other things, for an injunction to restrain the defendants from disregarding the two contracts above mentioned, and from interfering with the property covered thereby, except as in said contracts provided, and from preventing the plaintiff from reconnecting the wires so as to restore them to their original condition before the same were cut. On the first of March it

was ordered that the application for injunction be heard before me, at chambers at St. Louis, on the sixth of April, 1880, and in the mean time a preliminary injunction was allowed.

The defendants have answered fully, and numerous affidavits have been filed. Upon the record thus presented counsel have been fully heard, both orally and by printed briefs.

The Union Pacific Railway Company, defendants, admit the cutting of the wires as charged, as well as their purpose to disregard the contracts, and retake the telegraph lines and property, and in justification allege that said contracts were beyond the power of the company to make, contrary to public policy, and in violation of the acts of Congress chartering the Union Pacific Railroad Company, and that they are therefore void. The question of the validity of these contracts is the first to be considered.

1. The rules by which this question is to be determined are now well settled, at least in the Federal courts. They have been clearly stated by the Supreme Court in the recent case of *Thomas et al. v. The West Jersey R. Co.* (101 U. S. 71). From the opinion in that case, delivered by Mr. Justice Miller, I make the following extracts, as laying down the law by which I must be guided: —

“We take the general doctrine to be in this country; though there may be exceptional cases and some authorities to the contrary, that the powers of a corporation organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others. . . .

“There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires*, as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

“That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions — which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes — is a violation of the contract with the state, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in the case of *The York & Maryland Line Railroad Co. v. Winans* (17 Howard, 30). The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the Legislature of that State. The stock in it

was taken by a Maryland corporation, called the Baltimore & Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling-stock.

"In reference to this state of things, and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this court said: 'This conclusion [argument] implies that the duties imposed upon the plaintiff [in error] by the charter are fulfilled by the construction of the road, and that, by alienating its right to use and its power of control and supervision, it may avoid further responsibility. But these acts involve an overturn of the relations which the charter has arranged between the Legislature and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse required for public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the Legislature. *Beman v. Rufford* (1 Simon N. S. 550); *Winch v. B. & L. R. Co.* (13 Law and Equity, 506).'

"And in the case of *Black v. Delaware & Raritan Canal Co.* (7 C. E. Green, N. J. Eq. 390), Chancellor Zabriskie says: 'It may be considered as settled that a corporation cannot lease or alienate any franchise, or any property necessary to perform its obligations and duties to the state, without legislative authority.' For this he cites some ten or twelve decided cases in England and this country."

The case in which these propositions of law were announced was this: A New Jersey railroad corporation, without express authority, undertook to lease to another company for twenty years its railroad, with all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls. The contract or lease was confirmed by a vote of the stockholders. The lessor was authorized to cancel the lease upon giving three months' notice, but in that event was to be liable to pay the damages incurred by the other party by reason of such action. Under this provision the railroad company ended the contract, and resumed possession of the leased road. The suit was by the lessee for the damages provided for, and it was held that no recovery could be had because the contract was *ultra vires*. It remains to apply these principles to the case in hand.

2. It is certain that the contracts in question amounted to a lease, or alienation, by the Union Pacific Railroad Company, of property which was necessary to the performance of its obligations and duties to the government, and to the public.

In my judgment the Act of July 1, 1862, and its amendments, must be construed as chartering the Union Pacific Railroad Company, and

devolving upon it, individually and personally, the power and duty of constructing, operating, and maintaining a line of telegraph, as well as a railroad. This is made manifest by the consideration that the government endowed the corporation with large grants of land and bonds, to aid in the construction of these lines, and imposed upon the company the duty of reimbursing the government from the earnings of the road and telegraph line. Section 6, act of 1862. It is also clear from the language of the first section of said act, which empowers the corporation "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph, with the appurtenances," that the power conferred was personal, and carried with it a duty and an obligation which could not be transferred.

The very same language which authorizes the construction and operation of the telegraph line also authorizes the construction and operation of the railroad, and the property in the one is as necessary to the performance of the public duties of the corporation as that in the other. The charter of the company, with the amendments, considered as a whole, was manifestly intended to create a corporation which should be personally amenable to the government, in the exercise of the powers conferred, and which should in a *quasi* public capacity perform the duties imposed, and render an account of its earnings.

The purpose was not to authorize the construction of a line either of railroad or telegraph to be thereafter sold, leased, or transferred to other parties, leaving the government to the chances of securing from or through the lessee or vendee its proportion of the earnings. This is made still more clear by the provisions of the Act of June 20, 1874, amending the charter, which imposes upon the company and its officers and agents penalties for a failure to operate or use said railroad or telegraph, so far as the public and the government are concerned, as one continuous line, and which gives a right of action to any party aggrieved, "in case of failure or refusal of the Union Pacific Railroad Company, or either of said branches, to comply with this act or the acts to which this is amendatory."

I conclude that the charter of the Union Pacific Railroad Company devolved upon it the duty of constructing, operating, and maintaining a line of telegraph for commercial and other purposes, and that this is in its nature a public duty. I am further of the opinion that, by the provisions of the contract of September 1, 1866, and of December 20, 1871, the railroad company undertook to lease or alienate property which was necessary to the performance of this duty. The consideration for these contracts is declared to be "the demise of their telegraph lines, property, and good-will, and of the rights and privileges, in the manner hereinafter specified," etc.; and the property demised by the railroad company is "all its telegraphic lines, wires, poles, instruments, offices, and all other property by it possessed, appertaining to the business of telegraphing, for the purpose of sending mes-

sages and doing a general telegraph business." The lessee was to hold during the whole term of the charter of the railroad company and any renewal thereof. There is inserted a stipulation that the lessee shall perform all the duties imposed or that may be imposed upon the railroad company by their charter or by the laws of the United States. But, as already intimated, I do not think this latter clause makes the contract good. The railroad company was not at liberty to transfer to others those important duties and trusts which it, for a large consideration, and for a great public purpose, had undertaken to perform. It certainly could not divest itself of these powers and duties, and devolve them upon the plaintiff, without express authority from Congress.

3. But if the contracts in question are not *ultra vires*, by reason of the transfer of property necessary to the performance by the railroad company of its public duties, they are so because they attempt to transfer certain franchises of the said company. The right to operate a telegraph line, and to fix and to collect tolls for the use of the same, is, to say the least, the most valuable part of the franchise conferred by Congress upon the railroad company, as a telegraph company. This right is alienated by a clear and unequivocal assignment or transfer from the railroad company to the plaintiff. Without discussing other features of the contracts, I am compelled to hold that this feature is alone sufficient to render them in excess of the corporate power of the company.

4. This brings me to the question whether the railroad company can be permitted to rescind the contract, and on its own motion to take possession of the lines, offices, and property, without first returning the consideration received therefor from the plaintiff. As already stated, the railroad company received from the plaintiff, in payment for the property and rights agreed to be transferred by said contracts, 17,800 shares of the capital stock of the corporation plaintiff. There is a dispute as to the value of the stock, but I believe it is not placed by any one of the deponents at less than \$150,000, while some of them place it at a much higher sum.

No case has been cited in argument, nor have I been able to find one, which holds that a court of equity, having jurisdiction of the parties to "and the subject-matter of" an illegal contract, should require one of such parties to give up what he has received under it, without requiring the other to do the same. Many cases hold that a corporation which has made a contract *ultra vires*, which has not been fully performed, is not estopped from pleading its own want of power when sued upon such contract; but that doctrine does not apply to a case where a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return

the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other. As the parties and the subject-matter are now before the court, it is the duty of the court, as far as possible, to place them in *statu quo*. It has been held that even in cases at common law, a contract *ultra vires*, made between a corporation and another person, and under which the corporation has received value, which it retains, will be so far enforced as to estop the corporation from refusing payment on the ground of its own want of power. *Bradley v. Bullard* (55 Ill. 417).

And in the case of *Thomas v. R. Co.*, (Supreme Court U. S.) already quoted from at length, Mr. Justice Miller, upon this point, says: "There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. And in regard to corporations, the rule has been well laid down by Chief Justice Comstock, in *Parish v. Wheeler* (22 N. Y. 404), that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

The present case, like the New Jersey case in which these remarks were made, is one on which the contract has been executed in part, but it differs from that case in one important particular. In the New Jersey case the court say that, "so far as it [the contract in question] has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

If that case had been in equity, and it had appeared that the railroad company had received in advance the full consideration for the whole term of the lease, which it retained, while asking to be relieved from the contract, I have no doubt the court would have said: "You must come into this tribunal with clean hands; you must do equity before you can seek the aid of a court of conscience."

The contention of the railroad company is that it should be permitted to take possession of the property in controversy without process or legal proceedings. While I am clear that the contracts under which the property is held by plaintiff are *ultra vires*, there is a dispute upon that subject, and such a dispute as in my judgment cannot be determined by the railroad company of its own motion.

The right of rescission does not justify the railroad company in taking possession except by lawful means. The plaintiff has a right

to be heard upon issue joined in a proper proceeding before being ejected. The present question is not whether the contracts should be rescinded and the property restored to the railroad company, but whether this should be done by the railroad company upon its own motion, and in a way to deprive the plaintiff not only of a hearing in the regular course of this court, but also deprive it of the right of appeal.

It is one thing for me to hold that the contracts are in my judgment *ultra vires*, and quite another to say to the railroad company, "You may turn the plaintiff out and take possession without giving it a day in court."

An injunction will often be granted to restrain a party from deciding for himself a question involving controverted rights, and to compel him to resort to the courts, and this without regard to the absolute merits of the controversy. It is enough that there is a controversy to justify a court of equity in directing that it be settled by legal proceedings. *Eckelkamp v. Schroeder* (45 Mo. 505); *Varick v. New York* (4 Johns. Ch. 53); *Dudley v. Trustees* (12 B. Mon. 610); *Farmers v. Reno* (53 Pa. St. 224); *Sunsing v. Steamboat Co.* (7 Johns. Ch. 162).

The principle settled by these and many other cases is that a party who is in actual possession of property, claiming under color of title, is not to be ousted, except by the means provided by law, and such a possession the court will protect by injunction from disturbance by any other means. For this reason, therefore, as well as upon the grounds above stated, I am clearly of the opinion that the railway company cannot be permitted to oust the plaintiff from possession without process.

The injunction, heretofore granted, will be so far modified as to make it clear that the railroad company is at liberty to institute legal proceedings, either by cross-bill in this case or otherwise, to cancel and set aside the said contracts upon a return of the consideration, and to settle and adjust, upon principles of equity, the accounts between the parties.

BANK v. NILES.

(*Walker, (Mich.)* 99. 1842.)

THE bill in this case was filed to obtain the specific performance of a contract entered into by the parties on July 1, 1839. The complainants bound themselves to convey to defendant, within sixty days thereafter, certain real estate described in the contract, and to obtain from one Jeremiah H. Pierson a good and sufficient deed of the Rochester Mill property, and convey to him three undivided fourth parts of it; and, in case a mortgage should be given by them

on the mill property, for the purchase money, they covenanted to pay the incumbrance, and cause it to be discharged within five years. The defendant, in return, agreed to execute a mortgage to complainants for the purchase-money to be paid by him, amounting to \$28,000, on the property to be conveyed, and on certain other property named in the contract. Within the sixty days, complainants purchased and obtained a deed of the mill property from Pierson, for \$5,000, which they paid and secured to be paid to him. They then made out and executed a deed to defendant for three-fourths of it, with the other property they were bound by the contract to convey to him, and were ready and willing to perform their part of the contract.

The defendant demurred.

THE CHANCELLOR: —

The first objection made by defendant is, that the bank had no authority under its charter to make such a contract as that disclosed by the bill; and that this court will not, for that reason, decree a performance of it.

The third section of the act of incorporation concludes with these words: "The President, Directors, and Company of the Bank of Michigan shall be in law capable of purchasing, holding, and conveying any estate, real or personal, for the use of the said corporation." By the ninth section it is provided, "That the lands, tenements, and hereditaments, which it shall be lawful for the said corporation to hold, shall be only such as shall be required for its accommodation in relation to the convenient transacting of its business, or such as shall have been *bona fide* mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon the judgments which shall have been obtained for such debts."

The power given by the third section to purchase, hold, and convey real estate, is limited by the ninth section to specific objects. Taking the two sections together, the intention of the Legislature is clear, and but one construction can be given to them. It was intended that the corporation should have power to purchase real estate for the convenient transaction of its business, or to secure a debt; but not for the purpose of investing its capital, or of speculating in lands, or of buying them merely to sell again. I have no doubt this is the true construction of the charter. A different construction would enable the corporation to buy and sell real estate at pleasure, and render entirely nugatory the restriction imposed by the ninth section. The corporation, then, exceeded its powers, and contracted to do what it had no right to do under its charter, when it covenanted to purchase the mill property of Pierson, and convey three-fourths of it to defendant. It was an agreement to buy real estate of one individual to sell to another; a contract to violate its charter, by embarking in a business with which it had no right to meddle; — a contract which, for that reason, this court cannot, con-

sistently with equitable principles, assist the complainants to carry into execution. Equity will aid no one in doing that which is unlawful.

The purchase of the mill property of Pierson for \$5,000, after the contract was made, makes no difference; for it was done under the contract, and in part performance of it. The case of *The Banks v. Poitiaux* (3 Rand. R. 136) goes no further than this, that the corporation, having purchased the land, might make a deed of it; not that it might make a contract with A. to purchase lands of B., and sell them to A., which is the case before me.

It is unnecessary to decide the other questions made on the argument.

Demurrer allowed.

(This case was affirmed on appeal.)

NASSAU BANK v. JONES.

(95 N. Y. 115. 1884.)

APPEAL from a judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 30, 1882, affirming a judgment in favor of defendants, entered upon a decision of the court at Special Term.

This action was brought against the defendants as executors of one Daniel Jones, to compel them to transfer to the plaintiff certain shares of stock and bonds of the Denver & Rio Grande Railway Co., or the proceeds of such thereof as may have been disposed of, which are alleged to have been subscribed for by the decedent as agent of the plaintiff, and to account to the plaintiff for all profits derived from the same, and received either by said Jones or his executors.

RUGER, C. J. : —

The question involved in this case, as we regard it, is the right of a banking corporation chartered under the laws of this State to subscribe for the stock of a railroad corporation.

In the spring of 1879, the Denver and Rio Grande Railroad Company, being a corporation organized to construct railroads in Colorado and adjoining territories, with the view of raising money to extend its lines, published a circular, whereby it proposed in substance to issue \$5,000,000, of its bonds, in sums of \$1,000 each, payable thirty years after date, with annual interest at seven per cent in gold, secured by mortgage upon its property; and to deliver one of such bonds, together with five shares of its capital stock of the par value of \$100 per share, to each and every person who should advance thereon the sum of \$900, reserving, however, the privilege to the railroad company of withdrawing the proposition, when it should have received subscriptions to said loan to the amount of \$3,000,000.

This proposal was favorably received, and the loan was subscribed for by citizens and corporations in various States of the Union, to an amount greatly exceeding the sum required by the railroad company. Among others the defendant's testator, one David Jones, subscribed for, and was awarded \$90,000, of such contemplated loan. It is claimed by the appellant, and was found as a fact by the trial court, that Jones undertook, by the authority and for the benefit of the plaintiff, to contract with this railroad company, for a loan, under its proposal, in the name of the plaintiff, to the extent of one-half of the amount which should be allotted to him; and by this action the appellant seeks to recover, from Jones' executors, among other things, the profits claimed to have been made by him upon its share of the transaction. The right to maintain the action seems to depend upon the power of the bank to enter into the proposed contract, for if it had no lawful authority to make such a contract, it could not become liable to Jones upon its obligation to take and pay for the property contracted for; and consequently there would be no consideration for Jones' undertaking to subscribe for the benefit of the bank. Not only this, but the bank could not, by suit, enforce against any one an executory contract which it was unauthorized by its charter to make.

It becomes necessary, therefore, to inquire into the nature of the proposed contract, and the legal capacity of the plaintiff to transact business.

The proposition of the railroad company contemplated either a loan of money, or a sale of its stock and bonds; and the view we take of the case does not render it material to determine which construction should be given. By whatever name it be called, the transaction contemplated that its subscribers should become the legal owners of the certain stock and bonds thereby offered to be disposed of.

If it be regarded as a loan, the subscriber would receive the bonds with their mortgage security, as an evidence of the company's indebtedness to him; and the stock as a *bonus* to induce the making of the loan. On the other hand, if it be considered as a purchase of the stock and securities of the railroad corporation, the subscriber becomes the owner of such stock and bonds upon complying with the conditions of the proposition.

In either event he becomes the absolute owner of the property proposed to be delivered in exchange for the money advanced, and acquires all the rights and privileges, and subjects himself to all the liabilities, of such proprietorship.

The acquisition by the railroad of a new class of stockholders was as much a part of the scheme as the creation of a debt; and its proposition to loan money could not be availed of, under the terms of the offer, without necessarily involving an acceptance of the privileges, and incurring the liabilities of a stockholder. The offer of this stock was a material part of the proposition, and was undoubtedly largely

relied upon as an inducement to investors. The increase of creditors and stockholders would proceed *pari passu*, under this scheme; and the subscribers to the loan might, in case of the company's insolvency, eventually, as the owners of its stock, be compelled to contribute to the payment of its debts.

It is clear that a banking corporation cannot enter into a contract of this character, unless it has authority under its charter to become a subscriber for the stock of railroad corporations, and thereby assume the obligations to which stockholders are subject by statute. *Adderly v. Storm* (6 Hill, 624).

It is scarcely conceivable that it can be seriously urged that a moneyed corporation, having under its charter the right to transact a banking business only, may legally engage, as a corporation, in the construction of railroads, or in furnishing money for such an object, in exchange for the stock of a railroad corporation, and yet, when this case is analyzed and stripped of its irrelevant details and circumstances, we cannot see why this is not precisely what was attempted by the plaintiff.

This action is brought upon the theory that Jones was, in making the subscription in question, the agent of the plaintiff, and it thereby seeks to charge the defendants, as Jones' executors, with a trusteeship for its benefit, of a large quantity of the stock of the railroad corporation, for which it asks the defendants to account to it, as the owners thereof.

The complaint assumes, that the plaintiff, in 1879, became the equitable owner of a large amount of such stock, acquired by virtue of an original subscription therefor, made with the company issuing the stock; and that it has ever since been the equitable owner, and is now entitled to demand the immediate delivery and possession of such stock.

Assuming the validity of the contract relied upon by the plaintiff, it has been for several years a stockholder in the railroad company, and has thereby become answerable as such stockholder, for a moiety at least, of any sum which Jones might be required to pay, through any statutory liability for the debts of the corporation. *Stover v. Fluck* (30 N. Y. 64).

Even a cursory view of the provisions of the statute under which the plaintiff was organized, and the cases giving construction to the powers thereby conferred, renders it quite clear that the contract under which the plaintiff claims was not only *ultra vires*, but contrary to public policy.

The plaintiff is a moneyed corporation, organized under chapter 260 of the Laws of 1838, and authorized by that statute to "carry on the business of banking, by discounting bills, notes, and other evidences of debt; by receiving deposits; by buying and selling gold and silver bullion, foreign coins, and bills of exchange, and by loaning money on real and personal property."

The Legislature intended by the act in question to inaugurate in this State an entirely new system of banking, and thereby undertook to provide for the establishment of moneyed corporations which should furnish to the public a safe and reliable circulating medium for the transaction of its business, and secure and solvent depositaries for the custody of such moneys as were needed for current use by the business public. *Schermerhorn v. Talman* (14 N. Y. 117); *Leavitt v. Blatchford* (17 id. 526). The solvency of these institutions was guarded by special provisions and limitations in the act authorizing their incorporation, and has ever since been the object of sedulous care, both on the part of the Legislature and of the courts (Chap. 360, Laws of 1837; chap. 329, Laws of 1854; chap. 62, Laws of 1862). The language employed in the act defines their power and duties, and excludes by necessary implication a capacity to carry on any other business than that of banking, and the adoption of any other methods for the prosecution of such business than those specially pointed out by the statute. *Pratt v. Short* (79 N. Y. 440), *Morse on Banking* (5); *Talmage v. Pell* (7 N. Y. 347); *People v. Utica Ins. Co.* (15 Johns. 383). In the latter case, banking powers were defined, generally, as the right to issue bills, negotiate notes, and receive deposits; and in *Pratt v. Short* (*supra*) Judge Andrews describes the principal functions of a banking corporation to be to "issue notes to circulate as money, and discounting commercial paper." The business of banking, as defined by Webster, is the establishing of a common fund for lending money, discounting notes, issuing bills, receiving deposits, collecting the money on notes deposited, negotiating bills of exchange, etc. The implied restrictions upon the corporations formed under the act of 1838 against transacting any other business than that of banking, and the careful definition given to that word, not only by lexicographers, but in the reported cases, would seem clearly to establish a want of authority in such corporation to engage in any business transactions excepting such as relate to the collection of business paper, the buying and selling of coin and exchanges, and the loaning of moneys upon the securities pointed out by the statute. Certainly, the utmost liberality in the construction of the powers given to these corporations would not include the rights claimed for them in this case. The character and quality of the securities in which they are authorized to employ their moneys, and the nature of the business in which they are privileged to engage, have frequently been the subject of discussion in our courts, with the same uniform tendency to so interpret the law as to limit their business operations, and confine their loans and investments, to such transactions as should best promote their security and solvency. *Crocker v. Whitney* (71 N. Y. 161); *Schermerhorn v. Talman* (*supra*.) The spirit of the law, as well as a sound public policy, forbid these institutions from risking the moneys intrusted to their care in doubtful speculations or enterprises.

The great change made in the financial business of the country by the establishment of the National banking system has not altered the policy of the law regarding the institutions organized under the State system of banking, although it has much restricted the number of corporations subject to its application.

The protection of the public from the disastrous consequences which are to be apprehended from an unsound banking system is just as necessary now as formerly, and requires the application of the same principles that distinguished our jurisprudence when the State banks were the exclusive agents in our financial system.

For these reasons we are of the opinion that the plaintiff was not only precluded by public policy, but was not authorized by the statute under which it was organized, to enter into any engagement as a stockholder in a railroad corporation.

The contract between the plaintiff and Jones was wholly executory, and nothing has occurred thereunder, preventing the bank from setting up its own want of authority to make such a contract, as a defence to any action brought thereon by Jones.

While executed contracts made by corporations in excess of their legal powers, have in some cases been upheld by the courts, and parties have been precluded from setting up, as a defence to actions brought by corporations, their want of power to enter into such contracts, *Bissell v. M. S. & N. I. R. R. Co.* (22 N. Y. 258); *Whitney Arms Co. v. Barlow* (63 id. 62); *Woodruff v. E. R. R. Co.* (93 id. 618), this doctrine has never been applied to a mere executory contract which is sought to be made the foundation of an action, either by or against such corporations. It was said by Judge Selden, in *Tracy v. Talmage* (14 N. Y. 179), "That a contract by a corporation, which it has no legal capacity to make, is void and cannot be enforced, it would seem difficult to deny." In *White v. Buss* (3 Cushing, 448), Chief Justice Shaw lays down the rule as follows: "It is well settled by the authorities that any promise, contract, or undertaking, the performance of which would tend to promote, advance, or carry into effect an object or purpose which is unlawful, is in itself void and will not maintain an action."

Lord Mansfield, in *Smith v. Bromley* (Douglas, 696), says: "If the act is in itself immoral, or a violation of the general laws of public policy, then the party paying shall not have this action." In *Tracy v. Talmage* (*supra*), Judge Comstock says: "It is admitted that the contract of a corporation, which it has no legal capacity to make, cannot in its terms be enforced."

There is nothing in this case to exempt the plaintiff from the operation of the general principle determined in the cases referred to.

Jones owed no duty to the plaintiff, except that which sprang out of his engagement to purchase the stock and bonds in question; and that, having failed on account of its illegality, left no enforceable obligation resting upon him. *Levy v. Brush* (45 N. Y. 589). There

is no pretext for the claim that the contract was in any respect an executed one, for Jones never even entered upon its performance. His subscription for the loan in his own name was in direct violation of the obligation which it is claimed that he had assumed; and it is that obligation alone which is sought to be enforced in this action. The bank, by the transaction in question, secured Jones' promise to do certain things, and has relied solely upon that promise. It has done nothing in performance of the contract, and, so far as it is concerned, the contract remains wholly executory.

Neither can Jones be treated as a trustee for the benefit of the plaintiff; a trust whereby it is attempted to accomplish an illegal purpose, is quite as objectionable as a direct contract to effect the same object.

The law does not raise an implied obligation to effectuate a purpose which is forbidden, and which cannot be effected by the parties through the agency of an express contract. Perry on Trusts, 214.

The claim here is that a trust should be implied to enable the plaintiff to reap the profits from a transaction in which it was not authorized by law to engage. We have found no authority which supports such a claim, and are unable to discover any ground upon which this action can be maintained.

It follows that the judgment should be affirmed.

All concur, except RAPALLO and EARL, JJ., dissenting.

Judgment affirmed.

STOURBRIDGE CANAL COMPANY v. WHEELLEY.

(2 Barn. & Adol. 792. 1831.)

LORD TENTERDEN, C. J., in the course of this term, delivered the judgment of the court.

This case was argued before us in the last term. It was an action of assumpsit brought by the plaintiffs to recover the sum of £492 9s. as a compensation for the use of a way or passage for boats loaded with coals and other merchandise, along a part of the plaintiffs' canal, made under the powers of the 16 G. 3, c. 28 an act of Parliament for making and maintaining the Stourbridge Canal with two collateral cuts. This canal was formed upon two levels; the upper or summit level, which communicates with the Dudley Canal, then intended to be made and since completed; upon the whole of which level there is no lock; and the lower or Stourbridge level, extending from Stourbridge to Stourton; and the two levels are connected by a chain of sixteen locks. The defendants have carried large quantities of coals and other goods, part from the Dudley Canal, part not, along the upper level, without passing through any lock. Until

recently they have paid to the plaintiffs a compensation in the nature of tonnage for the coals and goods so carried, as other persons have also done; but the defendants having latterly refused to do so, this action has been brought; and the question is, whether the plaintiffs are entitled to demand anything for the use of the part of the canal on which the defendants have so navigated; if they are, the sum claimed is admitted to be reasonable, and the plaintiffs are entitled to recover it; if they are not, the previous payments by the defendants cannot render them liable, and the plaintiffs cannot recover anything.

The canal having been made under the provisions of an act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this, — that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act. This rule is laid down in distinct terms by the court in the case of *The Hull Dock Company v. La Marche* (8 B. & C. 51), where some previous authorities are cited; and it was also acted upon in the case of *The Leeds and Liverpool Canal Company v. Hustler* (1 B. & C. 424).

Adopting this rule, we are to decide whether a right to demand some compensation for the use of this part of the canal, is clearly and unambiguously given to the plaintiffs by this act of Parliament; and we think it is not.

The act of Parliament recites that the proposed canal will be of public utility (p. 732); the company are empowered to purchase land for the use of the navigation (p. 748); the lands acquired by voluntary or compulsory sale are vested in the proprietors for the use of the navigation, and for no other use or purpose whatsoever (p. 759); and all persons whatsoever are to have free liberty “to navigate upon the canal and collateral cuts with any boats or other vessels” of certain dimensions, “and to use the wharfs and quays for loading and unloading any goods, wares, merchandise, and commodities; and also to use the towing paths with horses for hauling and drawing such boats and vessels, upon payment of such rates and dues as shall be demanded by the said company of proprietors not exceeding the rates before mentioned in the statute” (p. 788). This refers to a previous clause (p. 777), which provides, that, in consideration of the great charge and expense of the proprietors in making, maintaining, and supplying with water the canal and collateral cuts, &c., it shall be lawful for the company from time to time to ask, demand, take, and recover for their own use and benefit for the tonnage and wharfage of iron, &c., and other commodities navigated, carried, and conveyed thereon, such rates and duties as they shall think fit, not

exceeding the sum of sixpence for every ton of iron, &c., navigated on any part of the canal, and which shall pass through any one or more of the locks which shall be erected on the said canal. A similar provision is made for the tonnage and wharfage of goods in vessels navigated on the collateral cuts; and a power of bringing an action for arrears or distraining is given to the company.

Now, it is quite certain that the company have no right expressly given to receive any compensation except the tonnage paid for goods carried through some of the locks on the canal or the collateral cuts; and it is therefore incumbent upon them to show that they have a right clearly given by inference from some of the other clauses.

One of the clauses relied upon by the plaintiffs is that which gives the public the use of the canal (p. 788), and it is contended that no persons have a right to use any part of the canal under that clause, except those who actually do pay some of the rates or dues, and consequently pass some of the locks; and that if individuals have no right to navigate a particular part, the company may make their own bargain as to the terms upon which they may be permitted to do so.

But the clause in question is capable of two constructions; one, that those persons who pass the locks, and therefore pay the rates, and those only, are entitled to navigate any part of the canal or cuts; the other, that all persons are entitled to use it, paying rates when rates are due. The former of these constructions is against the public in favor of the company, the latter is in favor of the public and against the company, and is therefore, according to the rule above laid down, the one which ought to be adopted.

And indeed the more obvious meaning of this clause is, to declare that the canal is dedicated to the public, but, at the same time, to preserve the right of the company to the rates already given; and it is reasonable to suppose that, by the section (p. 777), which gives the rates as a compensation for the expenses of the proprietors, the Legislature meant to include all the benefit they were to derive from the canal, and not to leave the company to make what agreement they pleased with the public in cases not provided for, and to gain an unlimited profit from a particular part of it. They probably did not contemplate the case of persons using the canal who did not pass any lock; but whether the omission was intentional, or arose from inadvertence, it is still an omission in that clause which provides for the emolument of the company.

Another section upon which some reliance was placed, was that in page 789, which gives the owners of adjoining lands the power to use any pleasure-boats on the canal, &c. (so as the same do not pass through any lock) without paying any rates or dues for the same, and so as such boat be not used for carrying any goods; and it is argued that the inference arising from the latter part of this clause is, that pleasure-boats carrying goods would be liable to pay rates, though they should pass no locks; and if pleasure-boats, then all

other boats should be equally liable. And there is no doubt but that this provision does afford some color for this argument. The object of the clause appears to have been, partly to secure the right of the proprietors to use the canal with pleasure-boats (and in that respect it is introduced *pro majore cautela*); and partly to prevent the company being injured by their passing through locks; and the framer of the clause seems to have added the last provision in the section merely to put pleasure-boats with goods on board on the footing of loaded vessels, without considering whether loaded vessels were liable to duties or not. At any rate this clause is not sufficient, in our judgment, to enable us to say that it is clear the Legislature intended to give the plaintiffs the right to the compensation claimed for the use of a part of the canal where there is no lock.

Upon the principle of construction, therefore, above laid down, viz., that the company are entitled to impose no burthen on the public for their own benefit except that which is clearly given by the act, we are of opinion that, as their right to claim this compensation is not clearly given by the act, the plaintiffs are not entitled to recover.

Judgment for defendants.

CHAPTER VI.

POWERS AND LIABILITIES OF A CORPORATION.

IN RESPECT OF BORROWING MONEY AND ISSUING NEGOTIABLE INSTRUMENTS.

UNION BANK *v.* JACOBS.

(6 *Humphrey (Tenn.)*, 515. 1845)

ON the 28th day of September, 1841, Jacobs, as President of the Hiwassee Railroad Company, executed a note, binding that company to pay to said Jacobs the sum of \$5,641, negotiable and payable at the Branch of the Union Bank at Knoxville, four months after date. The note was indorsed by Jacobs to Trautwine, and by Trautwine to the Union Bank, and delivered to the president and directors of the Bank, and discounted by the Bank for the benefit of the Hiwassee Company. At maturity, the note was protested, and suit brought by the Bank against Jacobs, as indorser, in the circuit court of Knox County.

It was tried by Judge Lucky and a jury at the February term, 1845. He charged the jury that the Hiwassee Company had no power to borrow money, and that the note given in execution of a void contract was null and void also.

The jury returned a verdict for the defendant, and plaintiff appealed.

TURLEY, J. delivered the opinion of the court:—

At the session of the Legislature of the State of Tennessee, in the year 1835–1836, the Hiwassee Railroad Company was created a body corporate, with perpetual succession, with power to sue and be sued, plead and be impleaded, and to possess and enjoy all the rights, privileges, and immunities, with power to make such by-laws, ordinances, rules, and regulations, not inconsistent with the laws of this State and the United States, as shall be necessary to the well ordering and conducting the affairs of said company; and be capable in law of purchasing, accepting, selling, and conveying estates, real, personal, and mixed, to the end, and for the purpose of facilitating the intercourse and transportation from Knoxville, East Tennessee,

through the Hiwassee district, to a point on the southern boundary of Tennessee, to be designated by commissioners as the most practicable route to intersect the contemplated railroad from Augusta to Memphis.

By the 2d section of the act of incorporation, the capital stock of the company is limited to six hundred thousand dollars, in shares of one hundred dollars each; and it is provided, that, so soon as four thousand shares are subscribed, the corporate power of said company shall commence, and have as full operation as if the whole of the shares comprising the capital stock were subscribed.

By the 4th section it is provided, that there shall be paid on each share subscribed, but not till after four thousand shares shall have been subscribed, such sum as the president and directors, or a majority of them, may direct, and in such instalments, not exceeding one fourth of the subscription in any one year: Provided, no payment shall be demanded until at least thirty days' notice shall have been given by the said president and directors in the newspapers printed in the towns of Knoxville and Athens, of the time and place of payment; and if any subscriber shall fail or neglect to pay any instalment or part of said subscription thus demanded, for thirty days next after the time it fell due, the stock on which it was demanded, together with the amount paid in, may, by the president and directors, or a majority of them, be declared forfeited, and, after due notice, shall be sold at auction for the benefit of the company, or they may waive the forfeiture after thirty days default, and sue the stockholders, at their discretion, for the instalments due.

By the 13th section, the president and directors of said company are invested with all the powers and rights necessary for the building, constructing, and keeping in repair of a railroad from Knoxville, East Tennessee, through the Hiwassee district, to a point on the southern boundary of Tennessee, on the nearest, best, and most practicable route, — the road to have as many tracks as may be deemed necessary by the board of directors, but not to be more than one hundred feet wide, which the company may purchase, or cause the same to be condemned for the use of the road, or any less breadth, at the discretion of the directors; and they may cause to be made, or contract with others for making of said road or any part thereof; and they, or their agents, or those with whom they may contract for making any part of said road, may enter upon, use, and excavate any land which may be laid out for the site of said road, for the erection of warehouses, engine arbors, reservoirs, booths, stables, offices, and mechanics' shops, or other works necessary or useful in the construction and repair thereof; and may fix scales and weights, build bridges, lay rails, make embankments and excavations; may use any earth, ground, rock, timber, or other material which may be wanted for the construction and repair of any

part of said road; and may construct and acquire all necessary steam-engines, cars, wagons, and carriages for transportation on said road by horses or steam power, and all necessary apparatus for the same.

Sections 15 and 16 make provision for compensation and payment by the company to individuals for land or other property appropriated under the provisions of the charter to the making of said road, and incidental injuries done by reason of its construction.

These are all the provisions of the charter that need be adverted to, for the purpose of investigating the questions of law arising in the case. Under the provisions of this charter, the company was legally organized and proceeded to construct the road; much work was done in excavations, embankments, building bridges, etc., and much money expended therefor, and in the payment of the salaries of the different officers necessary for the superintendence thereof. In the construction, the company became indebted to one Kennedy Lonergin, a contractor for grading the road, in the sum of five thousand dollars; for the payment of which, it executed, by its president, its promissory note to S. D. Jacobs, negotiable and payable at the office of discount and deposit of the Union Bank of the State of Tennessee at Knoxville; this note was negotiated by S. D. Jacobs to John C. Trautwine, and by him to the Union Bank, and the proceeds passed by the Bank to the credit of Kennedy Lonergin. When the note fell due, it was protested for non-payment, and due notice thereof given to the indorsers, Jacobs and Trautwine. They failing to pay, suit was instituted thereon against S. D. Jacobs, the first indorser, in the circuit court of Knox County, and the same was brought to trial before a jury, at the February term thereof, 1845, when the circuit judge charged the jury, "that the note was drawn by the Hiwassee Railroad Company, in violation of its corporate powers; that it was, therefore, null and void; and that the plaintiffs were not entitled to recover." Under this charge, a verdict was returned in favor of the defendant, and judgment rendered thereon against the plaintiffs, to reverse which, a writ of error is prosecuted to this court.

It is contended against the plaintiffs' right to recover that there is no power given, either expressly or by necessary implication, by the charter to the Hiwassee Railroad Company, to borrow money or to execute promissory notes; and that, therefore, the note executed and indorsed to the Bank is void, both as against the maker and indorsers, and that no action can be maintained against them thereon.

The construction of the powers of corporations has been a fruitful source of litigation, both in the courts of Great Britain and the United States. In the earlier cases they were construed with great strictness, and a stringent rule, as to the mode of exercising them, enforced. Mr. Story, in the case of the *Bank of Columbia v. Patterson, Adm'r* (7 Cranch, 305), says: "Anciently it seems to have

been held that corporations could not do anything without deed (13 H. 8, 12; 4 H. 7, 6; 7 H. 7, 7, 9). Afterwards, the rule seems to have been relaxed, and they were for convenience' sake permitted to act in ordinary matters without deed, as to retain a servant, cook, or butler (Plow. 91; 2 Saunders, 395); and gradually this relaxation widened to embrace other objects (Bro. Corp. 51; 3 Salk. 191; 3 Lev. 107). At length, it seems to have been established, that, though they could not contract directly except under their corporate seal, yet they might, by mere vote or other corporate act, not under their corporate seal, appoint an agent whose acts and contracts within the scope of his authority would be binding on the corporation (3 P. Wms. 419); and courts of equity, in this respect, seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal. 1st Fonblanque's Equity 305. This technical doctrine has in more modern times been entirely broken down." The same judge, in continuation in the same case, observes; "The doctrine that a corporation could not contract except under its seal, or, in other words, could not make a promise, if it had ever been fully settled, must have been productive of great mischief. Indeed, as soon as the doctrine was established, that its regularly appointed agents could contract in their name without seal, it was impossible to support it; for, otherwise, the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law, that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts, made by its authorized agents, are express promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie (3 Bro. Ch. Rep. 262; Douglass, 524; 3 Mass. Rep. 364; 5 Mass. 89, 491; 6 Mass. 50)." Whatever of strictness may have existed in the earlier cases, in restricting their power of contracting to the express grant of authority, has been also greatly relaxed, and the doctrine upon the subject been made more conformable to reason and necessity, the powers granted to corporations being now construed like all other grants of power, not according to the letter, but the spirit and meaning. In Angell & Ames on Corporations, page 192, sec. 12, it is said, "A corporation having been created for a specific purpose, can not only make no contracts forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, we are to consider, in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such a contract; and if the charter and

valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation, as directly or incidentally necessary to enable it to fulfil the purpose of its existence, or whether the contract is entirely foreign to that purpose. In general, an express authority is not indispensable to confer upon a corporation the right to become drawer, indorser, or acceptor of a bill of exchange, or to become a party to any other negotiable paper. It is sufficient, if it be implied as the usual and proper means to accomplish the purposes of the charter. Chitty on Bills, (5 Ed.) 17 to 21; Baily on Bills, ch. 2, § 7, p. 69, (5 Ed.); Story on Bills of Exchange, § 79, p. 94. In the case of *Mum v. Commission Co.* (15 Johnson, 52), Spencer, J., who delivered the opinion of the court, says: 'It has been strongly urged, that, under the act of incorporating this company, they could neither draw nor accept bills of exchange. Their power is undoubtedly limited; they are required to employ their stock solely in advancing money, when required, on goods and articles manufactured in the United States, and the sale of such goods and articles on commission. The acceptance of a bill is an engagement to pay money; and the company may agree to pay or advance money at a future day, and they may engage to do this by the acceptance of a bill. When a charter or act of incorporation and valid statutory law are silent as to what contracts a corporation may make, as a general rule it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, and none other. The creation of a corporation for a specific purpose implies a power to use the necessary and usual means to effectuate that purpose.'" Angell & Ames on Corp. 200, § 3.

Mr. Story, in his treatise on Bills of Exchange, p. 95, speaking of the power of corporations to draw, indorse, and accept bills of exchange, says: "It is sufficient if it be implied as a usual and appropriate means to accomplish the objects and purposes of the charter. But when the drawing, indorsing, or accepting such bills is obviously foreign to the purposes of the charter, or repugnant thereto, then the act becomes a nullity, and not binding on the corporation."

In the case of the *People v. The Utica Ins. Co.* (15 Johns.), Thompson, C. J., who delivered the opinion of the court, says, at page 383, "An incorporated company has no rights but such as are specially granted, and those that are necessary to carry into effect the powers so granted."

In the case of *Mott v. Hicks*, a quantity of wood was purchased for the president and directors of the Woodstock Glass Company by Whitehead Hicks, the president thereof, for which he executed the promissory note of the company at six months. It appears, from a reference in argument to the charter of the company, that

there was no clause authorizing it to issue bills or notes, or making such, if issued, binding and obligatory upon the company; yet it was held by the court, that an action would lie against the corporation upon the note, it having been executed by its legally authorized agent, acting within the scope of the legitimate purposes of such corporation (1 Cowen, 513).

In the case of *Hayward v. The Pilgrim Society* (21 Pick. 270), it was held that the trustees of a society incorporated for the purpose of building a monument, in virtue of their authority to manage the finances and property of the society, were held competent to bind the society by a promissory note through the agency of their treasurer.

These authorities fully establish the proposition, that, in the construction of charters of corporations, the power to contract, and the mode of contracting, is not limited to the express grant, but may be extended by implication to all necessary and proper means for the accomplishment of the purposes of the charter. Now, what are necessary and proper means? Mr. Story, as we have seen, says, if the means are usual and appropriate, the implication of power arises. Story on Bills, 95.

Chief Justice Marshall, in the case of *McCulloch v. The State of Maryland* (4 Wheaton, 413), says: "But the argument on which most reliance is placed, is drawn from the peculiar language of this clause of the Constitution. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be necessary and proper for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves Congress, in each case, that only which is most direct and simple. Is it true, that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing to which another may be termed necessary cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of the human mind, that no word conveys to it, in all situations, one single definite idea, and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words,

which import something excessive, should be understood in a more mitigated sense, — in that sense which common usage justifies. The word ‘necessary’ is of this description. It has no fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases.” In conclusion upon this subject, he says, page 421, same case: “We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.”

Now, if this be true doctrine in relation to the Constitution of the United States, surely it will not be contended that a more stringent rule will be applied in the construction of the powers of a corporation, than is applied in the construction of the powers of Congress under the Constitution of the United States.

To apply these principles, as established by the authorities cited, to the case under consideration. The Hiwassee Railroad Company is chartered to construct a railroad, a thing of itself necessarily involving a heavy expenditure of money; but in addition thereto, it is empowered to sue and be sued, to acquire and hold, sell, lease, and convey estates, real, personal, and mixed, which necessarily involves the power of making contracts for the same. How shall these contracts be made, both for the construction of the road and the purchase of the property? It is argued, that the capital stock of the company is the only means provided for the payment, and that no other can be resorted to for that purpose; or, in other words, that it must pay cash for every contract, for that no power is given, by which it may contract upon time; for if it may create a debt, of necessary consequence it may create written evidences of that debt, and these may be either promissory notes or bills of exchange. It is true, that the capital stock of the company is the source from whence an ultimate payment of the debts of the company must be made, but to hold that a sufficient amount of this stock must always be on hand, to pay immediately for every contract made, would be destructive of the operations of the company. By the provisions of the charter, not more than one-fourth of the stock shall be called for in any one year, and this upon thirty days’

notice; and if, within thirty days after such notice, the amount called for be not paid, the company is authorized to take steps against the delinquent stockholders, to enforce payment. Now, it is obvious that it never was intended that all the stock should be paid in before the company commenced operations. The early completion of the road was a desirable object for commercial purposes, and can it be pretended that the expenditures of the company were to be limited and restricted to the amount of capital actually paid in by the stockholders, and that under no circumstances were the company to exceed them? If, upon failure of the means on hand, the stockholders should neglect to pay upon a proper call, are the works to be suspended until such time as payments could be enforced? Are the persons who may have done work for it, and for which they have not been paid, to wait the slow process of the law before they can receive satisfaction? And shall the company not be permitted to use its credit in such emergency? It is so argued for the defendant. This construction of the charter would be ruinous in its consequences. The company might be compelled to suspend all operations at a time when great loss would result from deterioration to unfinished work, and be greatly injured also in its credit.

The restriction contended for is too refined and technical. It might have suited the days of the Year Books, when it was held that a corporation could contract for nothing except under its corporate seal; but it is strange that it should be urged at this day of enlightened jurisprudence, when the substance of things is looked to rather than forms. A corporation is, in the estimation of law, a body created for special purposes, and there is no good reason why it should not, in the execution of these purposes, resort to any means that would be necessary and proper for an individual in executing the same, unless it be prohibited by the terms of its charter, or some public law, from so doing.

There is no principle which prevents a corporation from contracting debts within the scope of its action; and, as has been observed, if it may contract a debt, it necessarily may make provision for its payment, by drawing, or indorsing, or accepting notes or bills. It is not pretended that this power extends to the drawing, indorsing, or accepting of bills or notes generally, and disconnected from the purposes for which the corporation was created.

The corporation, in the present case, was indebted to one of its contractors for work done upon the road, for the payment of which the note in question was drawn. This, upon principle and authority, was a usual and appropriate means for accomplishing the object and purposes of the charter, viz., the construction of the road. Not only do all the elementary writers sustain this view of the subject, but, as we have seen, there are three adjudicated cases in courts of high authority directly in its favor. The case of *Mum v.*

Commission Company (16 Johns. 52), the case of *Mott v. Hicks* (1 Cowen, 513), and the case of *Hayward v. The Pilgrim Society* (21 Pickering, 270).

There has not been produced a single case to the contrary. The cases cited relied upon are decided upon different grounds entirely. The case of *Broughton and others v. The Company and Proprietors of the Manchester and Salford Water Works* (3 Barnewall & Alderson, 1; reported in the English Common Law Reports, 215), decides nothing more than that a corporation, not established for trading purposes, cannot be acceptors of a bill of exchange, payable at a less period than six months from the date, because such a case falls within the provisions of the several acts passed for the protection of the Bank of England, by which it is enacted, that it shall not be lawful for any body corporate to borrow, owe, or take up any money upon their bills or notes payable at demand, or at any less time than six months from the borrowing thereof. It is true, that Baily, J., in his opinion, says: "There being no power expressly given to the corporation to make promissory notes or become parties to bills of exchange, I should doubt very much (even if the Bank acts were entirely out of the question) whether such corporation would have any power to bind itself for purposes foreign to those for which it was originally established;" and Best, J., in his opinion, says, "I am also of opinion, that this action is not maintainable, because this case comes within that rule of law by which corporations are prevented from binding themselves by contract not under seal. When a company, like the Bank of England, or East India Company, are incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated, that they should have power to accept bills or issue promissory notes; it would be impossible for either of these companies to go on without accepting bills. In the case of *Stark v. The Highgate Arch-Way Company* (5 Taunt. 792), the Court of Common Pleas seemed to think that, unless express authority was given by the act establishing the company to make promissory notes *eo nomine*, a corporation could not bind itself except by deed. Now, there is nothing in the act of Parliament establishing this company, which authorizes them to bind themselves except by deed." So, the authority of this case for the defendant rests solely upon the *dubitatur* of Baily and the opinion of Best, that the company could only bind itself by deed. How much, under these circumstances, it is worth, need not be said.

The case of the *People of the State of New York v. The Utica Insurance Company* (15 Johns. 358), decides, that, since the act to restrain unincorporated banking associations (April 11, 1804, re-enacted April 6, 1813), the right or privilege of carrying on banking operations by an association or company, is a franchise which can only be exercised under a legislative grant; that a cor-

poration has no other powers than such as are specifically granted by the act of incorporation, or are necessary for the purposes of carrying into effect the powers expressly granted; and that the act to incorporate the Utica Insurance Company does not authorize the company to institute a bank, issue bills, discount notes, and receive deposits, such powers not being expressly granted by the Legislature, and not being within their intention, as collected from the act of incorporation; and that the company having assumed and exercised these powers, they were held to have usurped a franchise.

It is scarcely necessary to enter into an investigation, to show the ground upon which this decision rests. Banking privileges, by an association or company, in New York, rest upon express grant. There was no such grant to the Utica Insurance Company, and an exercise of the power was not necessary and proper to the performance of the purposes for which it is created, but wholly foreign thereto.

In the case of the *New York Firemen Insurance Company v. Ely* (2 Cowen, 678), it is held, that a company incorporated for the purpose of insurance, and forbidden to carry on any other trade or business, also forbidden to exercise banking powers, with a clause in the act incorporating them enumerating the kind of securities upon which they may loan money, but not including promissory notes in such enumeration, have no power to loan moneys upon promissory notes or any securities other than those especially enumerated. This company being incorporated for the purpose of insurance only, the discounting of promissory notes would have been foreign to the purpose of its creation; but, in addition thereto, it is expressly prohibited from carrying on any other trade or business, or exercising banking powers, and the kind of securities upon which it may loan money are especially enumerated, promissory notes being excluded, it is a well-settled maxim of the law, the *expressio unius exclusio est alterius*;—then, for many reasons, this company had no power under its charter to discount notes. It is not only not given expressly or by implication, but upon every principle of legal construction is withheld.

In the case of the *Life Insurance and Fire Insurance Company v. The Mechanics' Fire Insurance Company of New York* (7 Wendell, 31), it is held, that “a corporation authorized to lend money only on bond and mortgage cannot recover money lent by the corporation, except a bond and mortgage be taken for its re-payment; every other security, as well as the contract itself, is void, and not the basis of action. The reason for this decision is obvious; bond and mortgage being specified as the securities upon which the company might lend money, all others were considered as excluded, upon the principle mentioned above, *expressio unius exclusio est alterius*.”

These are all the cases relied upon by the defendant for the support of the position assumed by him; we are satisfied that they

have no applicability to the question, and are not authority in this case.

We are then of opinion (to use the words of Chief Justice Marshall, in the case of *McCullock v. The State of Maryland*) that the end proposed by the Hiwassee Railroad-Company, in executing the note in question, was legitimate, and within the scope of its charter; that as a means it was appropriate, and plainly adapted to that end, which is not prohibited, but consistent with the letter and spirit of the charter, and therefore, not void, but binding and effectual upon the company and the indorsers.

Let the judgment of the Circuit Court be reversed, and the case be remanded for a new trial.

BATEMAN *v.* RAILWAY COMPANY.

DISCOUNT COMPANY *v.* SAME.

OVEREND, GURNEY & CO. *v.* SAME.

(*L. R. 1 Com. Pl.* 499. 1866.)

THE plaintiffs in these actions, as indorsees, sued the defendants, as acceptors of certain bills of exchange, and the defendants pleaded that they did not accept.

The defendants were a railway company, constituted under the 22 & 23 Vict. c. lxiii. This special act was in the usual form, both as to the powers given to and the restrictions placed on the company, and as to the incorporation of general acts; and there was no difference between the cases, except that in the last case evidence was given of the defendants having actually commenced business. (It appears, however, that this was admitted at the trial in the first two actions, and no point was made of it in the argument.)

The bills were directed to the Mid-Wales Railway Company, and were accepted in the following form: "Accepted by order of the board of directors, and payable at the Agra & Masterman's Bank, John Wade, Secretary," with the seal of the company affixed under these words. And there was no question but that there was a resolution of the board of directors to the above effect.

At the trial, a verdict was entered for the plaintiffs, with leave to the defendants to move to enter a verdict for themselves, on the grounds, first, that the defendants had no power by law to accept the bills, and, secondly, that the acceptances were not binding on them, and that even if bills could be accepted by them, the bills were not accepted in such a form as to be binding on them.

Rules *nisi* were obtained, pursuant to such leave, in all three actions.

ERLE, C. J. :—

These were actions by the indorsees against the acceptors of certain bills of exchange, and the defendants (who were defendants in all the actions) pleaded that they did not accept. It appears that the defendants are a corporation constituted for making a railway by virtue of a special act of Parliament and certain general statutes incorporated therewith, a corporation constituted for the distinct purposes stated in these statutes. It has been perfectly established that a corporation constituted for a specific purpose cannot be bound by a contract which is not connected therewith: such contract does not bind, because it is *ultra vires*. This company, then, being a corporation constituted for making a railway, can it be bound by a bill of exchange? I am of opinion that it cannot. A bill of exchange is a cause of action in itself, a contract of itself, which binds not only as between the original parties, but also in the hands of third persons, the indorsees. And I consider that it is altogether contrary to the principles of the law of bills of exchange, that a bill can be valid or not according as the consideration between the original parties was good or bad, or, in the case of a corporation, whether or not it was accepted for the purposes for which the corporation was constituted. The consideration of bills of exchange given at the very same time by a railway company, might be partly for work done on the railway, a valid consideration, and partly for money borrowed in fraud of their borrowing powers, an invalid one, and it would be most pernicious to hold that the bills given for work were valid, and that those given to obtain money, invalid. So much for the principle of the matter. Now, what is the state of the authorities? I can find no case as to the acceptance of a bill of exchange where the bill has been enforced subject to the question of whether the original consideration was valid. The only cases in which it has been held that a corporation could validly accept a bill of exchange are the cases of the Highgate Archway Company, the Bank of England, and the East India Company, and in all these cases the corporations were specially authorized to do so. And in *Broughton v. The Manchester Waterworks Company* (3 B. & Ald. 1), Mr. Justice Bayley entertained a doubt whether a holder of such a bill of exchange could sue without the proof lying on him that there was power to accept. What he laid down generally, applies *a fortiori* where the corporation is formed for specific purposes. This being so, I think, both on principle and authority, the acceptances were not binding on this company, constituted for purposes of which we have judicial notice.

BYLES, J. :—

I am of the same opinion. The cases are important, and raise the question whether it is competent for a railway company to accept a bill of exchange. We have asked for a precedent, and none can be produced. This is a corporation created by statute. But even if it were a common-law corporation, there is no authority for saying that it

could accept a bill of exchange. There are only three cases in which it has been held that a corporation can do so. First, the Bank of England, created specially for banking purposes; secondly, the East India Company, whose authority is ratified by two statutes; thirdly, the Highgate Archway Company, where express power was given. With these exceptions, there is no authority for saying that a common-law corporation can accept a bill of exchange, and there is more difficulty in saying that a statutable one can. In *Broughton v. The Manchester Waterworks Company* (*ubi supra*), it is clear that Mr. Justice Bayley thought a corporation could not issue bills of exchange. Even, therefore, if we know nothing more than that the defendants were a railway company, it is plain they could not accept. But we have judicial cognizance of the constitution of the company by means of the acts of Parliament, and we find that it is constituted to make a railway, just as in *Broughton v. The Manchester Waterworks Company* (*ubi supra*) the company was constituted to make waterworks. Even if this were not before us, the matter would be plain; but with this constitution of the company before us, it is plainer. It is said that the present is not the proper method of raising the question, but the persons signing purport to be agents of the defendants, and the plea in effect says that they are not agents; and this, therefore, is a proper mode of raising the question.

KEATING, J.:—

I am of the same opinion. It is unnecessary to go into the wider question discussed by my Brother Byles; in this case the question is whether this particular company can accept a bill of exchange. I rest my decision on the act of Parliament. It is clear that the Legislature has guarded against their powers of raising money by statutory provisions, as to the sum that may be raised, and although certain acts are incorporated with the special act, neither in the special act nor the general ones is any power conferred on the company to accept a bill of exchange. One of the general acts refers to the mode of contracting. And if the Legislature had intended that the company should have this power, it would be found in some of the acts. It is said that it seems absurd that a railway company, which, as carriers, must buy, etc., must not pay by a bill of exchange. But it is an entirely different thing to say that a company shall be liable to parties who supply goods, and to say that they may be liable on negotiable instruments, which may pass into the hands of third parties, and be void or not, according as the purposes for which they were issued were *ultra vires* or not. It seems to me the case may be decided on the simple ground that the Legislature did not intend to intrust the company with this power. I think that they cannot accept a bill of exchange, and I also think that the objection may be taken in the present form.

MONTAGUE SMITH, J.:—

I am of the same opinion. The plaintiffs as indorsees sue the

defendants as acceptors, so that the action is not between the immediate parties to the bills. I think a railway company is not competent to accept bills of exchange. A railway company is incorporated to make and maintain a railway; its powers and resources are limited by the incorporating statutes; but if they may accept bills of exchange, they either may do so to any extent, or there would have to be an inquiry whether the purposes for which the bills were accepted were within their powers in each particular case. I think the Legislature did not intend to give them the power. It is admitted that there is no authority in favor of it; and there is a great abundance of authority to show that in the analogous cases of mining, waterworks, gas, and other companies, the companies cannot draw bills of exchange, though they are more trading companies than a railway company. The first object in the constitution of a railway company is to make a railway, though, it is true, they may and practically always do become carriers. Corporations for the purposes of trade have the power of issuing bills of exchange as incidental to such trading; but this doctrine only applies where the primary object is trade, buying and selling. In addition to the authorities referred to there is the distinct authority of various eminent text-writers that such a company as this cannot accept a bill of exchange. Amongst others, Mr. J. W. Smith, in his treatise on Mercantile Law, says, "However, it has been considered that a trading corporation may differ from others as to its powers of contracting, and its remedies on contracts relating to the purposes for which it was formed. Thus, such a corporation may in some cases bind itself by promissory notes and bills of exchange; and it was even held that the Bank of England might without deed appoint an agent for such purposes. But a corporation will not have these extraordinary powers unless the nature of the business in which it is engaged raises a necessary implication of their existence." (Page 114, 5th Edit. by Dowdeswell.) Now, clearly, here there is no express power, nor is there any necessary implication. For these reasons, I am of opinion that the defendants were not competent to accept a bill of exchange; and on the other point I also agree with the rest of the court.

MONUMENT NATIONAL BANK *v.* GLOBE WORKS.(101 *Mass.* 57. 1869.)

HOAR, J. :—

THE single question presented for our decision in this cause, all others which arise upon the report having been waived, is, whether the note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity, and without any

knowledge that the makers had not received the full consideration, cannot be enforced against them, because it was in fact made as an accommodation note.

The argument for the defendants takes the ground that to issue an accommodation note is not within the powers conferred upon the corporation; and that, as any persons taking it had notice that it was the note of the corporation, they had notice that it was of no validity unless issued for a purpose within the scope of the corporate powers, and were therefore bound to ascertain not only that it was executed by the officer of the corporation who had the general authority to sign the notes which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain and execute.

The court are all of opinion that this position is not tenable, and that the defence cannot be maintained.

It has long been settled in this Commonwealth that a manufacturing corporation has the power to make a negotiable promissory note. *Narragansett Bank v. Atlantic Silk Co.* (3 Met. 282). And it was held in *Bird v. Daggett* (97 Mass. 494), as a just corollary to that proposition, that such a note in the hands of a holder in good faith for value is binding upon the maker, although made as an accommodation note. The question was not discussed, nor the reasons for the decision fully stated, in *Bird v. Daggett*; but it was assumed that the doctrine announced was clear and undoubted law.

The doctrine of *ultra vires* has been carried much farther in England than the courts in this country have been disposed to extend it; but, with just limitations, the principle cannot be questioned, that the limitations to the authority, powers, and liability of a corporation are to be found in the act creating it. And it no doubt follows, as claimed by the learned counsel for the defendants, that when powers are conferred and defined by statute, every one dealing with the corporation is presumed to know the extent of those powers.

But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply. As was said by Selden, J., in *Bissell v. Michigan Southern & Northern Indiana Railroad Co.* (22 N. Y. 289, 290): "There are no doubt cases in which a corporation would be estopped from setting up this defence, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented, that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would

be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."

This doctrine seems to us sound and reasonable; and in conformity with it, it was held in *Farmers' & Mechanics' Bank v. Empire Stone Dressing Co.* (5 Bosw. 275), that an accommodation acceptance by an officer of a manufacturing corporation, on behalf of the company, was not binding, unless the consideration had been advanced upon the faith of the acceptance; but that if the consideration was paid in good faith after the acceptance, and upon the credit of it, it could be enforced.

So it was said by Lord St. Leonards that he felt a disposition "to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation, and of the contract entered into." *Eastern Counties Railway Co. v. Hawkes* (5 H. L. Cas. 331, 373).

The cases on which the defendants rely are cases against municipal corporations, in respect to which the rule is much more rigid, or for the most part those in which the other contracting party had notice upon the face of the transaction of the want of corporate power.

There can be no doubt that it is very often true that a corporation may be responsible for the unauthorized, and even for the unlawful acts of its agents, apparently clothed with its authority. No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable, in this Commonwealth, for one committed by its servants.

Bills of a bank issued without consideration, and even stolen, are good in the hands of an innocent holder for value. Many other illustrations might be given, but enough has been said to show the principle on which our decision rests.

Judgment for the plaintiffs.

NATIONAL PARK BANK *v.* GERMAN-AMERICAN
COMPANY.

(116 N. Y. 281. 1889.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 8, 1886, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought upon certain promissory notes made by the firm of Squires, Taylor, & Co., made payable to the order of the makers, and alleged to have been indorsed by defendant, the German-American Warehousing and Security Company.

The plaintiff was incorporated in 1865 under the national banking act, and the defendant was incorporated in 1872 under chapter 701 of the Laws of New York, passed May 14, 1872. Both corporations were engaged in business in the city of New York, the defendant at No. 45 Broad Street, and both still exist, though the defendant discontinued all business in May, 1879. Squires, Taylor, & Co. (individual partners, Robert C. Squires, Charles E. Taylor, and Burnet Forbes), commission merchants, dealing in tobacco at No. 45 Broad Street, New York, began business October 1, 1876, and failed December 30, 1878. Robert Squires was a director and the president of the defendant from a date prior to November 1, 1876, until his death in February, 1879, and he was a director of the plaintiff from January 15, 1875, until his death. He was the father of Robert C. Squires, of the firm of Squires, Taylor, & Co., a brother-in-law of Burnet Forbes, of that firm, and when Squires, Taylor, & Co. failed, they owed Robert Squires \$25,000.

August 27, 1878, Squires, Taylor, & Co. made their promissory note, of which the following is a copy:—

NEW YORK, August 27, 1878.

Four months after date, for value received, we promise to pay to the order of ourselves, at the National Park Bank, in New York, ten thousand dollars, having deposited with said bank, as collateral security for payment of this, or any other liability or liabilities of ours to said bank, due or to become due, or that may be hereafter contracted, the following property, viz., in the store of the German-American Mutual Warehousing and Security Company, one hundred hogsheads tobacco, the market-value of which is now \$12,500, with the right to call for additional security should the same decline, and, on failure to respond, this obligation shall be deemed to be due and payable on demand, with full power and authority to sell and assign and deliver the whole of said property, or any part thereof, or any substitutes therefor, or any additions thereto, at any brokers' board, or at public or private sale, at the option of the said bank, or

its president or cashier, or its assigns, and with the right to be purchasers themselves at such brokers' board, or public sale, on the non-performance of this promise, or the non-payment of any of the liabilities above mentioned, or at any time or times thereafter, without advertisement or notice. And after deducting all legal or other costs and expenses for collection, sale, and delivery, to apply the residue of the proceeds of such sale or sales so to be made, to pay any, either, or all of said liabilities as said bank, or its president or cashier, shall deem proper, returning the overplus to the undersigned.

SQUIRES, TAYLOR, & CO.

Squires, Taylor, & Co., the makers and payees of said note, indorsed it in blank, and thereupon the president of the defendant indorsed it as a second indorser in form following: "German-American Mutual Warehousing and Security Company, Robert Squires, president." This note was then (August 27, 1878), discounted by the plaintiff, and the avails credited to said firm. September 2, 1878, Squires, Taylor, & Co. made a second note, dated that day, for the same amount, time, and in precisely the same form as the first note, and which was indorsed by said firm and by the defendant in the same manner, and it was discounted by the plaintiff, September 11, 1878, for and avails credited to said firm. September 11, 1878, Squires, Taylor, & Co., made a third note, dated that day, for \$12,000, for the same time and in precisely the same form of the first note, except one hundred and twenty hogsheads of tobacco, stated to be of the value of \$15,000, were pledged as security. Said firm and this defendant indorsed said note in the same manner in which the first note was indorsed, and it was then (September 11, 1878) discounted by the plaintiff for and the avails credited to said firm. November 27, 1878, Squires, Taylor, & Co., made a fourth note, dated that day, for \$4,000, for the same time and in precisely the same form of the first note, except forty hogsheads of tobacco, stated to be of the value of \$5,000, were pledged as security. Said firm and this defendant indorsed said note in the same manner in which the first note was indorsed, and it was, on that day (November 27, 1878), discounted by the plaintiff for and avails credited to said firm. Squires, Taylor, & Co., paid the president of the defendant \$360 for indorsing said four notes, being at the rate of one-fourth of one per cent per month for every month of the time said notes run. In December, 1878, said firm pledged to send to said bank forty hogsheads of tobacco as security for the four notes, in addition to those pledged as security for each note. The four notes were dishonored and duly protested. Upon a sale of the tobacco pledged, the first and second notes were paid, and such sums applied on the third and fourth notes that there was due on them May 7, 1879, \$12,621.63, for the recovery of which this action was brought against the members of the firm of Squires, Taylor, & Co., who did not defend, and against the appellant, which defends on the grounds, —

(1) That the board of directors of the defendant was without

power to authorize its president to bind it by contracts of indorsement, made for the accommodation of others, for a consideration paid by them.

(2) That its board of directors never authorized its president to make these or like indorsements.

(3) That its president being a director of the plaintiff, an officer of both corporations, the contracts of indorsement are void, and that the plaintiff had knowledge of the facts constituting the alleged defences when it discounted the notes.

Upon the trial, before a referee, the defences were overruled, and a judgment ordered for the amount claimed.

FOLLETT, C. J. —

The statute by which the defendant was incorporated provides that, in addition to the powers therein enumerated, it shall possess all the powers and privileges of corporations organized under the manufacturing act (Chap. 40, Laws 1848), and the acts extending and amending the same, except wherein such acts are inconsistent with the provisions of the incorporating statute. The litigants agree that the defendant's board of directors had power to authorize its president to make and indorse promissory notes for the purpose of transacting the business it was authorized to engage in, and that such power was conferred by the board on its president. The powers of corporations are those enumerated in the statutes under which they are incorporated, in general statutes, in the articles of association, and like instruments executed in pursuance of the statutes, denominated by Mr. Brice "constating instruments" (*Ultra Vires* (2d Am. ed.) 27); and also, such powers as flow from or are incidental and necessary to the exercise of the enumerated powers (1 R. S., 599, §§ 1-3). Counsel have not directed our attention to, nor have we found in any of the statutes referred to, a provision empowering the defendant to bind itself by making or indorsing promissory notes for the accommodation of the makers for a consideration paid.

It is well settled that such a power is not incidental to the powers expressly conferred on a corporation organized under statutes authorizing the formation of corporations for banking, insuring, manufacturing, and like business corporations. *Central Bank v. Empire Stone Dressing Co.* (26 Barb. 23); *Bridgport City Bank v. Same* (30 id. 421); *Farmers' and Mechanics' Bank v. Same* (5 Bosw. 275); *Morford v. Farmers' Bank of Saratoga* (26 Barb. 568); *Bank of Genesee v. Patchin Bank* (13 N. Y. 309); *Ætna National Bank v. Charter Oak Life Ins. Co.* (50 Conn. 167); *Monument National Bank v. Globe Works* (101 Mass. 57); *Davis v. Old Colony R. R. Co.* (131 id. 258); *Culver v. Reno Real Estate Co.* (91 Penn. 367); *Hall v. Auburn Turnpike Co.* (27 Cal. 255). The defendant having the general power to bind itself by promissory notes and contracts of indorsement, the plaintiff is entitled to recover if it is a holder of the notes for value, and without notice that they were indorsed for the accom-

modation of the makers, and not in the usual course of business. The referee finds that in consideration of one-fourth of one per cent per month for every month of the time on which the notes were given, the defendant indorsed for Squires, Taylor, & Co., between November 10, 1876, and August 27, 1878, the date of the first note in suit, nineteen notes precisely like the four in suit, except dates and amounts, aggregating \$170,000, which were discounted by the plaintiff for, and the avails placed to the credit of Squires, Taylor, & Co.

The referee also finds that defendant's president was never authorized by its board of directors to indorse commercial paper for the accommodation of makers, or to indorse such paper for a consideration paid by the makers, and that none of them knew that such indorsements had been made until this action was brought.

The fact that the maker of a promissory note procures it to be discounted for his own benefit is, if unexplained, notice to the discounteer that the indorsement is not in the usual course of business, but it is for the accommodation of the maker. *Stall v. Cutskill Bank* (18 Wend. 466); *Fielden v. Lahens* (9 Bosw. 436), (3 Trans. App. 218), (2 Abb. Ct. App. Dec. 111), (6 Abb. [N. S.] 341); 1 Ames' Cas. on Bills and Notes, 738; *Bank of Vergennes v. Cameron* (7 Barb. 143); *Hendrie v. Berkowitz* (37 Cal. 113); *Lemoine v. Bank of North America* (3 Dillon, 44); *Bloom v. Helm* (53 Miss. 21); Daniel on Neg. Inst. [2d ed.] 297, § 365; Edw. on Bills [3d ed.] 98, § 105.

Ex parte Estabrook (2 Lowell's Dec. 547) is opposed to these authorities, but this case is in conflict with the decisions in this State, and we believe it to be without the support of any well-considered case.

The indorsements having been made for the accommodation of the makers, and the plaintiff, having discounted the notes with notice of that fact, cannot recover.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

CHAPTER VII.

POWERS AND LIABILITIES OF A CORPORATION.

IN RESPECT OF MORTGAGING ITS PROPERTY.

In re PATENT FILE COMPANY.

(L. R. 6 Ch. App. 83. 1870.)

THIS was a motion by way of appeal from a decision of Vice-Chancellor Stuart, holding an equitable mortgage, by deposit, of the real estate of the Patent File Company, Limited, to be valid.

The Patent File Company was registered in 1863, with a nominal capital of £100,000. The memorandum of association stated the object of the company to be purchasing letters-patent granted to E. Bernot for an invention of a new machine for cutting files, and of certain other letters-patent relating to files; the manufacturing, purchasing, or otherwise acquiring machines and apparatus applicable to the manufacture of files; the manufacturing, purchasing, or otherwise acquiring and selling or disposing of files, blanks for files, and steel, "and the doing of all such other things (including the purchasing, leasing, or otherwise acquiring, holding, and disposing of lands and buildings) as are incidental or conducive to the attainment of the above objects or any of them."

The clauses of the articles of association referred to in the argument were the following:—

"41. The company may, with the sanction of an extraordinary general meeting, from time to time borrow and take up, on mortgage of any of the property of the company, or on such other security as they may think fit, any sum or sums not exceeding in the whole one-half of the nominal capital of the company.

"42. Any mortgage bond or other security, bearing the common seal of the company and issued for valuable consideration, shall be binding on the company, notwithstanding any irregularity touching the authority of the directors to issue the same; and no person taking any such security shall be bound to ascertain that the amount then due by the company on mortgage or other security does not exceed one-half of the nominal capital of the company."

"75. The business of the company shall be managed by the directors, who may pay all expenses incurred in the formation and registration of the company, and may exercise all such powers of the company as are not by the Companies Act, 1862, or by these articles, required to be exercised by the company in general meeting, subject, nevertheless, to any regulations of these articles, to the provisions of the Companies Act, 1862, and to such regulations, being not inconsistent with the said regulations and provisions, as may be prescribed by the company in general meeting. But no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made."

"78. The directors are hereby empowered to do and execute all necessary acts, deeds, or assurances that may be necessary for the purchase or acquisition of the patent rights mentioned or referred to in the memorandum of association, or for the purchase or taking on lease of lands or buildings, or the erection of buildings and machinery, or for the prosecution in any other manner of all or any of the objects of the company."

The Patent File Company had a banking account with the Birmingham Banking Company, which, in 1865, became heavily overdrawn. On the 9th of August, 1865, the balance being then above £11,000, the then manager of the bank wrote a letter requesting that it might be reduced.

On the 30th of August, 1865, an extraordinary general meeting was held and the following resolution passed: "That the directors be and are hereby authorized to borrow and take up from time to time, on mortgage of the lands, buildings, and fixed machinery of the company, or on such part thereof as they deem fit, or upon debentures under the seal of the company, such sum or sums of money not exceeding in the whole one-third of the nominal capital of the company, and that the directors are hereby authorized to affix the seal of the company to all instruments which they deem requisite for giving full effect to this resolution."

No loan could be obtained; and in April, 1866, the overdrawn having been increased, Mr. Shaw, the new manager of the bank, applied to the Patent File Company to reduce the balance, and on the 1st of May wrote to the company, that the balance must not be increased before the special board meeting, which was to be held on the 10th of May. Soon after this the managers had an interview, and Mr. Shaw said that security would be required. On the 10th the directors resolved that their solicitors should be authorized to give a mortgage by deposit of the title-deeds of the property on which the business of the Patent File Company was carried on. This was completed on the 30th of May, and the deeds were deposited, with a memorandum of deposit, under the seal of the company, making them a security for what should be due to the bank

to the extent not exceeding £25,000. At this time more than £23,000 was due, and the property in the security was estimated as worth about £35,000.

In October, 1866, a petition for winding up the Patent File Company was presented by a creditor, but stood over; and on the 13th of December, 1866, a resolution was passed for the voluntary winding up of the company. The petition afterwards came on for hearing, and on the 12th of January, 1867, an order was made for continuing the voluntary winding-up under supervision.

The property, the title-deeds of which had been deposited, having been sold under the direction of the Court, without prejudice to the rights of the parties, the Birmingham Banking Company applied to have the proceeds paid to them, and the liquidator took out a cross summons to have the equitable mortgage declared void. Vice-Chancellor Stuart held that the security was valid.

From this decision the liquidator appealed.

SIR W. M. JAMES, L. J.:—

This case appears to me one of the simplest description. The company is a body corporate, and by the law of England a body corporate can hold property and dispose of it as freely as an individual, unless it is specially prohibited from so doing. In the memorandum and articles of this company I can find nothing to prevent the company *qua* company from pledging part of its property for payment of a debt incurred in the course of its business. It is equally plain that, under these articles, the directors can do anything which the company could do, unless it is an act which they are specially prohibited from doing. I can find nothing in the memorandum or articles to prevent the directors from making the best terms they can with a creditor of the company by selling or pledging part of the property of the company. No doubt, a disposition of the property by the directors might be void in equity if it were contrary to the objects of the company; the directors would then be restrained from doing the act, as being an abuse of their fiduciary position. But in the present case there is nothing to prevent the company from making such an arrangement as this with a creditor, nor is there anything to prevent the directors from doing so.

There is no pretence for saying that this is a case of fraudulent preference. The bank required security. The directors cannot be supposed to have had any particular affection for the bank, but they wanted accommodation from the bank, and so they gave the security required. They mortgaged property worth £35,000 for £25,000, so it was not a security exhausting the property, and it was not tendered by the debtor, but asked for by the creditor.

SIR G. MELLISH, L. J.:—

I am of the same opinion. As to the question of fraudulent preference, the case is perfectly clear. The security was given in consequence of a demand by the creditor, and not only so, but there is

nothing to show that a winding-up of the company was then contemplated. On the contrary, the directors intended to go on, and thought that by raising money they could retrieve the affairs of the company. It was next urged that this security was void, because it was a pledging the entire property of the company in such a way that, if done by an individual, it would have been an act of bankruptcy. The answer to this is two-fold. First, that there is no provision in the Companies Act that every transaction which in the case of an individual would be an act of bankruptcy shall be void as against creditors; and the Legislature appears designedly to have omitted any enactment of that kind. Secondly, this is not a mortgage of the whole property of the company, for the shares were not fully paid up.

The third objection is the only one that could raise any serious doubt, namely, whether a joint stock company of this kind can raise money or give security for a past debt by deposit of title-deeds. It was urged that no company can mortgage unless expressly authorized to do so. Now, the company has property which it is authorized to deal with, and I should say that the true rule is just the contrary, namely, that the company can mortgage unless expressly prohibited from doing so. The 43d section of the act appears to recognize the creation of mortgages as an ordinary incident to a company. The memorandum in the present case mentions as a purpose of the company the "disposing of" its landed property. The articles give to the directors the whole powers of the company, subject to the provisions of the articles and of the Companies Act, 1862, and I cannot find anything either in the act or the articles to prohibit their making a mortgage by deposit. It would, in my opinion, be most undesirable to lay down a rule that no joint stock company can raise money in this way. A mortgage by deposit is the kind of security most usually given by mercantile men to bankers, and such a rule would seriously cripple joint stock companies in their business transactions. There being nothing in the articles to prohibit the giving such a security, I am of opinion that the company can give it as well for a past debt as for a future one. In fact, the case is stronger in favor of a security for a past debt, as it would be absurd to say that a company has not power to pay past debts; and if so, why should it be debarred from giving security, which is one way of applying its property in payment of its debts?

JONES v. GUARANTY COMPANY.

(101 U. S. 622. 1879.)

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

The New York Kerosene Oil Company and the New York Guaranty and Indemnity Company were corporations organized pursuant to the laws of New York.

On the 15th of February, 1867, Abraham M. Cozzens, as the president of the Oil Company, applied to the Guaranty Company for a loan of \$100,000. The sum of \$50,000 was advanced to him, and he thereupon delivered to the Guaranty Company the note of the Oil Company for that amount, of the date above mentioned, payable to and indorsed by A. M. Cozzens & Co., and having sixty days to run. At the same time he gave to the Guaranty Company a memorandum signed by him as such president, whereby he stipulated that he would cause to be prepared a mortgage by the Oil Company to the Guaranty Company on the real estate of the former therein mentioned, for the sum of \$100,000 to be held by the latter as security for the \$50,000 so lent, and for any further loan thereafter made by the Guaranty Company to the Oil Company. Cozzens thereupon procured a formal order to be made by the trustees of the Oil Company that such a mortgage should be executed, and the written consent of the holder of more than two-thirds of the stock of the Oil Company was given to the same effect. Both were necessary to the validity of the mortgage.

The capital stock of the Oil Company was \$500,000, and Cozzens owned of it \$493,000.

Passing by some intermediate details not necessary to be particularly stated, Cozzens caused to be prepared the bond and mortgage here in question, and both were duly executed. The counsel who prepared them made the mortgage describe the individual obligation of Cozzens as the liability to be secured instead of the debt of the company; but the mortgage recited that the Oil Company had authorized the giving of the mortgage to secure a loan of \$100,000, and that Cozzens had given to the Guaranty Company his personal bond in that sum to secure advances, not to exceed that sum, to be made to Cozzens upon the conditions in the bond mentioned, and that the requisite consent of stockholders had been given. The mortgage was conditioned for the payment by the Oil Company, and not by Cozzens, of the amount that might be due upon the instrument secured by it. The bond is set out at length in the record. It states that it was given to cover any advances then made or thereafter to be made by the Guaranty Company to

Cozzens to the amount of \$100,000 or less, on the condition that whenever any sum was so advanced the amount and date of the advance should be indorsed on the bond and signed by Cozzens, and that when any payment was made by Cozzens such payment should be indorsed in like manner, and that the amount which, according to the indorsements, should appear to be due on the bond should be considered as the amount due, "and for which the premises which have this day been conveyed to the said New York Guaranty and Indemnity Company, by the New York Kerosene Oil Company, by indenture of mortgage bearing even date herewith, shall be liable, and for no greater sum."

The mortgage and bond bear date on the 29th of April, 1867, but were delivered and took effect on the 11th of May following. The indorsements on the bond show that Cozzens received from the obligee three several advances, — one of \$50,000, and two of \$25,000 each. No credits are indorsed. The note of the Oil Company, indorsed and delivered to the Guaranty Company on the 15th of February previous, when the first loan of \$50,000 was made, was renewed when the bond and mortgage were delivered, and the amount was indorsed on the bond as an advance of that date. It was renewed several times subsequently, and the Guaranty Company holds the last renewal. When one of the advances of \$25,000 was made, a note of the Oil Company for that amount to Cozzens & Co. was indorsed and delivered as collateral. That note was also renewed from time to time, and the last renewal is held by the Guaranty Company.

When the other advance of \$25,000 was made, a warehouse receipt for oil, given by the Oil Company to Cozzens, was indorsed and delivered as a collateral. The receipt proved worthless. Nothing was ever received upon it. It is not controverted that the Oil Company owed Cozzens more than \$100,000 for his advances to it, nor that every dollar of the loans in question were used for its benefit. Not the slightest taint of dishonesty is shown in these transactions, nor is anything disclosed which warrants the suspicion of such a purpose.

The Oil Company was expressly authorized by the act under which it was organized to secure the payment of its debts theretofore or thereafter "contracted by it in the business for which it was incorporated, by mortgaging any or all real estate of such corporation," and it was declared that "every mortgage so made shall be as valid to all intents and purposes as if executed by an individual owning such real estate."

In March, 1868, Cozzens and the Oil Company became insolvent. Their paper went to protest. The business of the latter for the time was ruinous, and both were engulfed in the vortex of common disasters. Cozzens died about a week afterwards. "His death was caused by his failure. His physician said so." The unsecured credi-

tors attacked the validity of the mortgage. The Circuit Court sustained it, and the controversy has been brought here for review.

MR. JUSTICE SWAYNE, after making the foregoing statement, delivered the opinion of the court:—

The analysis of this case in the preceding statement divests it of all extraneous considerations, and presents it in the nakedness and simplicity of its material facts.

The central and controlling questions to be determined are:—

Whether the Oil Company had the power to give a mortgage for future advances; and,

Whether the mortgage here in question is, in the view of a court of equity, for the debt of the Oil Company or for the debt of Abraham M. Cozzens.

The oral arguments of the eminent counsel who appeared before us were addressed principally to these subjects. Numerous other points are made by the counsel for the appellant in his brief, and have been fully discussed in the printed arguments upon both sides. They are minor in their character, and we think involve no proposition that admits of doubt as to its proper solution. We are satisfied with the disposition made of them by the Circuit Court, and shall pass them by without further remark.

At the common law, every corporation had, as incident to its existence, the power to acquire, hold, and convey real estate, except so far as it was restrained by its charter or by act of Parliament. This comprehensive capacity included also personal effects of every kind.

The *jus disponendi* was without limit or qualification. It extended to mortgages given to secure the payment of debts. 1 Kyd, Corp. 69, 76, 78, 108; Angell & Ames, § 145; 2 Kent, Com. 282; *Reynolds v. Commissioners of Stark County* (5 Ohio, 204), *White Water Valley Canal Co. v. Vallette* (21 How. 414).

A mortgage for future advances was recognized as valid by the common law. *Gardner v. Graham* (7 Vin. Abr. 22, pl. 3). See also *Brinkerhoff v. Marvin* (5 Johns. (N. Y.) Ch. 320), *Lawrence v. Tucker* (23 How. 14).

It is believed that they are held valid throughout the United States, except where forbidden by the local law.

The statute under which the Oil Company came into existence made it "capable in law of purchasing, holding, and conveying any real and personal estate, whenever necessary to enable" it to carry on its business; but it was forbidden to "mortgage the same, or give any lien thereon." This disability was removed by the later act of 1864, which expressly conferred the power before withheld. This change was remedial, and the clause which gave it is, therefore, to be construed liberally with reference to the ends in view.

The learned counsel for the appellant insisted that a mortgage could be competently given by the Oil Company only to secure a

debt incurred in its business and already subsisting. This, we think, is too narrow a construction of the language of the law. A thing may be within a statute but not within its letter, or within the letter and yet not within the statute. The intent of the law-maker is the law. *The People v. Utica Insurance Co.* (16 Johns. (N. Y.) 357); *United States v. Babbit* (1 Black, 55).

The view of the court in *Thompson v. New York & Hudson River Railroad Co.* (3 Sandf. (N. Y.) Ch. 325) was sounder and better law. There the charter authorized the corporation to build a bridge. It found one already built that answered every purpose, and bought it. The purchase was held to be *intra vires* and valid. Here the object of the authorization is to enable the company to procure the means to carry on its business. Why should it be required to go into debt, and then borrow, if it could, instead of borrowing in advance, and shaping its affairs accordingly? No sensible reason to the contrary can be given. If it may borrow and give a mortgage for a debt antecedently or contemporaneously created, why may it not thus provide for future advances as it may need them? This may be more economical and more beneficial than any other arrangement involving the security authorized to be given. In both these latter cases the ultimate result with respect to the security would be just the same as if the mortgage were given for a pre-existing debt in literal compliance with the statute. No one could be wronged or injured, while the corporation, whom it was the purpose of the law to aid, might be materially benefited. Is not such a departure within the meaning, if not the letter, of the statute? There would be no more danger of the abuse of the power conferred than if it were exercised in the manner insisted upon. The safeguard provided in the required assent of stockholders would apply with the same efficacy in all the cases. The object of the loan, the application of the money, and the restraints imposed by the charter in those particulars, would be the same, whether the transaction took one form or the other. According to our construction the company could give no mortgage but one growing out of their business, and intended to aid them in carrying it on. In legal effect the difference between the two constructions is one merely of mode and manner, and not of substance.

Such securities are not contrary to the law or public policy of the State. Many cases are found in her reported adjudications where both judgments and mortgages for future advances have been sustained.

Our view is not without support from the language of the statute, that "every mortgage so made shall be as valid to all intents and purposes as if executed by an individual owning such real estate." If this mortgage had been given by individuals, the question we are examining doubtless would not have been brought before us for consideration.

When a deed is fatally defective for the want of a sufficient consideration to support it, such a consideration subsequently arising may cure the defect and give the instrument validity. *Sumner v. Hicks* (2 Black, 532). It is not necessary to go through the form of executing a second deed to take the place of the first one. This principle applies to the mortgage after all the advances had been made, conceding that it had before been invalid for the reason insisted upon.

The statute of 1864 neither expressly forbids nor declares void mortgages for future advances.

If the one here in question be *ultra vires*, no one can take advantage of the defect of power involved but the State. As to all other parties, it must be held valid, and may be enforced accordingly. *Silver Lake Bank v. North* (4 Johns. (N. Y.) Ch. 370); *National Bank v. Matthews* (98 U. S. 621). In the latter case this subject was fully examined.

A corporation can act only by its agents. If there were any such technical defect as is claimed touching the execution of this mortgage, it has been cured by acquiescence and ratification by the mortgagor.

No one else can raise the question. All other parties are concluded. *Gordon v. Preston* (1 Watts (Pa.), 385).

Where money had been obtained by a corporation upon its securities, which were irregular and *ultra vires*, but the money was applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and the shareholders were estopped from denying the liability of the company to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders, so far as the money thus raised is applied for the benefit of the company. In re *Cork & Youghal Railway Co.* (Law Rep. 4 Ch. 748).

A court of equity abhors forfeitures, and will not lend its aid to enforce them. *Marshall v. Vicksburg* (15 Wall. 146). Nor will it give its aid in the assertion of a mere legal right contrary to the clear equity and justice of the case. *Lewis v. Lyons* (13 Ill. 117).

The second point to be considered is whether the mortgage was for the debt of Cozzens or for the debt of the Oil Company.¹

We are satisfied beyond a doubt that it was the debt of the Oil Company and not his debt that was intended to be secured and was secured by the mortgage.

Decree affirmed.

¹ Part of the opinion relating to this question is omitted.

COMMONWEALTH v. SMITH.

(10 Allen, 448. 1865.)

BILL IN EQUITY seeking to impeach the validity of a mortgage, executed on the 30th of July, 1855, by the Troy and Greenfield Railroad Company to the defendants as trustees, covering by its terms the franchise, railroad, and all other property of the corporation, then owned or thereafter to be acquired, to secure bonds to the amount of \$900,000, to be issued to the contractor as part compensation for constructing the railroad, payable in thirty years from date. This mortgage recited the provisions of a contract for the construction of the railroad, dated December 30, 1854, to the effect that such bond should be given; and it was made subject to a prior mortgage to the Commonwealth, to secure State bonds to the amount of \$2,000,000, which the Commonwealth were to issue under the provisions of St. 1854, c. 226.

The following facts were agreed: Since the execution of the mortgage to the defendants, the Commonwealth have received two other mortgages upon the railroad and franchise of the Troy and Greenfield Railroad Company, one of which was dated on the 6th of July, 1860, and the other on the 5th of March, 1862; and also a surrender from the corporation of all their property, subject to redemption under St. 1862, c. 156. On the 4th of September, 1862, the Commonwealth took possession of the mortgaged premises in various towns, for breach of condition, in the manner shown by various certificates thereof, which are now immaterial. The Commonwealth under their various mortgages have at various times, from October, 1858, to July, 1861, advanced to the Troy and Greenfield Railroad Company large sums of money, amounting in all to several hundred thousand dollars. The corporation, under their mortgage to the defendants, have at various times, from August, 1855, to July, 1861, issued bonds to the amount in all of \$600,000, payable in thirty years from date. All these bonds were issued in good faith, and are held by *bona fide* holders, and the corporation have issued no other bonds than the above. Before advancing any money to the corporation, the Commonwealth had actual notice of the execution of the mortgage to the defendants, and of the fact that a number of bonds had been issued under the same. The amount of capital stock of the corporation which, in December, 1856, had been paid in, was \$143,905.77.

Upon these facts, and others which are now immaterial, the case was reserved by the Chief Justice for the determination of the whole court.

D. Foster, for the Commonwealth: The mortgage to the defendants has never been sanctioned or ratified by the Legislature, and

its validity must depend on the question whether the common-law powers of railroad corporations in Massachusetts permit them to execute mortgages, and if so to what extent. At common law, a railroad corporation has no power to execute any mortgage. This is clearly the English rule. *Winch v. Birkenhead, &c. Railway* (7 Railw. & Canal Cas. 384); *Beman v. Rufford* (1b. 48); *South Yorkshire Railway, &c. v. Great Northern Railway* (9 Exch. 84); *Shrewsbury, &c. Railway v. Northwestern Railway* (6 H. L. Cas. 113). It is also the prevailing opinion in this country. *Pierce v. Emery* (32 N. H. 504); *Hall v. Sullivan Railroad* (21 Law Reporter, 138); *Tippets v. Walker* (4 Mass. 595); *Gue v. Tide Water Canal Co.* (24 How. 257); *Worcester v. Western Railroad* (4 Met. 564); *Treadwell v. Salisbury Manuf. Co.* (7 Gray, 494); *Opinion of Justices* (9 Cush. 611); *Salem Mill Dam v. Ropes* (6 Pick. 32). The statutes of Massachusetts confer no such authority (St. 1854, c. 286; Gen. Sts. c. 63, §§ 120-123). The St. of 1854, c. 286, authorizing the issue of bonds of a certain description and for certain purposes is a virtual prohibition of the issue of any others. *Gelpcke v. Dubuque* (1 Wallace, 221).

The bonds issued under the mortgage to the defendants depart from the statute requirements in many respects. They were issued for an unauthorized purpose. They are payable in thirty years, instead of twenty. They were for an amount greatly exceeding the capital of the company. The bonds being void, the fact that they are held by *bona fide* purchasers is immaterial. Parties who take them are presumed to know the statute law. *Balfour v. Ernest* (6 Jur. (N. S.) 439); *Bissel v. Michigan Southern, &c. Railroad* (22 N. Y. 258); *Pearce v. Madison, &c. Railroad* (21 How. 441). The mortgage must perish with the bonds. It cannot stand as a security for any amount due under the contract for the construction of the railroad. The agreement with the contractor was not to give him valid bonds, but to give him just such bonds as these were. The parties selected a form of security which turns out to be invalid. Under these circumstances, the defendants would not be entitled to have the contract reformed in equity, nor can they set up a superior equity to the Commonwealth in this case. *Hunt v. Rousmaniere* (1 Pet. 1); *Leavitt v. Palmer* (3 Comst. 19).

S. Bartlett and C. Allen for the defendants: Even if it be conceded that the franchise to be a corporation and the delegated right of eminent domain are inalienable, there is nothing in the nature of a franchise to operate a railroad which is of that character. A corporation enters into no contract with the state that it will go on and act under its charter. The security of the state is founded upon the rules which it prescribes, and the restrictions which it imposes, and the power which it reserves to repeal or alter at will; and upon the power which resides in courts to enforce the due execution of the powers which are granted, or exact forfeitures in case of abuse. It is quite immaterial what persons may compose the corporation; the

individuals may all change, but the same duties will rest upon the corporation. The great weight of American authority is in favor of the existence of this power. *Morrill v. Noyes* (3 Amer. Law Reg. (N. S.) 18); *Miller v. Rutland, &c. Railroad* (36 Vt. 452); and cases cited; *Platt v. New York, &c. Railroad* (26 Conn. 544); *Hall v. Sullivan Railroad* (21 Law Reporter, 138); *Bowman v. Watkin* (2 McLean, 393, 394); *Union Bank v. Jacobs* (6 Humph. (Tenn.) 515); *Dinsmore v. Racine, &c. Railroad* (12 Wisconsin, 649); *Macon, &c. Railroad v. Parker* (9 Georgia, 377); *Pollard v. Maddox* (28 Ala. 321); *Allen v. Montgomery Railroad* (11 Ala. 454). The course of legislation in Massachusetts has recognized this as a common-law power. Sts. 1857, c. 178, §§ 1, 5; 1854, c. 423; c. 286, § 3; 1841, c. 44; Rev. Sts. c. 39, § 83; c. 44, § 11, *et seq.* The validity of a conveyance, executed by full authority of a corporation, cannot be questioned by third parties, on the ground that the corporation itself had no authority to execute it. Although a corporation has exceeded its authority, yet the question cannot be tried collaterally, but it is a matter between the corporation and the state. In this case, the Commonwealth stands in the attitude of an individual. The corporation itself, while retaining the consideration, could not maintain a bill in equity to escape from its contracts and conveyance. *Chester Glass Co. v. Dewey* (16 Mass. 102), and cases cited; *Parish v. Wheeler* (22 N. Y. 502). The Commonwealth, taking only a quit-claim title, take subject to all equities of which they have notice. They succeed to the rights of the corporation, and to no more. To hold that the Commonwealth can question this conveyance would be to hold that they have greater rights than their grantor had. This cannot be. *Parker v. Nightingale* (6 Allen, 344, 345); *Joslyn v. Wyman* (5 Allen, 62); *Taylor v. Dean* (7 Allen, 251); *Vermont, &c. Railroad v. Vermont Central Railroad* (34 Vt. 1); *Morrill v. Noyes* (*ubi supra*); *Silver Lake Bank v. North* (4 Johns. Ch. 370).

The validity of the bonds which the mortgage to the defendants was given to secure cannot be questioned in this process. By common law, clearly the corporation might issue such bonds. A cardinal rule of construction is, that a statute will not be construed to abridge a common-law power, unless its terms are clear. And the cases are very numerous where the literal construction of statutes has been departed from, in order to avoid unjust consequences, and to carry out the presumed intent of the Legislature. *Dwarris* on Sts. 544, 564, 593-595, 606-611, 652, 663; *Smith on Const. & Stat. Law*, 694, 792. See also *Ex parte Meymot* (1 Atk. 196, 199); *Cole v. Green* (6 Man. & Gr. 872, 890); s. c. (7 Scott, N. R. 682); *Bulkley v. Derby Fishing Co.* (2 Conn. 252); *United States v. Fisher* (2 Cranch, 400); *Staniels v. Raymond* (4 Cush. 316); *Stebbins v. Merritt* (10 Cush. 27, 31, 32). The cases arising under the statutes concerning settlements, usury, limitations, taxes, insolvent debtors, intoxicating liquors, and the proceedings of public officers, furnish

numerous other illustrations. Various bonds not executed in conformity to the statutes which required them have been held valid. *Bank of Brighton v. Smith* (5 Allen, 413), and cases cited. *Locke v. Johnson* (3 Allen, 153); *Pratt v. Gibbs* (9 Cush. 82); *Simonds v. Parker* (1 Met. 513). As a general rule, the forms prescribed for bonds are held to be merely directory. *Angell & Ames on Corp.* § 254; *Bank of Northern Liberties v. Cresson* (12 S. & R. 306). So county bonds and municipal bonds irregularly issued have been held valid, in the hands of *bona fide* holders. *Mercer County v. Hacket* (1 Wallace, 83); *Gelpcke v. Dubuque* (Ib. 175); *Meyer v. Muscatine* (Ib. 384); *Moran v. Miami Commissioners* (2 Black, 722); *Woods v. Lawrence County* (1 Black, 386).

The St. of 1854, c. 286, was not designed to deprive corporations of existing rights. Section 1 declared the right to issue bonds for certain purposes. But there were various other purposes for which, by common law, they clearly might issue bonds: as, for instance, to aid in constructing their road; to dissolve an attachment; to submit to arbitration; to prosecute a writ of replevin; and to convey property. It might be considered doubtful by some whether they had a right to issue bonds for the purposes named in the statute; but the giving of authority for these purposes did not abridge their general power to issue bonds for other lawful purposes. *Mobile, &c. Railroad v. Talman* (15 Ala. 472); *Allen v. Montgomery Railroad* (11 Ala. 437, 454); *Union Bank v. Jacobs* (6 Humph. 515). The statute therefore, does not apply, in any of its sections, to these bonds, which were issued for purposes not therein contemplated.

The provisions as to the form of the bonds are merely directory. Four suggestions are grouped together. Neither one is essential. Suppose, for instance, the bonds had been issued at a usurious rate of interest; would they alone, of all usurious contracts, be absolutely void? All of these provisions were simply designed to secure uniformity. The statute does not enact that, for a failure to comply with them, the bonds shall be void; and a strict compliance with them is not essential to the validity of the bonds. See *Bank of Brighton v. Smith* (5 Allen, 417); *Merritt v. Stebbins* (10 Cush. 27); *Hawkes v. Eastern Counties' Railway* (3 De G. & Sm. 743); *Bargate v. Shortridge* (5 H. L. Cas. 297). To give a different construction would involve consequences most unjust. It would enable the Commonwealth, for its own profit, to compel, in a collateral proceeding, an unwilling corporation to repudiate fair contracts entered into in good faith; although the Commonwealth had knowledge of the contracts before advancing a dollar to the corporation. *Parker v. Boston & Maine Railroad* (3 Cush. 117).

Even if the bonds are invalid, the debt of the corporation remains. They have agreed to give a good mortgage and good bonds. They are equitably bound by their promise to pay for the value which they received, although through accident or inadvertence or mutual mis-

take the promise is expressed in an invalid form. Must not the Commonwealth respect this equity? *Union Bank v. Jacobs* (6 Humph. 515), and Chancellor Kent's opinion, in note. The Commonwealth is in the position of a subsequent purchaser with notice. 3 Powell on Mortg. 1049-1058 a; *Dale v. Smithwick* (2 Vern. 151); *Card v. Jaffray* (2 Sch. & Lef. 374).

HOAR, J. : —

The question whether the mortgage made to the defendants by the Troy and Greenfield Railroad Company is of any validity against the Commonwealth requires the court to give a construction to the provisions of St. 1854, c. 286. To ascertain what the Legislature intended to authorize or prohibit by that statute, it will be expedient, first, to consider what were the powers of railroad companies in relation to the issue of bonds and the making of mortgages at common law, or before the statute was enacted.

There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which they may incur debts, and the right to make and use a common seal, — a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement. The general power to dispose of and alienate its property is also incidental to every corporation not restricted in this respect by express legislation, or by "the purposes for which it is created, and the nature of the duties and liabilities imposed by its charter." *Treadwell v. Salisbury Manuf. Co.* (7 Gray, 404).

But in the case of a railroad company, created for the express and sole purpose of constructing, owning, and managing a railroad, authorized to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties, the discharge of which is the leading object of its creation; required to make returns to the Legislature; there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body, of its own will. Such a franchise is not, in its own nature, transmissible. The power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. And although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and

used by the corporation after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in being depends upon the performance of its public duties. Having once established its road, if that and its franchise of managing, using, and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill, and buy another; but a railroad company cannot make a new railroad at its pleasure.

The whole reasoning of the court in the case of *Whittenton Mills v. Upton* (10 Gray, 582), in which it was held that a manufacturing corporation has no power to make a contract of copartnership, applies with much greater force to the transfer of its franchise by a railroad company.

No case has been cited in which the exercise of such a power has ever been judicially sanctioned in this Commonwealth where there was not express legislative authority for it; and the cases in which the Legislature has expressly conferred the power, or confirmed its exercise, furnish at once a strong implication that it would not otherwise exist, and afford a solution of the allusion to railroad mortgages which occurs in the statutes.

Coming then, to the consideration of the statute of 1854, we find it entitled "An act to authorize railroad companies to issue bonds."¹

We find no evidence that the Commonwealth has ever known and sanctioned the irregular and illegal issue of the bonds in question, either directly or by implication. Nor do we think that they fall within the class of cases in which it has been held that a violation of corporate powers cannot be taken advantage of collaterally. The second mortgage to the Commonwealth gives it a direct interest in the property, and, not being made expressly subject to any prior incumbrance, gives the right to maintain and prove that the supposed conveyance to the defendants was illegal and void.

The result to which the point decided leads is this: that, the defendants having no title which they can maintain against either of the mortgages to the Commonwealth, the plaintiffs have a plain, complete, and adequate remedy at law for any interference with the mortgaged property, and the bill must be dismissed.

HENDEE v. PINKERTON.

(14 Allen, 381. 1867.)

BILL in Equity brought by trustees under a mortgage issued by the Grand Junction Railroad & Depot Company, as security for

¹ Part of the opinion relating to this statute is omitted.

certain bonds of said company, to compel the defendant specifically to perform his written agreement to accept and pay for certain land in East Boston, bid off by him at auction. The following facts were agreed:—

By the act incorporating the Grand Junction Railroad & Depot Company, and acts in addition thereto, prior to the adoption of the by-laws hereinafter referred to, that corporation was authorized to hold lands in East Boston for depots and storehouses, as well as for railroad purposes, and to allow any other railroad corporation to establish depots upon its premises, and to sell or lease the land necessary therefor; and at the date of the mortgage hereinafter referred to, the corporation owned large tracts of land in East Boston, upon which it was engaged in constructing wharves and warehouses for storage of merchandise; and the lands conveyed by said mortgage, and the subject of this suit, were purchased for the like use, and were not required for the railroad track of the corporation, or for other railroad purposes.

Among the by-laws duly adopted by the corporation, it was provided as follows: "The directors shall have, in the management of the affairs of the corporation, and are hereby invested with, all the powers which the corporation itself possesses, not incompatible with the provisions of these by-laws and the laws of the Commonwealth;" and there was nothing in the by-laws incompatible with the exercise by the directors of the power to borrow money, or to issue bonds, or to convey in mortgage the lands of the corporation as security therefor. At the annual meeting of the corporation, held May 30, 1855, the said by-law was amended by striking out all that part thereof following the words "itself possesses," and inserting in lieu thereof the words "which are not in violation of the rights of the stockholders; provided, also, that the directors shall not enter into any contract or make any expenditure which relates to the permanent leasing or disposal of the property of the corporation, or the purchase of new property to an amount exceeding \$50,000, without the consent of the stockholders having been first obtained thereto, at a meeting legally notified for that purpose;" and, at a special meeting of the corporation, held December 14, 1855, the said amendment to the by-laws was reconsidered.

On the first of January, 1853, a mortgage was executed to the plaintiffs, as trustees, in the name of the corporation, of several parcels of land owned by the corporation, and about a mile of its railroad track, in East Boston, to secure bonds of that date to the amount of \$100,000, payable in five years. This mortgage was signed on the part of the corporation by its president, in pursuance of a vote of the directors authorizing him to do so, and to cause the seal of the company to be affixed thereto.

There was not upon this mortgage any seal of wax or wafer or other adhesive substance, distinct from the paper on which said

indenture is written; but, at the time of executing the same, there was impressed upon the paper opposite to the signature thereof, by the president of the corporation, the steel die adopted as the seal of the corporation, said die being constructed in two parts; upon one part thereof was raised, and upon the other part was sunk, a corresponding device, with letters and figures denoting the name of the corporation and the date of its incorporation; and, by means of said die, said device was indelibly and ineradicably impressed upon and into the substance of said paper; and such impression was so made by the president as and for the seal of said corporation, and in pursuance of the vote hereinbefore referred to. And a similar impression was in like manner made upon each of the bonds at the time of signing and issuing the same.

At several annual meetings of the stockholders of the corporation, prior to the date of the attachments hereinafter referred to, the directors presented their reports, containing a statement of the affairs of the corporation, wherein the indebtedness of the corporation upon said bonds, and the security given therefor by said mortgage, were fully stated and set forth, which reports were accepted by vote of the stockholders.

The equity of redemption of the corporation in the lands conveyed by the mortgage was sold on execution to one Welch, who conveyed the same to George W. Gordon; and by said sale and conveyance a good title to the equity of redemption was vested in Gordon, provided the mortgage was valid; and the corporation never redeemed the premises therefrom.

The plaintiffs likewise, upon default of payment of the bonds, and after demand made upon the corporation for payment of one of them, and by the request of the holders of more than one-half in amount of the bonds, entered upon the premises, and, in pursuance of the terms of a power of sale contained in the mortgage, sold the parcel of land which is the subject of this suit by auction to the defendant, he being the highest bidder therefor; and a memorandum of the sale was accordingly signed by the defendant, in which he agreed to comply with the terms thereof, and he paid into the hands of the auctioneer one hundred dollars to bind the bargain. The terms of sale provided that if any defect of title should appear, which could not be remedied by the sellers within thirty days, the sale should be void at the option of either party.

The plaintiffs, on the 20th of March, 1866, tendered to the defendant their own deed, a deed from Gordon, and a deed from the corporation, and the defendant refused to accept them on these grounds, and others, namely: 1. That said indenture of mortgage was not authorized by the stockholders of said corporation, but only by a vote of the directors thereof; 2. That in and by said indenture there was undertaken to be conveyed, in addition to the parcels of land aforesaid, about one mile of the road-bed and track of said

railroad, being but a fractional part thereof; 3. That there is no seal on said deed of indenture, of wax, wafer, or other adhesive substance, but only an impression of the corporation seal, as hereinbefore set forth; 4. That prior to the deed of release purporting to be that of said corporation to the defendant, dated March 20, 1866, two large attachments, amounting in the aggregate to over one hundred thousand dollars, were placed upon all the real estate of said corporation in the county of Suffolk, in suits against said corporation, which suits are still pending. But it was agreed that said suits were commenced and said attachments made long after the levy of the execution against the corporation hereinbefore referred to, and the conveyance under the levy and sale thereon to said Gordon.

Upon the foregoing facts, the case was reserved by Foster, J., for the determination of the full court.

W. G. Russell, for the plaintiffs. The general rule is, that corporations may issue bonds and mortgage their real estate in payment or as security for their debts. *Angell & Ames on Corp.* §§ 187, 191. The only established limitation of this rule, as applied to railroad corporations, is that they cannot, without distinct legislative authority, alienate their franchises, or their property, which is so inseparably connected with their franchises, as to be essential to the exercise and enjoyment thereof. *Commonwealth v. Smith* (10 Allen, 448); *Richardson v. Sibley* (11 Allen, 65). The present case does not come within this limitation. The lands in question were not intended or used for railroad purposes, but were held under special authority for other purposes (St. 1847, c. 30, §§ 3, 4). The fact that the mortgage included a small portion of the railroad of the corporation does not avoid the conveyance of the land. *Amesbury v. Bowditch Ins. Co.* (6 Gray, 596, 607); *Commonwealth v. Hitchings* (5 Gray, 482); *Shaw v. Norfolk Co. Railroad* (Ib. 180); *Pierce v. Emery* (32 N. H. 484). The vote of the directors was a sufficient authority for the execution of the mortgage. The directors of a corporation, in the absence of restriction in the charter or by-laws, have all the authority of the corporation itself in the conduct of its ordinary business. *Bank of Middlebury v. Rutland & Washington Railroad* (30 Vt. 159, 169); *Redfield on Railw.* 408. This authority extends to contracting debts, and pledging or conveying real or personal estate in payment or as security. *Sargent v. Webster* (13 Met. 497, 503); *Burrill v. Nahant Bank* (2 Met. 163); *Despatch Line of Packets v. Bellamy Manuf. Co.* (12 N. H. 225); *Bank of Middlebury v. Edgerton* (30 Vt. 182, 190); *Miller v. Rutland & Washington Railroad* (36 Vt. 452, 474); *Augusta Bank v. Hamblet* (35 Maine, 491); *Jackson v. Brown* (5 Wend. 590); *Hoyt v. Thompson* (19 N. Y. 207); *Gordon v. Preston* (1 Watts, 385). In this case, the by-laws conferred authority; and the subsequent action of the stockholders confirmed it.

The impression of the common seal of a corporation upon paper, made in the manner above set forth, is a good seal at common law. *Sprange v. Barnard* (2 Bro. C. C. 585); *The Queen v. St. Paul* (7 Q. B. 232); *Carter v. Burley* (9 N. H. 558); *Allen v. Sullivan Railroad* (32 N. H. 446); *Woodman v. York & Cumberland Railroad* (50 Maine, 549); *Bank of Manchester v. Slason* (13 Vt. 334); *Corrigan v. Trenton Delaware Falls Co.* (1 Halst. Ch. 52); *Connolly v. Goodwin* (5 California, 220); *Curtis v. Leavitt* (15 N. Y. 1, 90); *Ross v. Bedell* (5 Duer, R. 462); *Pillow v. Roberts* (13 How. 472); *Follett v. Rose* (3 McLean, 332, 335); Sugden on Powers, (8th ed.) 232; Matthews on Presumptions, 39. See also *Commonwealth v. Griffith* (2 Pick. 11, 13); *Tasker v. Bartlett* (5 Cush. 359).

FOSTER, J.:—

1. We entertain no doubt that the Grand Junction Railroad and Depot Company could lawfully sell and convey lands embraced in this bill. They were not acquired to enable the corporation to carry on the business which it was chartered to do for the benefit of the public, nor needed or used for that purpose. Their alienation in no wise impaired or affected the usefulness of the company as a railroad, or its ability to exercise any of its corporate franchises. In the absence of any express or implied legislative prohibition, this corporation possessed all the ordinary rights of ownership over these lands, and could convey them away absolutely, or mortgage them to secure any valid indebtedness. The recent cases in which railroad mortgages have been adjudged invalid by this court do not countenance any doubt of the power of a railroad company to sell and convey whatever property it may hold, not acquired under the delegated right of eminent domain, or so connected with the franchise to operate and manage a railroad that the alienation would tend to disable the corporation from performing the public duties imposed upon it, in consideration of which its chartered privileges have been conferred.

The special provisions of the acts relative to this company contemplate the acquisition of lands for sale or lease to other railways, and the parcels included in the bill are agreed to have been purchased for such purposes, and not for the use of the corporation in its own railroad business.

2. It may be true that so much of the mortgage as embraced a portion of the railroad track and the franchise belonging thereto is inoperative and void. But the parcels of land conveyed are entirely separate and independent, not in any way connected with this piece of track. The ordinary rule must be applied to this conveyance, by which, if the part that is valid can be separated from that which is void, and carried into effect, it will be done. *Amesbury v. Bowditch Ins. Co.* (6 Gray, 607).

3. The directors were competent to exercise the power of the corporation to convey or mortgage these lands. This is plain from

the terms of the by-law investing them with all the powers of the corporation, not incompatible with the by-laws and the laws of the Commonwealth. The authorities cited on the brief of the plaintiffs support the doctrine that the directors of railway corporations may mortgage property to secure debts which they are authorized to contract, even without any express authority from the corporation to do so. But we have no occasion to resort to any such general power on the part of directors, because here the language defining their powers is so broad and explicit as to leave no room for doubt.

4. The objection to the validity of the seal upon the mortgage remains to be considered. It was a distinct and visible impression of the corporate seal upon and into the substance of the paper on which the conveyance was written. This court has always been and still is disposed to recognize and preserve inflexibly the distinction between sealed and unsealed instruments. In this Commonwealth a scroll has never been treated as a seal. And a fac-simile of the seal of a corporation printed with ink on the blank form of an obligation at the same time when the blank was printed and by the same agency, has been recently, on full consideration, decided to be a mere scroll, and not a valid seal. *Bates v. Boston & New York Central Railroad* (10 Allen, 251). In that case there was nothing more than a scroll made with types, which differed from the scroll printed on the legal blanks in general use in some of the United States in no other respect than in its resemblance to the common seal of the corporation. A printed scroll is no better than one made by pen and ink. And the fact that it was a fac-simile of the device of the corporate seal did not change its character and convert it from a scroll into a seal. No definition of a seal has ever been made, and none can be suggested, liberal enough to include the method adopted in that case, which would not destroy the distinction uniformly adhered to in the usage and judicial decisions of this State. If we should pronounce every scroll a seal, we should speedily be called upon to take the next step of pronouncing every flourish to be a scroll; and nothing would remain of the ancient formality of sealing. Such a course would not only be an unwarrantable judicial innovation upon the common law, but would obliterate the important practical distinction between two classes of instruments of different degrees of solemnity, one of which does and the other does not conclusively import a consideration; one of which remains binding for twenty years, while the other is by statute subject to a limitation of only six years. No case has been found where such a printed device has been regarded as a seal by any court which preserves the distinction between seals and scrawls or scrolls.

On the other hand, such an impression of a seal as the one now before us has never been held insufficient; while similar seals have been decided to be valid in numerous English and American cases,

without, as well as with, the aid of statute provisions. In the present instance, we have a durable impression upon a tenacious substance made for the express purpose of solemn authentication. And after our own courts have allowed wafers instead of wax, and paper with gum or mucilage instead of wafers, there seems little reason why we should hesitate also to allow the sufficiency of an impression of a corporate seal on the paper itself. The extent to which this practice has prevailed among corporations; the fact that the seals of all our own courts have been from an early period of the same description; the sanction of numerous decisions in other States and in the Federal courts; the convenience and unobjectionable character of the usage, are arguments in its favor too powerful to be resisted, in the absence of any decisive authority to the contrary.

All the light that can be thrown upon the subject by historical and philological research has been afforded to us by the learned and exhaustive briefs which have been furnished by the counsel in this and a former case. But it is unnecessary to incorporate into this opinion the citations and illustrations collected by their commendable diligence.

To maintain the distinction between sealed and unsealed instruments the line must be drawn somewhere, and we are satisfied to draw it so as to exclude written or printed scrawls, scrolls, or devices; but so as to include an actual and permanent impression, upon the substance of the paper, of the common seal of a corporation.

Upon all the questions submitted to us no defect appears to exist in the title of the plaintiffs in equity, and they are entitled to a decree for specific performance by the defendant of his contract to purchase and pay for the lands described in the bill.

CHAPTER VIII.

POWERS AND LIABILITIES OF A CORPORATION.

IN RESPECT OF HOLDING STOCK IN ANOTHER CORPORATION.

FRANKLIN COMPANY v. INSTITUTION FOR SAVINGS.

(68 *Maine*, 43. 1877.)

IN EQUITY.

WALTON, J. :—

The claim which we are required to pass upon originated in this way :—

In April, 1875, the trustees of the Lewiston Institution for Savings subscribed for \$50,000 worth of the capital stock of the Continental Mills, one of the manufacturing corporations doing business at Lewiston. The savings bank had no money with which to pay for the stock, and in July following the Franklin Company, another corporation doing business at Lewiston, agreed to pay the \$50,000 to the Continental Mills, take the notes of the savings bank for the amount, and hold the stock as security. Five notes for \$10,000 each, payable in one year from date, with interest semi-annually, were prepared and signed by the treasurer of the savings bank, and sent to William B. Wood, at Boston; and he being the treasurer of the Continental Mills as well as treasurer of the Franklin Company, paid the money in his latter capacity to himself in his former capacity, and afterwards (when does not appear) made a certificate, signed by himself and the president of the Continental Mills corporation, stating that the Franklin Company was the "proprietor of five hundred shares in the Continental Mills, as collateral." It does not appear that this certificate was ever delivered to the savings bank, or offered to them, or that any of its officers ever knew of its existence. And it does not show upon its face that the savings bank has any interest in the stock, or connection with it whatever. The Lewiston Institution for Savings having become insolvent, in May, 1876, commissioners were appointed to receive and decide upon all claims against the institution. The Franklin Company presented for allowance the five notes above described, and afterwards filed a

claim for \$50,000 and interest, as so much money paid out by the Franklin Company at the request and for the benefit of the savings institution. Both claims were rejected by the commissioners, and the case is before the law court on report agreed to by counsel. There is no other consideration for the notes, and no other basis for the claim for money paid, than the payment to the Continental Mills above described. The claims, therefore, are one in substance, although presented in two forms.

I. The first question is whether it is competent for the trustees of a savings bank, at a time when there are no funds in the bank for investment, to agree to take shares in a manufacturing corporation, and thereby create a debt binding upon the bank.

We think not. It is familiar law that a corporation possesses such powers, and such only, as the law of its creation confers upon it. The rule is stated with great uniformity.

"A corporation has only such powers as are specifically granted, or such as are necessary for carrying the former into effect; and these powers can only be exercised for the purposes contemplated by its charter." Brightly's Federal Digest, citing *Humphreville Copper Co. v. Sterling* (1 West. L. Mo. 126.); *Beaty v. Knowler* (4 Pet. 152; s. c. 1 McL. 41); *Perrine v. Chesapeake & Del. Canal Co.* (9 How. 172); *Farnum v. Blackstone Canal Co.* (1 Sum. 46).

"A corporation can do no acts, and make no contracts, either within or without the State which created it, except such as are authorized by its charter." Br. Fed. Dig., citing *Bank of Augusta v. Earle* (13 Pet. 519); *Tombigbee R. R. Co. v. Kneeland* (4 How. 16); *Runyan v. Coster's Lessee* (14 Pet. 122).

"A corporation, being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." Marshall, C. J., in *Dartmouth College v. Woodward* (4 Wheat. 518, 636).

"An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it." *Hood v. N. Y. & N. H. Railroad* (22 Conn. 1, and 502).

As corporations are created by public acts of the Legislature, and all their powers, duties, and obligations are declared and clearly defined by public law, parties dealing with them must take notice of those powers and the limitations upon them, at their peril; and will not be allowed to plead ignorance of those powers and limitations in avoidance of the defence of *ultra vires*. *Pearce v. Mad. & Ind. Railroad* (21 How. 441); *Andrews v. Ins. Co.* (37 Maine, 256).

"In the United States, corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law." Green's Brice's *Ultra Vires*, 95, note, citing a large number of authorities.

"It certainly needs no argument or authority to show that a cor-

poration created for the purpose of insurance has no power to advance its moneys or obligations to sustain another corporation in a similar or dissimilar business." Opinion of the court in *Berry, Receiver, v. Yates* (24 Barb. 199).

"When the directors of the company subscribed for stock in a building corporation, whatever may have been their motive they transcended the powers conferred upon them, and departed from the legitimate business of the company, as much as if they had subscribed for stock in a manufacturing or steamboat company; and such subscription, in our opinion, is not binding upon the defendants, and any payments made upon it to the plaintiffs would be money received without consideration." Opinion of the court in *Mutual Savings Bank v. Meriden Agency Co.* (24 Conn. 159).

If a corporation can purchase any portion of the capital stock of another corporation it can purchase the whole, and invest all its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. A banking corporation could become a manufacturing corporation, and a manufacturing corporation could become a banking corporation. This the law will not allow; and it has been held that notes given by a manufacturing corporation for the purchase of shares in a bank are not collectible. *Sumner v. Murey* (3. W. & M. 105). That the notes given by a railroad corporation, for the purchase of a steamboat to be run in connection with its road, are not collectible. *Pearce v. Railroad* (21 How. 441).

It would seem, therefore, upon principle as well as authority, that it is not within the authority of the trustees of a savings bank to invest its funds in the stock of manufacturing corporations, unless expressly authorized so to do by its charter, or the public laws of the State.

But we do not rest our decision upon this ground. We rest it upon the broader ground that it is not competent for the trustees of a savings bank to purchase on credit property of any kind, not needed for immediate use, or the investment of existing funds. No such power is expressly conferred upon them; nor do we think it can be sustained as an incidental power.

It is suggested that it may be convenient in this way to provide, in advance, for the investment of funds that may afterwards come into the possession of the bank. We think the creation of debts, by corporations or individuals, for no other purpose than to provide a ready way to dispose of future acquisitions, a proceeding of very questionable convenience; that in the great majority of cases, it would be likely to prove, as it did in this case, very inconvenient. But it is a sufficient answer to say that the law imposes no duty upon the trustees of savings banks to provide for the investment of future funds or future deposits. Their whole duty is performed when they have provided safe investments for the funds already committed to

their care. To hold that they may create debts binding upon existing depositors for the benefit of future depositors, whose money, after all, may never be committed to their care, would be a doctrine as startling as it would be unprecedented.

II. The second ground on which the claim of the Franklin Company is sought to be maintained is this; it is said that where a corporation is authorized to hire money for any purpose, mere knowledge on the part of the lender that it is to be used for an illegal purpose will not preclude a recovery. This may be true. But the claim in this case is not for money lent. It is for money paid. And the latter is the only claim which the evidence tends to support. Ordinarily such a distinction is unimportant. But in this case it is vital. It is the hinge on which the case turns. It may be true that when money is lent, and the borrower is left free to use it as he pleases, mere knowledge on the part of the lender that the borrower intends to use it for an illegal purpose will not bar a recovery. But it is well settled that if it be a part of the agreement that the money shall be used for an illegal purpose, or anything is done by the lender in furtherance of such a use of the money, a recovery therefor cannot be had. Thus, the mere knowledge of the lender that the borrower of money intends to gamble with it, if, by the terms of the agreement, the latter is left free to use it as he pleases, may not constitute a bar to a recovery of it. But it is well settled that if the money is lent for the express purpose of enabling the borrower to gamble with it, a recovery cannot be had. *Cannan v. Bryce* (3 Barn. & Ald. 179); *McKinnell v. Robinson* (3 M. & W. 434); *Tracy v. Talmage* (14 N. Y. 162). As already stated, there is no claim in this case for money lent. And the evidence would not support such a claim, if there was one. The money was never for a moment in the possession of the bank. Never, for a moment, did the bank possess either the right or the power to use the money as it pleased. The agreement was that the Franklin Company should pay for the stock for which the trustees of the bank had subscribed, and take the stock and hold it as security. We thus see that by the very terms of the agreement the money was to be applied to a specified purpose, and that purpose an illegal one. We use the word "illegal," not in the sense of *malum in se*, nor *malum prohibitum*, but in the sense in which it is used to describe the unauthorized acts of corporations, — acts and contracts *ultra vires*.

"The contracts of corporations which are not authorized by their charters are illegal, because they are made in contravention of public policy. . . . Although the unauthorized contract may be neither *malum in se*, nor *malum prohibitum*, but, on the contrary, may be for some benevolent or worthy object, as to build an almshouse or a college, or to purchase and distribute tracts or books of instruction, — yet, if it is a violation of public policy for corporations to exercise powers which have never been granted to them, such contracts, notwith-

standing their praiseworthy nature, are illegal and void." Selden, J., in *Bissell v. Railroad Companies* (22 N. Y. 258, 285).

"Any application of, or dealing with, the capital, or any funds or money of the company, which may come under the control or management of the directors, or governing body of the company, in any manner not distinctly authorized by the act of Parliament, is, in my opinion, an illegal application or dealing." Lord Langdale, in *Solomons v. Laing* (12 Beavan, 339).

These extracts are to show the sense in which the word "illegal" is used when employed to describe the unauthorized acts and contracts of corporations. And, with respect to such acts and contracts, it has been very aptly said that the powers and franchises of corporations are grants from the government; that it would be just as reasonable and just as legal to allow one who has a patent for one hundred acres of land, to take possession of two hundred acres, as to allow a corporation to usurp and exercise a power not conveyed to it in its charter.

III. Another ground on which the Franklin Company claims to recover is that, when a contract has been executed, in whole or in part, and the corporation has thereby received a benefit, a recovery may be had by the other contracting party to the extent of the benefit thus conferred, notwithstanding the contract was *ultra vires*. It is a sufficient answer to this argument to say that the case fails to show that the savings bank has been thus benefited. The \$50,000 paid by the Franklin Company was paid directly to the Continental Mills. Not a cent of it ever came into the possession of the savings bank. The stock for which the \$50,000 was paid was issued directly to the Franklin Company. The title never for a moment vested in the savings bank. Although, by the terms of the agreement, the Franklin Company was to hold the stock as collateral security merely, still, the agreement, being *ultra vires*, cannot be enforced. Nothing possessing the slightest intrinsic value, not even a right of action, was ever secured to or vested in the savings bank. There is absolutely nothing on which a *quantum meruit* or a *quantum valebat* claim can be sustained.

Decision of the commissioners affirmed.

Claim of the Franklin Company disallowed.

APPLETON, C. J., BARROWS, VIRGIN, PETERS, and LIBBEY, JJ., concurred.

FRANKLIN BANK v. COMMERCIAL BANK.

(36 Ohio St. 350. 1881.)

ERROR to the Superior Court of Cincinnati.

The plaintiff and defendant were banking corporations, organized under the act "to authorize free banking," passed March 21, 1851 (1 S. & C. 168). Their corporate existence, except for purposes of winding up their affairs, ceased on the first day of January, 1873. On the 19th day of March, 1869, the defendant, the Commercial Bank, issued to Charles B. Foote, its president, a certificate of ownership of two hundred shares of the par value of fifty dollars each of its capital stock, which certificate was as follows:—

COMMERCIAL BANK OF CINCINNATI, STATE OF OHIO.

Number 44.

Shares, 200.

This certifies that Charles B. Foote, of Cincinnati, Ohio, is the proprietor of two hundred shares of fifty dollars each in the Capital Stock of the Commercial Bank of Cincinnati.

Transferable only on the books of the bank by the said Charles B. Foote or
 25 cents } his lawful attorney, on the surrender of this certificate.
 Revenue Stamp. } and is subject, together with all dividends thereon, for any
 debts or demand due from the holder to said bank.

Cincinnati, March 19th, 1869.

(Signed) H. COLVILLE.

Cashier.

(Signed) CHARLES B. FOOTE,

President.

Indorsed in blank, on the back, as follows:

Witness, H. COLVILLE.

CHAS. B. FOOTE.

The by-laws of the defendant prohibited a transfer of the shares of a holder while indebted to the bank.

On May 16, 1870, Foote, who was then, and continued to be, until about the 15th day of October, then next, the president and a director and stockholder of the Commercial Bank, borrowed of the plaintiff, the Franklin Bank, on his own account, the sum of \$10,000, payable on demand, and delivered to the Franklin Bank said certificate, as security for said loan. At this time Foote was indebted to the Commercial Bank in a sum largely in excess of the value of said two hundred shares of stock, but at the same time he was the owner of a large number of the shares of the capital stock of said bank, in addition to said two hundred shares. But at no time was his indebtedness to the Commercial Bank reduced below the actual value of two hundred shares of the capital stock.

On December 31, 1872, the plaintiff presented said certificate to the Commercial Bank, and demanded a transfer on its books of said

two hundred shares of stock to the name of the plaintiff, which transfer was refused. Whereupon the plaintiff brought the original action, setting up said loan, the pledge of said stock as security therefor, with notice thereof to defendant, the presentation of said certificate, and the demand for said transfer, with the refusal of the defendant, and alleged a consequent conversion of said stock by defendant. The petition prayed a judgment against the defendant for refusing said transfer, for the sum of \$10,561.43, the amount then due from Foote on said loan, alleging the value of said two hundred shares of stock to be in excess of said sum. The petition also prayed for such other relief, legal or equitable, as might become proper.

The case went to trial, and a bill of exceptions was sealed, containing all the testimony, which, in view of the opinion of the court and the facts above stated, it becomes unnecessary to notice further, except to state that proof was offered, showing a custom among bankers to fill the blank indorsement on the back of a certificate of bank stock, authorizing the holder to transfer the shares on the books of the company.

Sections 11 and 12 of the act under which the plaintiff and defendant were incorporated are as follows:—

“11. The capital stock of every company shall be divided into shares of fifty dollars each, which shall be deemed personal property, and shall only be assignable on the books of the company, in such manner as its by-laws shall prescribe; each bank shall have a lien upon all stock owned by its debtors, and no stock shall be transferred without the consent of a majority of the directors, while the holder thereof is indebted to the company.

“12. No company shall take as security, for any loan or discount, a lien upon any part of its capital stock; but the same security, both in kind and amount, shall be required of shareholders as of persons not shareholders; and no banking company shall be the holder or purchaser of any portion of its capital stock, or of the capital stock of any other incorporated company, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, on security, which at the time was deemed adequate to insure the payment of such debt, independent of any lien upon such stock; and stock so purchased shall in no case be held by the company so purchasing, for a longer period of time than six months, if the same can be sold at what the stock cost at par.”

The first sentence of section 13 is as follows:—

“In all elections of directors, and in deciding all questions at meetings of the stockholders, each share shall entitle the owner thereof to one vote.”

The superior court gave judgment for the defendant, which judgment it is now sought to reverse.

Healy & Brannan, and Lincoln, Smith & Stevens, for plaintiff in error.

Matthews, Ramsay, & Matthews, for defendant in error.

The plaintiff and defendant were incorporated under the Act of March 21, 1851 (1 S. & C. 170), as banking companies. Banks incorporated under that act are expressly forbidden to purchase or hold

shares in other corporations, and by clear implication forbidden to loan upon such shares. *Straus v. Eagle Co.* (5 Ohio St. 59); *Fowler v. Scully* (72 Penn. St. 456).

Healy & Brannan, and Lincoln, Smith & Stevens, in reply, claimed that even if the taking of the shares as security is within the prohibition of section 12 of said act, still no one but the State can complain of such an act. *Leazure v. Hillegas* (7 S. & R. 311); 12 Wall. 361; 3 Rand. (Va.) 136; 29 Mo. 576; 12 Am. L. Rev. 143; 24 Ohio St. 28. It was the duty of the defendant to make the transfer and let the State impose the penalty, if the plaintiff has disregarded the law. *Union National Bank v. Matthews* (98 U. S. 621). The prohibition of said section 12 extends only to cases of purchase of stock, and not to a loan upon collateral security of bank shares. 4 Johns. Ch. 370; *Baird v. Bank of Washington* (11 S. & R. 411); *Angell & Ames on Corp.* § 157; *Ayers v. Bank*, L. R. 3 P. C. 548, 558, 559.

BOYNTON, J.:—

We are met at the threshold of the case with the inquiry, whether an action will lie in favor of the plaintiff against the defendant for refusing to transfer, on the books of the defendant, to the name of the plaintiff, the two hundred shares of the capital stock of the defendant, represented by the certificate issued to Foote, and by him pledged to the plaintiff as security for the loan obtained. Such refusal to so transfer said stock, and an alleged consequent conversion of the same by the defendant, constitute the gravamen of the plaintiff's action. The 12th section of the act under which the two corporations were organized and from which they derived their powers, expressly provided, that no banking company organized under its provisions should be the holder or purchaser of any portion of its capital stock or of the capital stock of any other incorporated company, unless such purchase should be necessary to prevent loss upon a debt previously contracted in good faith, on security which, at the time, was deemed adequate to insure the payment of such debt, independent of any lien upon such stock (1 S. & C. 170, § 12). And by section 29 it was provided, that all the rights, privileges, and franchises which the company derived from the act should be forfeited, if the directors of the company should knowingly violate, or permit any of the officers or agents of the company to violate, any of the provisions of the act. That the stock in the present case was pledged or received to secure a precedent loan is not claimed.

There would seem to be little doubt, either upon principle or authority, and independently of express statutory prohibition of the same, that one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute. *Mutual Savings Bank, &c. v. Meriden Agency* (24 Conn. 159); *Franklin Company v. Lewiston Savings Bank* (68 Me. 43); *Central Railroad Company v. Collins*

(40 Ga. 582); *Sumner v. Marcy* (3 W. & M. 105). Were this not so, one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining the control of the bank's stock. Nor would this result follow any the less certainly, if the shares of stock were received in pledge only, to secure the payment of a debt, provided the shares were transferred on the books of the company to the name of the pledgee. A person in whose name the stock of the corporation stands on the books of the corporation is, as to the corporation, a stockholder, and has the right to vote upon the stock. *State ex rel. White v. Ferris* (42 Conn. 560); *Ex parte Willcocks* (7 Cow. 402); *In re Barker* (6 Wend. 509); *Hoppin v. Buffum* (9 R. I. 513); Field on Corp. § 69.

Hence, if the plaintiff appeared on the books of the defendant as the transferee or owner of the two hundred shares of stock represented by the certificate to Foote, it would have the right to vote upon the stock at all meetings of the stockholders of the defendant; and it would only be necessary for it to procure in pledge, as security for money loaned, a majority of the shares of the capital stock of the Commercial Bank, in order to obtain full control of its affairs, and take charge of its banking operations. This would not only be exercising powers granted to the plaintiff neither expressly nor by implication, but those which are clearly opposed to the manifest spirit and intent, if not to the language, of the statute. This court has uniformly adhered to the doctrine announced in *Straus v. Eagle Ins. Co.* (5 Ohio St. 59); that corporations have such powers, and such only, as the act creating them confers; and are confined to the exercise of those expressly granted, and such incidental powers as are necessary to carry into effect those specifically conferred. *Bank of Buffalo v. Toledo F. & M. Ins. Co.* (12 Ohio St. 601). This principle has recently been most emphatically asserted, both by the Supreme Court of the United States, in *Thomas v. Railroad Co.* (101 U. S. 71), and by the House of Lords, in *Ashbury Railroad Carriage and Iron Co. v. Riche* (L. R. 7 H. L. 653). It was claimed in argument in both cases, that a corporate body may do any act which is not either expressly or impliedly prohibited by its charter; although it was conceded that a stockholder might enjoin the act, where it was not authorized, either expressly or by implication, and that the State by proper process and proceedings might forfeit the charter. But it was held, in the first case, that the powers of a corporation organized under a legislative enactment are such only as the statute confers, and that the enumeration of them implies the exclusion of all others; and by the second case, that the contract sued on, being of a nature not included in the Memorandum of Association, was *ultra vires*, not only

of the directors, but of the whole company, and which the whole body of shareholders was incapable of ratifying.

Notwithstanding the rule thus prevailing, the act under which both the plaintiff and the defendant were organized, did not leave the right or power of the plaintiff to acquire the title to shares of stock in another corporation, to be determined alone upon the principle of construction which the rule above stated adopted. The right to deal in shares of stock in other corporations is not only not found among the enumerated powers which the act confers upon banks organized under its provisions, but the power, in language of the most undoubted import, is denied, and its exercise expressly prohibited. It therefore follows that the refusal of the defendant to permit the transfer upon its books to the plaintiff of the two hundred shares of its stock, violated no right of the plaintiff, and consequently created no liability on the part of the defendant. Such refusal did not amount to a conversion of the stock.

Its action in refusing the transfer was but the denial of any right by the plaintiff to be placed in a position to interfere and participate in the control and management of its internal affairs. To the claim of the plaintiff, that it was the duty of the defendant to make the transfer, when the same was demanded, and leave the State to impose the penalty of forfeiture on the plaintiff for a violation of its charter, we do not consent. The cases of *Union National Bank v. Matthews* (98 U. S. 621), and *Jones v. Guaranty and Indemnity Co.* (101 U. S. 622), and the cases therein cited, do not support such proposition. The principle of those cases is, that where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but voidable only, and that the sovereign alone can object; that the conveyance is valid until assailed in a direct proceeding instituted for that purpose. But they neither, by the principle maintained, nor by the reasoning advanced in support of it, sanction the doctrine that one corporation may buy up the stock of another, and thereby enable itself to interfere with the internal management of its affairs, especially where the power to do so is expressly prohibited by its charter.

In our opinion the petition stated no cause of action against the defendant, and hence laid no foundation for a judgment in favor of the plaintiff. That the plaintiff may have acquired rights by the pledge received from Foote, to such interest in the bank as said certificate of stock represented, is quite true. But what that interest is, if any, we cannot in the present case determine.

Judgment affirmed.

MILBANK v. RAILROAD COMPANY.

(64 How. Pr. (N. Y.) 20. 1882.)

HAIGHT, J. : —

This action was brought by the plaintiffs, who are the owners of forty-nine shares of the capital stock of the Buffalo, New York, and Erie Railroad Company, on behalf of themselves and the other stockholders, to restrain and enjoin the New York, Lake Erie, and Western Railroad Company, its agents, officers, and directors, from voting at any meeting of the stockholders of the Buffalo, New York, and Erie Railroad Company for the election of directors or otherwise. The Buffalo, New York, and Erie Railroad Company is a corporation organized in the year 1857, and now existing under the laws of the State, for the purpose of constructing and operating a railroad from the city of Buffalo to the village of Corning. On or about the 27th of February, 1863, the Erie Railway Company entered into an agreement in writing with the Buffalo, New York, and Erie Railroad Company, by which the latter leased and rented to the Erie Railway Company its real estate, road-bed, rolling-stock, branch tracks, property, etc., for the period of 490 years, at an annual rental of \$233,100. At various times during the years 1873 and 1874 the Erie Railway Company purchased 5,759 shares of the capital stock of the Buffalo, New York, and Erie Railroad Company, being more than one half of all of the capital stock of such company, and paid for the same out of its corporate funds. Subsequently, and in the year 1878, all the property and franchises of the Erie Railway Company were sold under a decree of this court, on foreclosure of a mortgage on such property, to the defendant the New York, Lake Erie, and Western Railroad Company. By such sale the New York, Lake Erie, and Western Railroad Company claims to have become the owner of the 5,759 shares of the stock of the Buffalo, New York, and Erie Railroad Company, and threatened to vote thereon at the next meeting of such corporation for the election of directors.

There is no conflict as to the facts. In the first place, it becomes important to determine whether or not the purchase of the stock of the Buffalo, New York, and Erie Railroad Company by the Erie Company was *ultra vires* and against public policy. Section 8 of chapter 140 of the Laws of 1850, being the general railroad act, provided that, "it shall not be lawful for such company to use any of its funds in the purchase of any stock in its own or any other corporation." It is contended, however, that this provision did not apply to the Erie Railway Company. The New York and Erie Railway Company was organized under chapter 224 of the Laws of 1832,

and was authorized to construct a railroad from New York City, through the southern tier of counties, to the shore of Lake Erie, at some eligible point between Cattaraugus Creek and the Pennsylvania line. Various amendments were enacted prior to 1848, but in none have I found any provisions prohibiting corporations from purchasing stock in other corporations.

In 1848 the general railroad act was passed (see Chap. 140). Section 11 contained the same prohibition contained in section 8 above quoted. Section 46 provides that "all existing railroad corporations within this State shall, respectively, have and possess all the powers and privileges, and be subject to all the duties, liabilities, and provisions contained in this act," &c. So that, under this section, the New York and Erie Railroad became bound by the provisions of section 11, and was expressly prohibited from purchasing the stock of another corporation. This chapter, together with the acts amending the same, were, however, repealed by section 50 of the general railroad act of 1850. After the repealing clause it contained the following: "But all railroad companies formed under said act are hereby continued in existence, in the same manner as if said act were not repealed, and such companies shall be subject to all the provisions and shall have the same powers, rights, and privileges, and be subject to the same duties, as if they had been incorporated under this act." It will be observed that this saving clause only extends to railroad corporations "formed under this act." While the New York and Erie Railroad existed and did business under the act and was bound by its provisions, still it was not formed under it, and is therefore not covered by the saving clause. Section 49 of the general act of 1850 provides that certain sections shall apply to existing railroad corporations, but fails to mention section 8.

It is quite possible that it was an oversight on the part of the Legislature in failing to provide that section 8 of the general Act of 1850 should apply to existing railroads, or in failing to embrace them in the saving clause in repealing the Act of 1848. Certainly there appears to be no reason for continuing the prohibition clause as to all railroads formed after 1848, and repealing it as to those previously formed. It consequently becomes necessary to consider the question at common law and under the general statute. In England there appears to be some conflict in the authorities; but in the United States, Green, in his American notes of Brice's *Ultra Vires*, page 95, says: "Corporations cannot purchase or hold or deal in stock of other corporations, unless expressly authorized to do so by law."

It has been held that a railroad corporation cannot lease its road-bed, rolling-stock, and franchises unless authority is expressly given, and such leases, if made, would be *ultra vires* and void. See *Thomas v. Railroad Company* (101 U. S. R. 71); *Troy and Boston Railroad Co. v. Boston, &c. Railroad Co.* (86 N. Y. 107); see also 80 N. Y. 27; 77 N. Y. 232. In the case of *Talmage v. Pell* (7 N. Y. 328) it was

held that a bank corporation has no power to purchase the stocks of other corporations for the purpose of selling them for profit, or as a means of raising money, except when such stocks have been received in good faith as security for a loan made or a debt due such corporation, or when taken in payment of such loan or debt. In the case of *The Mechanics' Mutual Savings Bank v. The Meriden Agency Company* (24 Conn. 159) it was held that a company organized to do a general insurance agency, commission and brokerage business, has no power to subscribe to the stock of a savings bank and building association. In the case of *The Central Railroad Company v. The Pennsylvania Railroad Company* (21 N. J. Eq. 475) it was held that a corporation cannot, in its own name, nor in the name of individuals, subscribe for stock or be a corporator under the general railroad law. In the case of *Berry v. Yates* (34 Barb. 200), it was held that an insurance company has no power to subscribe to the capital stock of another insurance company. In the case of *Hazelhurst v. Savannah Railroad Company* (43 Georgia, 57), it was held that if one railroad buy the stock of another, it practically undertakes a new enterprise not contemplated by its charter. This cannot be done by any implication; the power to do so must be clearly expressed. In the case of *The Central Railroad Company v. Collins* (40 Georgia, 583) it was held that the power to buy and hold real and personal property and make contracts is confined to such property and such contracts as are incident to building, managing, and maintaining the railroad; that the purchase of stock in another railroad is outside of the objects of the charter.

In this State there is a statute which appears to me to control the question. Section 1, title 3, chapter 18, part 1, of the Revised Statutes in substance provides: "Every corporation, as such, has power, — first, to have succession by its corporate name for the period limited in its charter, and, when no period is limited, perpetually; second, to sue and be sued; third, to make and use a common seal; fourth, to hold, purchase, and convey real estate; fifth, to appoint subordinate officers and agents; sixth, to make by-laws" Section 2 provides: "The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter, or in the act under which it shall be incorporated." Section 3 provides: "In addition to the powers enumerated in the first section of this title, and to those expressly given in its charter or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given." See also, Colby's N. Y. Railroad Laws, sec. 115, and authorities therein cited. In the case under consideration the right to purchase stock is not expressly given, and it is not claimed that the purchase of the stock in question, "was necessary to the exercise of the powers enumerated and given."

The Erie Railway Company was organized under chapter 160 of the Laws of 1860 and chapter 119 of the Laws of 1861. As such corporation it purchased all the rights, property, and franchises of the New York and Erie Railroad under a decree in foreclosure. Under these statutes, it appears that the Erie Railway Company possessed the same powers, and was subject to the same duties and liabilities, as the New York and Erie Railroad Company, and no others. One had no more right to purchase stock in another corporation than did the other. It was under this state of the law that the Erie Railway Company purchased the stock in question. The conclusion that I have reached is, that such purchase was not necessary in the exercise of any of its corporate powers; that it was unauthorized and in violation of the statute, and was consequently *ultra vires*. I do not understand this conclusion to be in conflict with the authorities which hold that a corporation may take title to all kinds of personal property to secure debts due it, created in lawful and legitimate business. The collection of such debts is among the powers given by the statute, and is necessary in the exercise of its corporate franchises. But collecting debts and investing its corporate funds are quite different acts.

In the second place, it becomes necessary to determine what, if any, title the New York, Lake Erie and Western Railroad Company have acquired to the stock, and what power it possesses over the same. In February, 1874, and subsequent to the purchase of the stock in question, the Erie Railway Company executed to the Farmers' Loan and Trust Company, as trustees, a mortgage to secure debts then owing, such mortgage covering all its property and franchises, including these shares of stock. The New York, Lake Erie and Western Railroad Company was organized under the general railroad law of 1850, and chapter 430 of the Laws of 1874, as amended by chapter 446 of the Laws of 1876. As such corporation it purchased all of the property, rights, and franchises of the Erie Railway Company under a decree made upon the foreclosure of the mortgage. Section 1, of chapter 446, among other things, provides that "the purchasers of such railroad property and franchises, and such persons as they may associate with themselves, their grantees or assignees, or a majority of them, may become a body politic and corporate, and as such may take, hold, and possess the title and property included in said sale, and shall have all the franchises, rights, powers, privileges, and immunities which were possessed before said sale by the corporation whose property shall have been sold as aforesaid."

It is contended that under this statute the New York, Lake Erie and Western Railroad Company's title to such stock becomes absolute and perfect, notwithstanding the fact that the purchase by the railway company was unauthorized and against public policy. It is true that this statute authorizes the new corporation to take, hold, and possess the property included in the sale; but do these words of

the statute change the character of the ownership from what it was under the old corporation? It held and possessed the title to the stock; it collected semi-annually the dividends accruing thereon. If a stockholder of that corporation had applied seasonably to the court it would have been restrained from paying out the corporate funds in the purchase of such stock. No action, however, was taken on the part of the stockholders; the corporation was permitted to purchase the stock and pay for it with its corporate funds. The money cannot be recalled. The stockholders, having rested upon their rights until the purchase was consummated, cannot be heard to complain, notwithstanding the fact that such purchase was unauthorized and in violation of its charter.

By this statute the Legislature intended to transfer this stock into the hands of the new corporation, and it does not appear to me that it was the legislative intent to invest the new corporation with any greater, different, or other title than that possessed by the old corporation. This, it appears to me, must have been the intention of the Legislature from the clause of the statute which follows: "And shall have all the franchises, rights, powers, privileges, and immunities which were possessed before such sale, by the corporation whose property has been sold as aforesaid." That is, the new corporation has the rights and power over this stock which were possessed by the old corporation before the sale. Again, it appears to me that it could not have been the intent of the Legislature to deprive other persons not interested in the old or new corporation so formed, of any rights or remedies which they may have had in reference to such stock; as, for instance, if the Buffalo, New York and Erie Railroad Corporation or its stockholders were injured or prejudiced by the voting upon such stock by the Erie Railroad Company, and were entitled to commence an action to protect themselves from injury, which might result from such voting, it does not appear to me that it was the intention of the Legislature to deprive them of such remedy by authorizing a transfer of this property to the new corporation.

This brings us to consider, in the third place, whether or not the Buffalo, New York and Erie corporation or its stockholders, the plaintiffs in this action, have such a standing in court that they can demand the relief prayed for. As I have before stated, the time has passed in which the stockholders of the Erie Railway Company could be heard to complain. The Buffalo, New York and Erie or its stockholders were not interested in the corporate funds of the Erie Railway Company, and the paying out of such funds in the purchasing of stock, although illegal and unauthorized, did not prejudice or injure such corporation or stockholders. The mere taking title to, the holding of the stock and the collection of the dividends thereon, as they may accrue from time to time, work no injury to the Buffalo, New York and Erie Railway Company or its stockholders, and consequently they have no cause for complaint. It is only when the

New York, Lake Erie and Western Railroad Company seeks to vote upon the stock, and thereby obtain control of the corporation, that such corporation or its stockholders can be prejudiced. No offer was made to vote on this stock while it was held by the Erie Railway corporation; it was not until after it had been purchased by the new corporation that the attempt to vote on it was made. The question thus presented is somewhat serious and important. I have been unable to find any reported case in which this question appears to have been squarely decided. The new corporation, the New York, Lake Erie and Western Railroad Company, has been organized under the general railroad law, and is now bound by section 8 of that statute.

It appears to me that the reason for the prohibiting of the purchasing of stocks in other corporations both under section 8 of the general railroad act and section 3 of the Revised Statutes, referred to, are twofold. First. It is against public policy to permit the officers of a corporation to take the corporate funds belonging to the stockholders and expend it in purchasing or speculating in the stocks of other companies. In the second place, it is against public policy to have or permit one corporation to embarrass and control another and perhaps competing corporation in the management of its affairs, as may be done if it is permitted to purchase and vote upon the stock. Green in Brice's *Ultra Vires*, at page 604, under the head of "Proceedings by Third Parties," says: "The whole of the law, in so far as the present subject is concerned, may be summed up in the two statements: First, that as no person can institute legal proceedings on account of illegal acts, however great their detriment to the public or to others than himself, whether to obtain damages for them or to restrain their repetition, unless he has been personally damaged, so neither can he do so if the acts are *ultra vires* of a corporation instead of a private individual. Secondly, if on the other hand a private person be wronged by such acts, he may in every case sue for damages or to restrain them, and that, although the matter complained of would not have been a tort if done by an ordinary citizen. In a word, torts committed by a corporation stand, as regards legal proceedings by aggrieved parties in respect thereof, in exactly the same position as torts by private persons, with the single qualification, arising from the doctrine of *ultra vires*, that every act directed or concurred in by a corporation in excess of its powers will, if it causes harm to any third party, be a tort, and give to such party a right of action."

In the case of *The State, ex rel. The Attorney-General v. McDaniel et al.* (32 Ohio, 354-368), a question was raised as to the right of the Cincinnati, Hamilton and Dayton Railroad Company to vote upon the bonds which it held of the Dayton and Union Railroad. It was alleged that it held the bonds illegally; that it got the control of the same, and placed them in the hands of its directors to enable them to vote at the election for the purpose of getting control

of the Dayton and Union Railroad, and of running the same in the interest of the Cincinnati, Hamilton and Dayton Railroad Company. It was held that it was not necessary to decide the question so raised, although the question was elaborately discussed upon the argument; but the learned justice who wrote the opinion in the case says, in reference thereto, that, "we are all inclined to the opinion that it, the Cincinnati, Hamilton and Dayton Railroad Company, had no such power." This case seems to be the nearest in point of any that I have been able to find, and, while it was not necessary to decide the question in disposing of the case, yet all of the judges of the highest court of the State of Ohio were of the opinion that the railroad company who had acquired the bonds of another railroad company had no power to vote thereon, and thus acquire control of such corporation.

In the case under consideration, the New York, Lake Erie and Western Company have acquired by purchase the majority of all the stock issued by the Buffalo, New York and Erie Railroad. If its officers are permitted to vote thereon, they can elect a board of directors of their own choosing. It would then be for the interests of the New York, Lake Erie and Western Railroad Company to have the Buffalo, New York and Erie Company managed and controlled in the interests of the former company. This would be liable to result in injury to these plaintiffs and their fellow stockholders, and if so they have a right to complain.

My conclusions, therefore, are that while the New York, Lake Erie and Western Railroad Company is the owner of the stock in question, and has the right, while it remains the owner, to collect and receive the dividends thereon, and has the right to sell and dispose of the same, it has not the right to vote thereon, and that the stockholders of the Buffalo, New York and Erie Railroad Company have the right to have it enjoined from so voting in case it threatened to do so. Judgment should be ordered for the plaintiffs, in accordance with the views herein expressed, with costs.

In re ASIATIC BANKING CORPORATION.

(*L. R. 4 Chan. App. 252. 1869.*)

THIS was an appeal from a decision of Vice-Chancellor Stuart, refusing to remove the name of the Royal Bank of India from the list of contributories (*Law Rep. 7 Eq. 91*).

The Royal Bank of India was formed in 1863, by memorandum and articles of association, under an Indian Act of 1857, which was almost identical with the Companies Act, 1856. The objects of the company, as defined by its memorandum of association, were as follows:—

"The objects for which the company is established are for carrying on the trade of bankers in all its branches, and to do and transact all matters and things incidental thereto as now existing, or which it may at any time hereafter be lawful for establishments carrying on banking, or for dealing in money, or in notes, bills, or other securities for money, to do or transact."

Clause 3 of the articles repeated the above clause of the memorandum, and proceeded to provide that such business should be fixed and determined, and in all respects regulated by such rules, regulations, and by-laws, as the directors of the company might from time to time make, which should be entered in a book kept for that purpose, and signed by three of the directors.

By clause 63, until the directors otherwise determined, three directors were to form a quorum.

Clause 68: "The board of directors shall have generally the entire management, superintendence, control, ordering, and directing of the affairs, business, concerns, and property of the company, including power to buy, sell, or take on lease, land or buildings, or both, for use of the company as occasion shall require; and shall, in every case not provided for, or inadequately provided for, by these presents, or by any rules or regulations hereafter made or established by any general meeting, have full power to regulate their own proceedings and the mode of conducting their business, and to act in such manner as they may think best calculated to effect and accomplish the objects and purposes for which the company is established, and to promote the welfare of the company; and also have and assume all powers which are requisite or necessary to enable them to carry into effect the objects and purposes for which the company is established, subject, nevertheless, to the provisions and restrictions contained in these presents and Act XIX of 1857."

70. "The board of directors shall have the full and entire control and disposal, on account and for the purposes of the company, of all moneys belonging thereto, whether already or hereafter to be subscribed or contributed, or in any manner acquired for the purposes thereof."

71. "The board of directors shall have full power, and it shall be their exclusive province, to prescribe the mode of receiving, collecting, and expending the moneys and funds of or owing to the company, and of drawing checks, and otherwise disposing of the funds and moneys which from time to time shall be in the hands of the bankers or treasurer, or otherwise at the disposal of the company; and the board of directors shall have full power in all respects, as they shall think advisable, to direct, control, and provide for the receipt, custody, and issue, management, remittance, and expenditure of the moneys and funds of the company."

By-laws were made by the directors, among which was the following rule:—

"The bank may accept lands, houses, ships, shares in public companies, or any other property, as a security for a debt absolutely and *bona fide* previously due and owing, or as security for the payment of any sum for which any person or persons may have rendered himself or themselves liable to the bank; but such security is never to be taken for an original loan, nor are shares in public companies so accepted as security to be transferred to the bank so as to involve it in the liabilities of such companies."

Notwithstanding this by-law, it appeared to have been the course of the Royal Bank to make loans on deposit of shares. The practice was for the borrower to give his promissory note, and deposit the share certificates with deeds of transfer executed by him, the name of the transferee being left in blank, and with a power of attorney enabling a nominee of the Royal Bank to receive the dividends. Among the shares so taken were 1000 shares in the Asiatic Banking Corporation.

In the early part of 1865 it was decided by one of the Indian Courts, that securities of this nature were invalid as against execution creditors of the depositors. The directors of the Royal Bank, being alarmed at this, passed the following resolution on the 30th of March, 1865, at a meeting at which six directors were present:—

"The meeting, having had under consideration the system of advancing loans upon shares, resolved, that, with the exception of the shares of the Royal Bank, only the shares of companies registered with limited liability, or shares of companies incorporated by royal letters-patent, should be advanced upon; that no advances should be made on any shares on which less than one-half the amount of the capital was paid, and that any shares upon which loans were granted should be registered in the name of the manager or in the name of the bank." This minute was duly entered in the minute book of the directors, but was not signed by three directors nor entered in the book of by-laws.

The 1000 shares were accordingly transferred into the name of the Royal Bank; the name of the Royal Bank being filled in, and the transfer deeds executed by the manager on behalf of the bank, the common seal of the bank not being used. The transfers were completed, and the shares registered in the name of the bank at different times between the 11th of April, 1865, and the 12th of December, 1865. At various times between the 11th of April, 1865, and the 5th of July, 1866, the Royal Bank sold, and received the purchase-money for, a number of these shares, and transferred to the purchasers the shares so sold. The number held by the bank was thus reduced to 605, of which number the bank remained the registered holder down to the date of the order for winding up the Asiatic Bank. In July, 1865, and February, 1866, the Royal Bank received dividends on the shares for the time being standing in its name.

Vice-Chancellor Stuart having refused to remove the name of the Royal Bank of India from the list of contributories, the present appeal was brought.

SIR C. J. SELWYN, L. J.:—

The memorandum of association constituting the Royal Bank of India declares its object to be to carry on the trade of bankers; and its power to do everything incidental to the business of banking is expressed in the most wide and unlimited terms. Then the 71st of the articles of association gives to the directors powers of very extensive and general character,—in fact, to do everything which in their judgment should be necessary for the purpose of carrying on this business of banking. It is argued, however, that the by-laws were in a certain sense incorporated with the articles, and that they control the powers of the directors. But it is to be observed, that the articles and the memorandum constitute the whole of what may be termed the public document in such a case as this. The memorandum is, except under very special circumstances, not capable of being altered at all, and the articles are, excepting also under special circumstances, the governing and binding laws of the company. But these by-laws, to which no one but the officers of the company has access, not only are not unalterable laws, but they are laws which may be from time to time altered in any way by the directors of the company as they may think fit, subject, it is true, to the regulation that those alterations are to be entered in a book, and signed by three of the directors. It appears that the directors did pass certain by-laws, which are entered in the book, with respect to the nature of the securities which they should take, and amongst them was one upon which great reliance is placed. [His Lordship read the by-law set out above.]

Now, with respect to the first question which has been argued, viz., as to the capacity of a trading corporation to accept shares in another trading corporation, it is sufficient for me to say that I entirely agree with the judgment of Lord Cairns in the case of *Barned's Banking Company* (Law Rep. 3 Ch. 105), viz., that there is not, either by the common or statute law, anything to prohibit one trading corporation from taking or accepting shares in another trading corporation. There may, of course, be circumstances which prohibit or render it improper for a company to do so, having regard to its own constitution as defined by its memorandum and articles; but excluding all these considerations, although in the statute of 1862 the words "person or persons" continually occur, still I think it must be taken to include corporations, and looking at the question as a mere abstract question, in my judgment there is nothing to prevent a corporation from being a shareholder in another trading corporation.

Then the question comes to this: Are the terms, general purport, and effect of the memorandum and articles of association of the

Royal Bank of India such as to render it *ultra vires* for its directors to do what they have done in this instance? In the first place, I apprehend that making advances upon shares in public companies is within the ordinary course of the dealing of bankers. This must be obvious to every one who is familiar with the cases which have occurred in this Court. It appears, accordingly, that this bank, in the ordinary course of its business, was in the habit of advancing money and taking as security shares in different companies, and of accepting those shares as security either for money advanced at the time, or for money which had been previously advanced; and the course of business was that the certificates of shares were deposited with the bank, accompanied by a blank transfer and power of attorney, enabling some nominee of the bank to receive the dividends which accrued due in respect of those shares. Accordingly, they so received the dividends upon a great number of shares in the Asiatic Banking Corporation. It appears that a judicial opinion was afterwards expressed, that in that state of circumstances, unless a formal transfer was executed, the bank were only in the position of equitable mortgagees, and that the shares themselves remained in the order and disposition of the borrower or depositor. The directors of the Royal Bank of India, being alarmed by that decision, accordingly met, and it appears that on the 30th of March, 1865, six directors having been present, they passed a resolution, part of which was, that any shares upon which loans were granted should be registered in the name of the manager, or in the name of the bank. That resolution was duly passed, and entered in the proper book of the company containing resolutions of the directors. It is true that it was not entered in the shape of being a repeal or alteration of the by-law which I before mentioned, nor was it entered in the book of by-laws, nor signed by three of the directors. But the substance of the transaction is this,—that the directors, having obtained certain securities in the ordinary course of their business, became alarmed by a judicial decision that those securities in their then shape were invalid, or liable to great danger, and therefore they, exercising, in my judgment, ordinary prudence, came to a resolution that that danger should be guarded against in the only way in which it could be guarded against, viz., by completing these mere equitable deposits by legal transfers. It appears to me that this was entirely within the province of the directors, and was an exercise of a reasonable judgment by them under the peculiar circumstances in which they were placed.

Then that resolution, having been passed, was afterwards acted upon, and a great number of shares, of which the bank had before been merely equitable mortgagees, were transferred to them. It appears that the transfers were made on printed forms, at different intervals between the 11th of April and the 12th of December, 1865. It is true that those transfers are not executed under the seal of the company,

but there is what has been termed only a wafer "For the Royal Bank of India, J. Gordon, Manager." The transfers having been so executed, it appears that the bank caused itself to be duly registered as a shareholder in respect of these shares. Some of the shares have been sold and transferred by them to purchasers, and they have received the purchase-money in respect of those shares, and have ever since remained registered shareholders as to the rest, which are the 605 shares now in question, and they have received the dividends on those shares. It has been said by Mr. Karslake, that the receipt of the dividends is a matter of no importance, because in their character of equitable mortgagees, having in their possession powers of attorney in respect of those same shares, they might have received the dividends under the powers of attorney as much as they did under the transfers. But I think that the sale of so many of these shares was, on the part of the bank, an unequivocal act of appropriation and acceptance by them, and although it be true that they might have received the dividends under the powers of attorney, if those powers had remained in force, it is obvious that having sold some of the shares in the character and capacity of registered shareholders, they must be taken to have received the dividends on the remaining shares in the same character and capacity; and it is equally obvious that the powers of attorney from the former shareholders, whose shares had been transferred to the bank, were put an end to and became inoperative as from the date of those transfers. I think, therefore, under these circumstances, that any question as to the mode in which the transfers were executed by the bank or its agent, becomes quite immaterial, because, as was held by the full Court of Appeal in *Coles v. Bristowe* (Law Rep. 4 Ch. 3), where shares have been so accepted, it becomes quite immaterial whether the deed of transfer has been executed or not. And then, in addition to that, by the 45th section of the Indian Act of 1857, it is declared that, "any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and such contract may be in the same manner varied or discharged." It has been said that here there is no evidence of any authority; but I think that under the circumstances which I have already stated, the authority of the bank is most clearly and explicitly proved. There is the resolution of the directors, entered into, as I have already said, under circumstances which rendered it prudent and proper that such a resolution should be come to. Then we have the resolution acted upon by the bank, we have them procuring themselves to be entered as shareholders, and dealing with the shares; and after that I think it impossible that it can be argued with success that there was no authority to their agents to do what in fact was done.

Then it is said that the consequence is one of very great hardship, as involving the shareholders in the Royal Bank of India in a great number of liabilities in respect of other companies with which they have had nothing to do; and many cases have been suggested in argument, such as that of bankers becoming partners in a brewing company, or a shipping company, or many other things with which, in their own articles of association, they had no connection whatever. But I think the answer to that is, that such dangers are necessarily involved in lending money upon securities of this kind. Take, for instance, the common case of a banker advancing money upon the security of a ship and the freight. Nothing, probably, would be further from the notion of the banker than entering into any transaction respecting the sailing of the ship, or receiving freight in respect of that ship. But if he is obliged to foreclose his security, if he is obliged to take possession of the ship, then, as a prudent man, he would necessarily become involved in the management of the sailing of the ship and receiving the freight, as constituting the only means by which he could recover the money he had advanced. I may mention one very familiar instance, known to us all, that of a well-known insurance company. Having lent money upon the security of a mortgage on land in Galway, and having been obliged to foreclose that mortgage, they became dealers in land in Galway on a very large scale. So in this case, if it is once established that it was within the authority of the directors to lend money upon the security of shares, it necessarily follows that anything which was a prudent and proper act for them to do with a view to obtaining the benefit of such security, was equally within the scope of their authority. If it could have been shown that it was an act absolutely prohibited by their memorandum or articles of association, then, no doubt, a different question would have arisen; the act would have been *ultra vires* and incapable of confirmation or ratification; but in my judgment there is no such prohibition, but, on the contrary, the directors had, under the memorandum and articles of association, powers so ample as fully to justify that which was done; and I think that the mere circumstance of their having passed that by-law, of which no public notice was given, and which they had power from time to time to alter as they thought fit, cannot be construed as constituting any such prohibition, more especially when the very same persons who had power to alter that by-law did, for a reasonable cause, pass the resolution under which the acts now in question were done.

The result, therefore, is that in this case—the company having received the shares in the ordinary course of their business as bankers, as a deposit or security for moneys owing to them; the directors having afterwards, for a reasonable cause, and influenced by the effect of a judicial opinion, and acting for the benefit of the company, and at a meeting duly constituted, resolved that those

securities should be changed from equitable securities into complete legal transfers; that resolution having been acted on, and the shares having been, in fact, transferred to the Royal Bank of India, and accepted by them, and they having been duly registered as shareholders, and having taken the benefit of the shares, having sold and received the purchase-money for some of the shares, and having in their character of registered shareholders received the dividends on the remaining shares down to the time of the winding up—I think that the name of the Royal Bank of India was rightly included in the list of contributories in respect of the remaining 605 shares, and consequently that the appeal motion must be dismissed with costs.

SIR G. M. GIFFARD, L. J. :—

This is an appeal by the Royal Bank of India seeking to have its name taken off the list of contributories of the Asiatic Bank. The Royal Bank of India is upon the register of shareholders; it was put there some time ago in respect of these particular shares, along with others; it has, as shareholder, sold some of the shares, and received the purchase-money, and has received considerable sums of money for dividends on the rest. I quite agree, however, that all this would not make the company a shareholder if the transaction was *ultra vires*.

The Royal Bank of India was constituted under the Indian Act of Parliament, which gets rid of the difficulties which sometimes arise as to dealings with corporations, — I mean difficulties with reference to the seal, and other matters of that description. It is constituted by a memorandum of association and by articles as a bank for the purpose of lending money, and that upon every species of security. From the very nature of such a company it must, without more, be inferred that the directors have all the ordinary powers which the managers of an ordinary bank would have, and you may safely deal with the managers of such a bank upon that assumption, unless there is something in the articles to restrict their powers; and here the articles tend strongly the other way. If it is sought to import the by-laws into transactions with third parties, it must, according to the ordinary law of principal and agent, be shown that those third parties knew that there was a restriction upon the general powers of the agents. Now, in the first place, it is not proved that these by-laws were known to the Asiatic Bank, and therefore we must assume that they were not so known. Even if they had been known, I think that the subsequent resolution which, although not signed, is recorded, — passed, as it was, by six directors, — would be abundantly sufficient to get rid of the effect of these by-laws. It is not, however, necessary to decide that point, for I am clearly of opinion that in the dealings between the Asiatic Bank and the Royal Bank of India all that has to be looked to is the act of Parliament and the memorandum and articles which constituted the company.

What, then, was the transaction? I quite agree that the Royal Bank of India had no authority to speculate in shares, and that if it had gone upon the Stock Exchange and bought shares as a speculation, such a proceeding would have been *ultra vires*, and all that has taken place would not have been enough to constitute the Royal Bank of India shareholders in this bank, or prevent them from repudiating these shares. But the transaction was of quite a different nature. There was a *bona fide* loan upon the deposit of shares. That unquestionably is a transaction within the scope and objects of the company, being one within the scope of every ordinary banking business. While that goes on, and while these shares are in the hands of the Royal Bank of India, there comes a decision in a court of law, from which the Royal Bank of India infer, rightly or wrongly, that their shares will be in jeopardy unless they take a transfer of them either into the name of their manager or into their own name. In consequence of that, they take the reasonable course of having the shares transferred into their own name, for the purpose of making those securities which they had taken valid and effective, and for no other purpose whatever. Of course, although no banker is authorized to become a partner with merchants, or shipowners, or builders, or to engage in transactions of that sort, yet he is authorized to lend upon securities of that description, and he is authorized to take every rational course for the purpose of making his securities good and available. In that way he may become liable upon a building contract; in that way he may become liable as a shipowner; in that way he may become liable in respect of matters of freight, or, in fact, in respect of any matters connected with a bill of lading which he holds as a security. I entirely found my judgment on this, that it is within the scope of an ordinary banking business to make the loans which have been made, and to take the deposit of shares as a security; and when the directors, having done so, afterwards took a reasonable and *bona fide* course to realize those securities, they cannot now turn round and say that what they did for that purpose was *ultra vires*, and not justified by their articles of association.

Upon these grounds I am of opinion that the decision in the Court below was perfectly right, and that the appeal must be dismissed with costs. I must say the justice of the case is entirely in this instance with what the law most clearly is.

FIRST NATIONAL BANK v. NATIONAL EXCHANGE BANK.

(92 U. S. 122. 1875.)

ERROR to the Court of Appeals of the State of Maryland.

The plaintiff, a national bank organized under the laws of the United States, and doing business at Charlotte, N. C., desiring to increase its capital stock, and for that purpose to deposit with the treasurer of the United States at Washington \$50,000 in bonds of the United States, employed Bayne & Co., of Baltimore, as its agent, to procure and deliver them at the treasury. Not having money to pay for them at the time, the plaintiff sent its president, Wilkes, to Baltimore, with a certificate previously prepared in Charlotte, as follows : —

FIRST NATIONAL BANK OF CHARLOTTE, N. C.

Charlotte, Dec. 15, 1865.

Received, on deposit, from Bayne & Co., fifty-five thousand United States 5-20 bonds, third issue, payable to the order of themselves on return of this certificate.

JOHN WILKES,

Pres. First Nat. Bk., Charlotte, N. C.

This certificate was delivered by Wilkes to Bayne & Co., in Baltimore, and on the 18th of December, 1865, they, having indorsed the same, deposited it, together with other securities, with the National Exchange Bank of Baltimore, as collateral security for a call loan of \$80,000 then made by that bank to said firm of Bayne & Co.

A few days after the delivery of said certificate, the plaintiff deposited in New York, to the credit of Bayne & Co., a sum sufficient to pay the same, and received, in January, 1866, oral notice from them that the certificate was discharged, and subject to its order. In March, 1866, the plaintiff received a written notice to the same effect, but did not apply for the surrender of said certificate. In April following, Bayne & Co. failed; and the plaintiff was then notified by the defendant that it held the certificate of deposit for value, and demanded the delivery of the bonds therein mentioned.

Wilkes, the president, was sent by the plaintiff to Baltimore to negotiate for the return of said certificate. He informed the defendant that it had been satisfied by the payment to Bayne & Co., and disavowed any legal liability on account of same to the defendant. To avoid suit, however, Wilkes offered to pay \$5,000 upon the delivery of the certificate; which defendant refused, but offered to take \$20,000, and threatened suit unless so settled. Wilkes declined to pay this sum, but asked for delay until he could return to Charlotte

and consult the directors of his bank. He again returned to Baltimore, and new negotiations for compromise of the controversy between the two banks in regard to their respective rights to the certificate were opened. Wilkes ascertained that the defendant held, among its collaterals from Bayne & Co., a large number of shares of Washington, Alexandria and Georgetown Railroad stocks, the market-value of which had been seriously depressed by the failure of Bayne & Co. Having informed himself in regard to the condition of the stock and its supposed value, and after one or two interviews with the president and directors of the defendant, it was finally agreed that the plaintiff should take four hundred shares of the Washington, Alexandria and Georgetown Railroad stock, and one thousand shares of the Maryland Anthracite stock, the same being valued at \$40,000; and one hundred and twenty-five shares of the stock of the plaintiff, valued at \$15,000, — the latter, inasmuch as he was advised that a national bank could not buy its own stock, to be taken by Wilkes himself; thus making \$55,000. Upon the basis of this settlement, the defendant was to deliver to Wilkes the certificate held by it for the \$55,000 United States bonds. The plaintiff paid to the defendant the sum of \$40,000 according to the terms of the above settlement, and received the certificates for one thousand shares coal stock. The four hundred shares of railroad stock were not then delivered, there being a suit about it at the time of the agreement which prevented all transfers; but it was regarded and treated by both parties as belonging to the plaintiff.

In September, 1869, nearly three years after the date of the settlement, suit was brought by the plaintiff in the Superior Court of Baltimore City to recover the \$40,000 paid by it to the defendant in pursuance of the arrangement above stated. At the request of the plaintiff, the court granted the following propositions of law: —

First, That if the plaintiff agreed to purchase for \$40,000 the railroad and coal stock, and paid that sum, then the court must find for the plaintiff for that amount, provided the court shall find that the defendant knew the plaintiff to be a national bank, and shall further find that the certificate of deposit was delivered up in consequence of said contract, if by said contract no part of the \$40,000 was to be paid for the certificate.

Second, That if the plaintiff agreed to purchase the said stock for \$40,000, and Wilkes also agreed to purchase for \$15,000 one hundred and twenty-five shares of plaintiff's stock, and the inducement to both agreements was Wilkes's desire to obtain the certificate of deposit, and he did so obtain it, that does not inure to make the first contract valid, provided the court shall find, that, by the first-mentioned contract, the consideration for which the sum of \$40,000 was to be paid was the railroad and coal stock, and that no part of said sum was to be paid for the certificate of deposit.

Third, That if the plaintiff, in order to compromise the certificate of deposit, agreed to purchase it and the railroad and coal stock for

\$40,000, and paid the money, then the plaintiff is entitled to recover so much of said sum as the court shall find was paid for said stock.

The court found for the defendant, and rendered a judgment in its favor, which the Court of Appeals affirmed: whereupon the case was brought here by writ of error.

Mr. J. Upshur Dennis and Mr. John Scott, Jr., for the plaintiff in error: The determination of the validity of the transaction involved in this case must necessarily depend upon the construction of the National Banking Law.

The eighth section of that law enumerates the powers which a national bank can exercise. Every other power is as much withheld as if it was in express terms prohibited. *Pearce v. Mad. & Ind. R. R.* (21 How. 442); *Bank of Augusta v. Earle* (13 Pet. 587); *Perrine v. Ches. & Del. Canal Co.* (9 How. 184); *Penn., Del. & Md. Steam Nav. Co.* (8 G. & J. 319).

No clause gives it power to purchase stocks: on the contrary, the authority specifically conferred on it to buy exchange, coin, and bullion, raises the conclusive presumption that the omission of that power was intentional. *Expressio unius exclusio alterius*.

Conceding that the two agreements — the one for the abandonment of the claim, and the other for the purchase of stock — may be inseparably united, it is insisted that the court below erred in holding that a power to acquire stocks is incidental to that of providing for the discharge of a disputed claim by way of compromise. Taking anything from the defendant but a release or a discharge, transcends the limits of necessary powers, and enables a corporation to accomplish indirectly that which was intended to be prohibited. Upon the principle which underlies the opinion of the Court of Appeals, it may be said that a corporation has, as an incident to the power to discharge its indebtedness, that of acquiring the requisite funds; and, as a legitimate means of so doing, the privilege of engaging in business of any kind, provided its real and *bona fide* object is to meet outstanding demands against it. This line of argument would give these creatures of the statute every power the exercise of which is not in positive terms forbidden.

The true doctrine is, that an implied or incidental power must be deducible from the grant, and fairly within its scope, — partake of the same character as the specifically granted powers, but not enlarge them, and tend naturally to secure the same result. A power to discharge may embrace that of making a payment of any kind whatever, but not that of purchasing or acquiring. That is a distinct and substantive power of an entirely different nature. *Pearce v. Mad. & Ind. R. R.* (*supra*); *East Anglian Ry. v. Eastern Counties Ry.* (7 Eng. Law & Eq. 503); *Hood v. N. Y. & N. H. R. R.* (22 Conn. 1; *id.* 502); *Russell v. Topping* (5 McLean, 197); *Clark v. Farrington* (11 Wis. 323); *Beatty v. Knowles* (4 Pet. 167).

The precise proposition involved in this controversy has been de-

cided in *Talmage v. Pell* (3 Seld. 328). See also *Fowler v. Scully* (72 Penn. 461); *Shoemaker v. National Mechanics' Bank* (2 Abb. C. C. 422); *Shinkle v. First National Bank of Ripley* (22 Ohio, 516); *Wiley v. First National Bank of Brattleboro'* (47 Vt. 552); *First National Bank of Lyons v. Ocean National Bank* (N. Y. Ct. of Ap., Albany Law Jour., April 17, 1875).

The Court of Appeals of Maryland, in *Weckler v. First National Bank of Hagerston*, decided at the April Term, 1875, but not yet reported, has changed its former views, and recognizes and enforces the doctrine announced in *Talmage v. Pell* (*supra*).

MR. CHIEF JUSTICE WAITE delivered the opinion of the court:—

The question presented for our consideration in this case is, whether a national bank, organized under the National Banking Act, may, in a fair and *bona fide* compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time, that, by turning the stocks into money under more favorable circumstances than then existed, a loss, which would otherwise accrue from the transaction, might be averted or diminished. Such, according to the finding below, was the state of facts out of which this suit has arisen. That finding is conclusive upon us.

A national bank can “exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes” (Rev. Stat., sect. 5136, par. 7; 15 Stat. 101, sect. 8).

Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the board of directors and the officers and agents of

the bank, and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter or by-laws. Banks may do, in this behalf, whatever natural persons could do under like circumstances.

To some extent, it has been thought expedient in the National Banking Act to limit this power. Thus, as to real estate, it is provided (Rev. Stat. sect. 5137; 13 Stat. 107, sect. 28) that it may be accepted in good faith as security for, or in payment of, debts previously contracted; but, if accepted in payment, it must not be retained more than five years. So while a bank is expressly prohibited (sect. 5201; 13 Stat. 110, sect. 35) from loaning money upon or purchasing its own stock, special authority is given for the acceptance of its shares as security for, and in payment of, debts previously contracted in good faith; but all shares purchased under this power must be again sold or disposed of at private or public sale within six months from the time they are acquired.

Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in *Fleckner v. Bank U. S.* (8 Wheat. 351), where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions. For this reason, among others, the acceptance of an indorsed note in payment of a debt due was decided not to be a "dealing" in notes. Of course, all such transactions must be compromises in good faith, and not mere cloaks or devices to cover unauthorized practices.

It is difficult to see how a debt due from, or a contested obligation resting upon a bank, occupies any different position in respect to this power of adjustment and compromise from that of a debt owing to it. The object in both cases is to get rid of or reduce an apprehended loss growing out of legitimate business; and it would seem that whatever might be done in the one case ought not to be excluded from the other under the same circumstances. Often a discharge by a bank of its own obligation creates a debt due to it from another. Such was the case here. Bayne, without authority, transferred to the defendant, as collateral security for his indebtedness, a certificate of deposit issued to him by the plaintiff, and afterwards collected the money due upon the certificate from the plaintiff without disclosing the transfer. Any payment by the plaintiff to the defendant, therefore, in discharge of its liability upon the certificate, became a lawful charge against Bayne. He was insolvent. It was, on this account,

not only the right, but the duty, of the officers and agents of the plaintiff to protect by their arrangements, as far as possible, the stockholders whose interests they represented. This was necessarily left to their judgment and discretion. No question of good faith is involved. The transaction for all the purposes of this suit must be taken to have been, in fact, what it purports to be, — a fair and honest compromise of an outstanding claim, with a view to ultimate protection against an impending loss. As such, we think it was within the corporate powers of the bank, and that the Court of Appeals did not err in so holding.

Judgment affirmed.

CHAPTER IX.

POWERS AND LIABILITIES OF A CORPORATION.

IN RESPECT OF HOLDING ITS OWN STOCK.

RAILROAD COMPANY *v.* MARSEILLES.

(84 Ill. 145. 1876.)

APPEAL from the Circuit Court of La Salle County.

MR. JUSTICE WALKER delivered the opinion of the Court:—

On the first day of August, 1871, appellant, by its president, executed an agreement, in writing, with appellee. Appellant, in the agreement, recites and acknowledges the fact that appellee had issued bonds of the town to the amount of \$10,000, bearing ten per cent interest, and payable in ten years, and had delivered the same to the company; and that the sole consideration for the issuing and delivery of the bonds was, that the company should construct and put into operation a railroad from Pekin to Chicago, through the town of Marseilles, in the State of Illinois; and that the company had sold the bonds and used the proceeds thereof in grading, or partly grading a railroad from Pekin to Marseilles; and that the company had entered into a contract with Ralph Plumb, by which he had agreed to construct the same from Streator to Chicago, the following year.

The company there agrees and binds itself, that if, from any cause, it should fail to construct the road from Pekin to the town of Marseilles, it should pay to the president and trustees of the town of Marseilles, for the use of the town, the sum of money the company had received on the sale of the bonds, and the interest accrued thereon, upon the tender, by the town, of the stock issued to the town by the company.

Appellee, on the 19th of September, 1873, brought suit on this agreement, to recover the money. It was averred that the time for constructing the road had expired, but it had not been built. It was also averred that appellee had tendered a return of the stock and had demanded the money, but the company refused to receive the stock or pay the money.

After filing a demurrer to the declaration, which was overruled, defendant filed several pleas. The first denied the tender. The second averred that the contract was executed without any good or valuable consideration. The third plea set up that the time for constructing the road, as agreed between the company and Plumb, had not elapsed. The fourth plea averred that the time for building the road had been extended. Issues to the country were joined on the first, third, and fourth pleas, and a demurrer was filed to the second, which the court sustained, and appellant abided by its plea. A trial was had, resulting in a verdict and judgment in favor of plaintiff, and defendant appeals.

It is urged that there was no time named in the agreement for the completion of the road. The instrument states that Plumb had contracted to construct the road the following year; and as the agreement was executed in 1871, no other reasonable conclusion can be reached, than it was to be completed during the year of 1872. This is manifest from the language employed. It will bear no other construction. It then provides, that if the road should not be constructed, the company would refund the money, with interest. When constructed? Obviously within the time specified. Why name the time within which Plumb had agreed to complete it, if not to fix the time when the company would pay the money if not completed? The recital was evidently made for some purpose, and what other could have induced it? The presumption is, that the parties intended to fix a period when the tender might be made and the money demanded. We cannot conclude that it was intended that the time should remain undetermined for all coming time. Rational persons and the most ordinary business men would not do so absurd a thing as that. It seems to us, therefore, to be obvious, that a fair and reasonable interpretation of the agreement is, that if the road was not constructed according to Plumb's agreement, during the year 1872, the money should then be payable on an offer to return the stock and its being tendered to the company.

It is urged that the court below erred in sustaining the demurrer to appellant's second plea. It averred that the instrument sued on was executed without any good or valuable consideration whatever; that plaintiff was a legally organized municipal corporation, which had voted to subscribe \$10,000 to the capital stock of defendant's road, and to issue the bonds of the town to the amount of \$10,000, to pay for such subscription, and that the vote was had, the subscription made, and the bonds issued in pursuance to the statute in such case made and provided; and the bonds so issued were, thereafter, and before the execution of the agreement sued on, and in pursuance of the power and authority aforesaid, delivered by the plaintiff to defendant, as a payment upon its subscription to the capital stock of the defendant, and for no other purpose, cause, or

consideration whatever, and that it was not a condition upon which the vote was taken, the subscription was made, the bonds were issued or delivered, that the defendant should construct or put in operation a railroad from Pekin to Chicago by way of Marseilles, or the construction or putting into operation a railroad from and to such points, by way of Marseilles, constituted no part of the consideration for the issuing of the bonds and the delivery thereof, as recited in the plaintiff's declaration; that by so subscribing to the capital stock plaintiff became a stockholder in defendant's road, and the bonds were delivered and received as a payment upon such subscription; and the plea avers that the subsequent execution and delivery, by the defendant, of the instrument in writing, to the plaintiff, was without any good or valuable consideration whatever, and which defendant had no authority to make.

The declaration, after setting out the instrument sued on, avers that the consideration for the execution of the same was that expressed in the deed. It then becomes necessary to inquire what was the consideration thus mentioned. The agreement contains several recitals which may have and probably did operate as inducements to the making of the contract, but it is manifest that the consideration, as therein expressed, was the surrender of the shares of stock, held by the town, in case the road was not completed in the time specified. What had preceded, in the way of recital, formed no part of the consideration, and it did not matter whether such recitals were true or untrue. Nor could defendant, by denying them or any of them, form a material issue. A defendant must always tender a material issue, before the plaintiff can be compelled to accept it. It was immaterial what was the consideration which induced appellee to subscribe and pay for the stock, as this was a sale of the stock by appellee, and was a purchase thereof upon the terms specified. The averments of the plea clearly fail to show a want of consideration. Appellee had the stock, which is not denied, and from the averments of the plea appellee had paid the company in full for it. It is not averred there were any false or fraudulent representations made by appellee; and it is not denied that appellee offered to return the stock after the time for building the road had elapsed, and appellant had failed to perform. This plea presented no defence, and the demurrer was properly sustained.

Nor does the averment at the close of the plea, that the company had no power to make the contract, in anywise render it a good plea. We entertain no doubt that a railroad company may, for legitimate purposes, purchase shares of stock which have been issued to individuals. Such is believed to have been the general custom of such bodies, nor have we known the power to have been questioned. There is nothing in this plea to show that this purchase was not for legitimate purposes. If the shares issued to appellee were a

consideration to support the contract for the delivery of the bonds to the company, and that they were cannot be questioned, then why was not the sale of the same shares, by the village to the company, a sufficient consideration to sustain this agreement? We are unable to perceive any reason.

It is next urged, that the town authorities had disabled themselves from delivering the stock, by contracting to sell it to Plumb. It is claimed that the indorsements by him, on the back of the agreement, amounted to a sale to him. We think the effect of these indorsements is misconceived. The authorities of the town seem to have supposed that Plumb had some interest in the transaction, as he was a contractor for the construction of the road, and hence they were desirous to have his assent, which he gave, on the conditions specified. He by no means agreed to purchase and pay for the stock, or any portion of it. Nor do we see that he bound himself to do any act, but simply consented that the company should refund the money, and he would receive the stock.

We are at a loss to see in what manner it became necessary to the force of the instrument that he should, in anywise, consent to it. He does not seem to have had any controlling power over the company, or its acts or agreements. The company was bound by the contract made by its president, and we cannot perceive how Plumb could control his acts. These indorsements made by Plumb, so far as we can see, were wholly nugatory, and had no effect whatever. The indorsements were no more than that of any other stranger to the agreement.

What has been said in reference to the necessity of Plumb's consent to the contract applies to his inserting the condition that it was to be on the terms that the road should be constructed within the time specified in the contract, or within such further time as should be agreed upon for its construction. It did not matter, in the slightest degree, what terms or conditions he inserted in his consent, as it in nowise affected the agreement between other parties. He was only stating what he desired and consented to, and not what the company would consent to; but he acted for himself; and not for the company.

The tender of the stock and the demand of the money were sufficiently proved. We fail to perceive any error in this record, and the judgment must be affirmed.

Judgment affirmed.

(84 Ill. 643.)

PER CURIAM:—

On considering the petition heretofore filed, we granted a rehearing to further consider the question, whether the railroad company had the power to contract for and purchase shares of stock of its own company. We have again fully examined the question, and,

after considering the arguments and authorities bearing on the question, we will proceed to announce our conclusions thus reached.

The rule is familiar, and is not contested, that such bodies can only exercise such powers as may be conferred by the legislative body creating them, either in express terms or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted, and to accomplish the purposes of their creation. Such being the rule, the question arises, whether this corporate body might make such a purchase, or is it outside of, and beyond the limit of its power?

Appellant has referred us to a number of cases in our own court, in which it has been held that such organizations have no power to release subscribers for their stock from paying therefor and from their subscriptions; that, when such subscriptions are intended to be fictitious, or the subscribers are released from payment, it operates as a wrong, if not a fraud, on the other subscribers for stock in the same company. But here, the stock had been subscribed, paid for, and certificates thereof issued to, and they were owned and held by, the village at the time this contract was entered into and executed. So, the question is not, whether appellant may release the village from paying for and receiving shares subscribed for, but whether appellant has power to purchase shares of its own stock, paid for, issued to, and held by the village.

In the case of *Taylor v. Miami Exportation Co.* (6 Ohio, (Hammond's R.) 83), it was held that a banking corporation might lawfully receive shares of its own stock from a solvent debtor in discharge of his indebtedness. The court went further, and held that, where a large number of shares had been issued to enable the holder to vote for certain persons for directors at an approaching election, and, after the holder had thus voted, the money paid for the shares was returned to him, and he restored the shares to the bank, as there was no loss sustained by the transaction, and the result of the election was not changed, and whilst the court condemned the transaction, it held that equity could afford no relief, as no one had been injured. It was also held in that case that, where the shares of the company were transferred to it in payment of such indebtedness, the corporation might hold and sell it as it did its other property.

In the case of the *City Bank of Columbus v. Bruce* (17 N. Y. 507), it appeared that the board of directors passed a resolution that all stockholders indebted to the bank on stock notes, by a specified day, might pay such debts to the bank in its shares of stock, at a named per cent, and that not far from half of the stock of the bank was thus surrendered; and the court held, there was no ground for questioning the validity of the transaction; that no rule of common law or any provision of the charter forbade it; and the Ohio case is referred to and approved by the court.

In the case of *Williams v. The Savage Manufacturing Co.* (3 Md. Ch. R. 452), it was held that banking corporations had the right to take shares of their own stock in pledge or payment of indebtedness to the corporation, and to reissue the same. On the latter proposition *Ex parte Holmes* (5 Cow. 426) is referred to by the court in its support.

In the case of *The State v. Smith* (48 Vt. R. 266), it was held, that where a railroad company had purchased 2350 shares of the stock of the company, the stock did not merge, and the legality of the purchase seems to be recognized by the court. And in further support of the rule, see Angell & Ames on Corp. § 280, where it is said it is one of the corporate powers that may be legally exercised.

If, then, as in the cases above referred to, a bank may purchase and hold its own shares, no reason is perceived why a railroad corporation may not do the same thing, and the case of *The State v. Smith* (*supra*) was the purchase of stock by a railroad company, and of shares of its own stock. These authorities, we think, fully recognize the power of the directors of a company, when not prohibited by their charter, to purchase shares of stock of their company. It falls within the scope of the power of the directors to manage and control the affairs and property of the company for the best interests of the stockholders, and when they have thus acted, we will presume, until the contrary is shown, that the purchase was for legitimate and authorized purposes.

If it were shown that the purchase was made to promote the interests of the officers of the company alone, and not the stockholders generally, or if for the benefit of a portion of the stockholders and not all, or for the injury of all or only a portion of them, or if it operated to the injury of creditors, or would defeat the end for which the body was created, or if it was done for any other fraudulent purpose, then chancery could interfere. In such case, *Melvin v. The Lamar Ins. Co.* (80 Ill. 446), and other cases in chancery referred to in appellant's brief, would apply, but the defence cannot be made at law. The case of *Belford Railroad Co. v. Bower* (48 Pa. St. R. 29) was in a court where there is no distinction between actions at law and suits in equity, and we presume the defence was allowed by the application of equitable principles, and the cases in the British courts which seem to bear on the question were in equity. Whatever may be the rights of stockholders or creditors, if there are any, relief can only be had in equity, and by a stockholder or other *cestui que trust*.

The judgment of the court below will, therefore, be affirmed.

Judgment affirmed.

CLAPP v. PETERSON.

(104 Ill. 26. 1882.)

MR. JUSTICE SHELDON delivered the opinion of the court: —

By the will of her step-son, P. W. Bonner, who died in July, 1870, appellee, Georgie H. Peterson, a resident of the State of New York, became owner of all personal property left by said Bonner, and in September, 1870, on application made to her in New York, she sold all said property to the Illinois Land and Loan Company. On November 20, 1874, she filed her bill against said company to set aside such sale, and for other relief in respect thereto, on the ground that she had been induced to make the sale through the fraudulent misrepresentations of the company, for an inadequate consideration, and on May 1, 1877, she obtained in the suit a money decree against the company, for \$5653.33. An execution issued upon the decree having been returned *nulla bona*, Mrs. Peterson, on September 18, 1879, filed her bill in chancery in the present case, to subject property in the hands of Caleb Clapp to the payment of this decree. A decree was entered in her favor granting the relief sought, which on appeal to the Appellate Court for the First District, was affirmed, and the present appeal taken to this court.

It appears that the Illinois Land and Loan Company was chartered by an act of the Legislature in 1867, with a capital stock of \$100,000, with 1,000 shares of \$100 each, all of which was paid in. Caleb Clapp, a non-resident of the State, was a stockholder in the company, and in January, 1874, he surrendered to the company 555 shares of stock, in consideration of which the company executed to him a deed of warranty of two lots in Chicago, one of the value of \$50,000, and the other of the value of \$5,500, that amount being the consideration stated in the deed. The stock was cancelled, and was considered, at the time, of par value. Mr. Clapp continued to be till his death, and his estate still is, the owner of the lots. It is these lots which are sought to be subjected to the payment of said money decree against the company.

The legal principle which appellants' counsel lays down and insists upon as applying to the case, is, that corporations may purchase their own stock in exchange for money or other property, and hold, re-issue, or retire the same, provided such act is had in entire good faith, is an exchange of equal value, and is free from all fraud, actual or constructive, this implying that the corporation is neither insolvent nor in process of dissolution. We think there must be added to the proposition the further condition that the rights of creditors are not affected.

The doctrine so elaborately urged by appellants' counsel, that a corporation has the power to purchase its own stock, seems well enough settled, and was asserted by this court in *Chicago, Pekin and Southwestern R. R. Co. v. Marseilles* (84 Ill. 643). Yet, in so holding there, the qualification was added, that, in equity, the transaction might be impeached if it operated to the injury of creditors. We see nothing to show that the transaction in the present case was not in good faith, that there was any element of fraud about it, or that there was anything in the apparent condition of the company to interfere with the making of the exchange that was had. It is only as injuriously affecting the interests of creditors, we think, that the transaction can be questioned, and it is in that view that it must be considered and passed upon.

In *Sanger v. Upton* (91 U. S. 60), it is laid down: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships. When debts are incurred a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation for their security." This doctrine is abundantly established by the authorities. 2 Story's Equity Jur. sec. 1252; *Wood v. Dummer* (3 Mason, 308); *Spear v. Grant* (15 Mass. 505); *Curran v. Arkansas* (15 How. 304); *Bartlett v. Drew* (57 N. Y. 587).

The shareholders of a corporation are conclusively charged with notice of the trust character which attaches to its capital stock. As to it they cannot occupy the status of innocent purchasers, but they are to all intents and purposes privies to the trust. When, therefore, they have in their hands any of this trust fund, they hold it *cum onere*, subject to all the equities which attach to it. Thompson's Liability of Stockholders, sec. 13; *Wood v. Dummer* (3 Mason, 312).

It is objected, against the principles above stated, that the cases in which they were declared were where there was actual or constructive fraud or unfairness, where the corporations were insolvent, or in process of being wound up. The question naturally would arise mostly in such circumstances, but the principles enunciated are general in scope, following from the nature of the capital stock of corporations, and the relation of a stockholder to the corporation, and we know of no limitation of their application as above suggested, or reason for denial of their full applicability to the present case. Indeed, we do not understand appellants' counsel as asserting the validity of the purchase, or reduction by a corporation, of its stock, where it should directly appear that it was an injury to its creditors. But it

is denied that there was any such injury in this case. It is said, first, the company actually owed no one at the time, and even if it did, as the bill admits that the shares at the time of the exchange were valued at par, and worth full purported value, it follows from the stock being worth its par value, as a matter of course, that the company was then entirely solvent, and had assets sufficient to discharge all its debts, if it had any debts, and also to pay the stock in full, — that under no other circumstances could the admission of the bill be true. There was no proof as to the condition of the company, or the value of the stock, save the testimony of the secretary of the company that at the time of the deed to Clapp the stock in the company was at par value technically, — that he did not know what the market value was, and did not know that it had any market value. The admission of the bill was the simple fact that the stock was at par. The complainant, of course, knew nothing as to what made the stock at par. But if the stock was at par, in so rating it this indebtedness to appellee could not have been taken into account. It was supposed, of course, the purchase of personal property, which had been made of appellee, would stand, and that there was no liability on account of it. If, then, the stock was just at par, not considering appellee's claim, with that claim recognized, the assets would have failed to pay the indebtedness of the company by the amount of her claim, to wit, \$5,653.33, and to that amount the company was insolvent.

It is insisted that this exchange of corporate property for stock was unassailable by any one, because it was an exchange of equal values; the lots being worth \$55,500, and the shares of stock being worth \$55,500, there was equal value received, and there could be harm to no one. This cannot be so, as respects creditors. Suppose all the remaining property of the company had been one other lot worth \$44,500, and the company had made a like exchange with another stockholder of that lot for the remaining 445 shares of stock, and cancelled the stock, what would there have been left to pay creditors? The partial exchange which was made affected the rights of creditors in a like way, only to a less extent. It is not as if there had been an exchange made with Clapp of these lots for other real property of equal value, or as if there had been a sale to him for \$55,000 in money. In such case a substitute would have been furnished to the company to which creditors might have had recourse for payment of their debts. But the exchange of corporate property for shares of stock, and cancelling the stock, furnishes no equivalent for creditors.

Although the money decree in favor of appellee was not obtained until in 1877, some time after Clapp's purchase, yet the cause of action of appellee against the company (the fraudulent purchase of the personal property from her) arose in September, 1870, which was before the purchase by Clapp, that being in January, 1874, so that at

the time of Clapp's purchase appellee must be regarded as being a creditor of the company.

We can but regard the transaction in question, of the exchange of stock for the lots and the cancellation of the stock, as a withdrawal by the stockholder of his share of the capital stock, leaving appellee's debt against the company unpaid; that the transaction was to the injury of appellee as a creditor; that the property taken by Clapp stood charged with a trust for the payment of appellee's claim; that Clapp cannot be held to be an innocent purchaser, and that the property in his hands is affected with the trust, and appellee may pursue the property and subject it to the satisfaction of her debt.

It is insisted there was such laches here on the part of appellee in lying by for so long a time before the purchase by Clapp, taking no steps to disaffirm the fraudulent purchase from her, as should estop her from resort to this property in the hands of Clapp. Had appellee known of the fraud upon her, or should have known of it in the exercise of reasonable diligence, there would have been force in this position; but the bill alleges that on the discovery of the fraud appellee filed her former bill to set aside the fraudulent sale, and if such was the fact no laches would be imputable to her. Appellee's residence in a distant State would be a circumstance which would go to account for not sooner discovering the alleged fraud. We are not prepared to say that there was such laches here as should disentitle to the relief sought.

It is said that appellee's decree against the company was rendered, as well as the suit commenced, after Clapp had ceased to be a member of the company, and not being a party to the suit he should not be bound by the decree against the company, and that as against him the decree should not be taken as evidence of the alleged fraudulent purchase by the company from appellee. We think Clapp took the property affected with all equities as against the company, and subject to the equity of being charged with whatever prior claim might be established as against the company, and the decree is the highest evidence of an indebtedness by the company.

It is finally urged that at least the decree is erroneous in holding the property received by Clapp to be chargeable with the whole debt, instead of a share of it, in the proportion his stock bore to the whole capital stock. As among the stockholders such a *pro rata* decree would have been equitable. But in such a case as this, of a judgment creditor, after return of an execution against the company unsatisfied, seeking in a court of equity to reach certain specific property once belonging to the company, as charged with a trust for the payment of his debt, he may pursue the property into whosoever hands he may find it, where it stands affected with the trust, and subject it to the satisfaction of his debt, and he is not obliged to attend to adjusting the equities between the stockholders. We regard the following authorities as fully warranting this, and the form of

the decree in this respect; *Bartlett v. Drew* (57 N. Y. 587); *Marsh v. Burroughs* (1 Woods, 463); *Hatch v. Dana* (101 U. S. 205).

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

TREVOR v. WHITWORTH.

(L. R. 12 App. Cas. 409. 1887.)

APPEAL from a decision of the Court of Appeal.

James Schofield & Sons Limited were incorporated in 1865 under the Companies Act, 1862, with a capital of £150,000 in 15,000 shares of £10 each. The objects, as stated in the memorandum of association, were to acquire and carry on the business of certain flannel manufacturers, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto, or proper to be carried on in connection therewith.

The memorandum did not authorize the company to purchase its own shares.

Several of the articles of association dealt with the purchase of shares by the company. In the view which the House took it is necessary to refer only to two.

Article 179. "Any share may be purchased by the company from any person willing to sell it, and at such price, not exceeding the then marketable value thereof, as the board think reasonable."

Article 181. "Shares so purchased may at the discretion of the board be sold or disposed of by them or be absolutely extinguished, as they deem most advantageous for the company."

The company having in 1884 gone into liquidation in the Court of Chancery of the County Palatine of Lancaster, a claim was made against the company by the respondents, as executors of Whitworth, a deceased shareholder, for the balance of the price of Whitworth's shares sold by the executors to the company in 1880, and not wholly paid for. The circumstances under which the purchase in question and other purchases by the company of its own shares were effected are stated in the judgments.

A summons having been taken out by the appellants, the official liquidators, to determine whether the claim ought to be allowed, the Vice-Chancellor of the County Palatine made an order declaring that, without prejudice to any claim by the claimants against any persons other than the liquidators and the company, the claim against the company ought not to be allowed.

The Court of Appeal (Cotton, Bowen, and Fry, L. J.J.) reversed this decision and allowed the claim. Against this decision the liquidators now appealed. The only question material to this report

being the general question, whether such a company can purchase its own shares, the arguments on the other points are omitted.

Rigby, Q. C. and O. Leigh Clare, for the appellants :—

The purchase of its own shares by a limited company incorporated under the Companies Act is *ultra vires* and invalid, and this whether there is or is not power given in the memorandum of association. It is not indeed necessary to go that length in the present case, for the memorandum gave no power to the company to purchase its own shares, and the memorandum cannot be extended to objects foreign to its scope by the articles of association. That portion of the articles therefore which authorizes such a purchase is invalid, and the contract of purchase was *ultra vires*, and no subsequent ratification could avail anything. *Ashbury Railway Carriage and Iron Company v. Riche* (Law Rep. 7 H. L. 653); *Cree v. Somervail*, per Lord Blackburn (4 App. Cas. 648, 666); and *In re Dronfield Silkstone Coal Company*, per Jessel, M. R. (17 Ch. D. 76, 83). But independently of that point, such a purchase is inconsistent with the Companies Acts; it is in reality a reduction of capital in a manner different from that required by those acts. That this is so is clearly shown by the judgment of Jessel, M. R., in the last-named case. See also the observations of James, L. J., in *Hope v. International Financial Society* (4 Ch. D. 327, 336). In the earlier cases the distinction between authority given in the memorandum and authority given in the articles was not fully recognized: the question was generally argued on the articles. But no authority in the memorandum could confer such a power on a limited company. The surrender of shares is another matter, and may be lawfully made without reducing the real capital, but no reduction of capital otherwise than as allowed by statute is legitimate, whether the purchase of its own shares by a company be carried out by way of trafficking or otherwise.

Romer, Q. C., and A. C. Maberley, for the respondents, contended that the articles of association must be construed so as to authorize only such purchases as would be consistent with the memorandum: that there the purchase was or might be incidental to the carrying on of the business of the company, and was therefore authorized by the memorandum. That it might well be necessary to buy out hostile shareholders or to prevent nominees of a rival company from becoming shareholders: as *In re Dronfield Silkstone Coal Company* (17 Ch. D. 76); a strong authority for the respondents. That the question being one of domestic management and the object being to keep the company a family concern, such a transaction would be legitimate, and would not amount to a reduction of capital as prohibited by the Companies Acts; and that if the directors had used their powers improperly they would be personally liable. They also referred to *Marshall v. Glamorgan Iron and Coal Company* (Law Rep. 7 Eq. 129), *Taylor v. Pilsen Joel and General Electric Light Company* (27 Ch. D. 268); and relied on *Phosphate of Lime Com-*

pany v. Green (Law Rep. 7 C. P. 43), a case expressly treated as a sale by Willes, J.

The House took time for consideration.

LORD HERSCHELL:—

My Lords, three questions are raised by this appeal; first, whether certain shares in James Schofield & Sons Limited were purchased by G. W. Schofield on his own account, or as agent for the company; secondly, whether, assuming that they were purchased for the company, and that the company had power to buy its own shares, the purchase had taken place in accordance with the articles of association; and thirdly, whether the company had power to purchase the shares.

James Schofield & Sons Limited was incorporated under the Companies Acts on the 31st of May, 1865, with a capital of £150,000 in 15,000 shares of £10 each. At an extraordinary general meeting of shareholders of the company on the 6th of May, 1884, it was resolved that the company should be wound up voluntarily, and on the 15th of May following it was ordered by the Vice-Chancellor of the County Palatine that the voluntary winding-up should be continued under the supervision of the Court.

By an affidavit filed on the 1st of October, 1884, the respondents claimed from the company in the winding-up £2,873 12s. A summons was taken out by the appellants for the purpose of determining whether this claim ought to be allowed. Upon the hearing of this summons the claim was rejected by the Vice-Chancellor, but, upon appeal, this decision was reversed.

On the 1st of May, 1880, G. W. Schofield bought from the respondents, who were the executors of Robert Whitworth, a deceased shareholder, 533 shares in the company (twenty-eight fully paid up, 500 with £6 paid, and five with £5 paid), for the price of £3,305, the purchase-money to be paid within three years then next, at such time as the buyers should appoint, and interest at 5 per cent to be paid by the buyers until completion. Interest was accordingly paid in the mean time, and on the 3d day of May, 1883, a transfer of the shares was executed by the vendors and G. W. Schofield.

On the 5th of May a receipt was given to G. W. Schofield for the sum of £3,305 for shares bought. But £505 only having been in fact paid, a promissory note was on the same day given to the appellants for £2,800 "deposited on loan at 5 per cent per annum, interest from date." This was signed "for J. Schofield & Sons, Limited. G. W. Schofield, director."

The first question is, whether this transaction was entered into by G. W. Schofield on his own account, or as agent for the company. If the former, it is clear that Schofield was guilty of a gross fraud. Upon a review of the evidence I see no ground for coming to such a conclusion. I think the purchase of the shares was in fact made by him on behalf of the company.

The question whether, assuming the company had power to purchase its own shares, the purchase was effected in accordance with the articles of the company, is one of much greater difficulty. The article empowering the company to purchase its shares is as follows: "Article 179. Any share may be purchased by the company from any person willing to sell it, at such price, not exceeding the then marketable value thereof, as the board think reasonable." Now there is not the slightest evidence that the directors ever considered, either at a formal meeting of the board or otherwise, the question whether these shares should be purchased. The utmost that can be said to be established is that the directors other than G. W. Schofield, who negotiated the purchase, knew that the respondents had come to see him upon the subject. But further, the only authority to buy was at such price not exceeding the then market value as the board should think reasonable. The par value of the shares was apparently given in this case, as in the case of the other purchases, as a matter of course, and I see no reason to believe that any judgment was exercised upon the point by the board.

But although I think it far from clear that even if it was competent for the company to purchase the shares, this transaction can be supported, I do not intend to pronounce an opinion upon this point, because, in consequence of the view which I believe all your Lordships entertain upon another part of the case, it is unnecessary to do so.

I pass now to the main question in this case, which is one of great and general importance, whether the company had power to purchase the shares. The result of the judgment in the Court below is certainly somewhat startling. The creditors of the company which is being wound up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been, and having ceased to be, shareholders in the company, claim that the company shall pay to them a part of that capital. The memorandum of association, it is admitted, does not authorize the purchase by the company of its own shares. It states, as the objects for which the company is established, the acquiring certain manufacturing businesses, and the undertaking and carrying on the businesses so acquired, and any other business and transaction which the company consider to be in any way auxiliary thereto, or proper to be carried on in connection therewith.

It cannot be questioned, since the case of *Ashbury Railway Carriage and Iron Company v. Riche* (Law Rep. 7 H. L. 653), that a company cannot employ its funds for the purpose of any transactions which do not come within the objects specified in the memorandum, and that a company cannot by its articles of association extend its power in this respect. These propositions are not and could not be impeached in the judgments of the Court of Appeal,

but it is said to be settled by authority, that although a company could not, under such a memorandum as the present, by articles authorize a trafficking in its own shares, it might authorize the board to buy its shares "whenever they thought it desirable for the purposes of the company," or "in cases where it was incidental to the legitimate objects of the company that it should do so." The former is Lord Justice Cotton's expression; the latter that of Lord Justice Bowen.

I will first consider the question apart from authority, and then examine the decisions relied on.

The Companies Act, 1862, requires (sect. 8) that in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed amount; and provides (sect. 12) that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock, but that "save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association."

What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders.

Experience appears to have shown that circumstances might occur in which a reduction of the capital would be expedient. Accordingly, by the Act of 1867 provision was made enabling a company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully-worded provisions to show how inconsistent with the very constitution of a joint stock company, with limited liability, the right to reduce its capital was considered to be.

Let me now invite your Lordships' attention to the facts of the present case. The company had purchased, prior to the date of the liquidation, no less than 4142 of its own shares; that is to say, considerably more than a fourth of the paid-up capital of the company had been either paid, or contracted to be paid, to shareholders, in consideration only of their ceasing to be so. I am quite unable to see how this expenditure was incurred in respect of or as incidental

to any of the objects specified in the memorandum. And, if not, I have a difficulty in seeing how it can be justified. If the claim under consideration can be supported, the result would seem to be this, that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company's liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result. I do not think it was disputed that a company could not enter upon such a transaction for the purpose of reducing its capital, but it was suggested that it might do so if that were not the object, but it was considered for some other reason desirable in the interest of the company to do so. To the creditor, whose interests, I think, sects. 8 and 12 of the Companies Act were intended to protect, it makes no difference what the object of the purchase is. The result to him is the same. The shareholders receive back the moneys subscribed, and there passes into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock, available to meet the demands of the creditors.

What was the reason which induced the company in the present case to purchase its shares? If it was that they might sell them again, this would be a trafficking in the shares, and clearly unauthorized. If it was to retain them, this would be to my mind an indirect method of reducing the capital of the company. The only suggestion of another motive (and it seems to me to be a suggestion unsupported by proof) is that this was intended to be a family company, and that the directors wanted to keep the shares as much as possible in the hands of those who were partners, or who were interested in the old firm, or of those persons whom the directors thought they would like to be amongst this small number of shareholders. I cannot think that the employment of the company's money in the purchase of shares for any such purpose was legitimate. The business of the company was that of manufacturers of flannel. In what sense was the expenditure of the company's money in this way incidental to the carrying on of such a business, or how could it secure the end of enabling the business to be more profitably or satisfactorily carried on? I can quite understand that the directors of a company may sometimes desire that the shareholders should not be numerous, and that they should be persons likely to leave them with a free hand to carry on their operations. But I think it would be most dangerous to countenance the view that, for reasons such as these, they could legitimately expend the moneys of the company to any extent they please in the purchase of its shares. No doubt if certain shareholders are disposed to hamper the proceedings of the company, and are

willing to sell their shares, they may be bought out; but this must be done by persons, existing shareholders, or others, who can be induced to purchase the shares, and not out of the funds of the company.

It is urged that the views I have expressed are inconsistent with the forfeiture and surrender of shares in a company. I do not think so. The forfeiture of shares is distinctly recognized by the Companies Act, and by the articles contained in the schedule, which in the absence of other provisions regulate the management of a limited liability company. It does not involve any payment by the company, and it presumably exonerates from future liability those who have shown themselves unable to contribute what is due from them to the capital of the company. Surrender no doubt stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration or any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in *In re Dronfield, &c. Co.* (17 Ch. D. 76): "It is not for me to say what the limits of surrender are which are allowable under the act, because each case as it arises must be decided upon its own merits."

I turn now to the authorities. In *Teasdale's Case* (Law Rep. 9 Ch. 54), Lord Justice James said: "There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares." But in the subsequent case of *Hopq v. International Financial Society* (4 Ch. D. 327, 336), that learned Judge said: "I am reported to have said in *Teasdale's Case* (Law Rep. 9 Ch. 54), that the power to purchase shares would be good. I am not quite sure whether that was not too wide a deduction from the cases to which I was then referring, and certainly it was not necessary for the decision of the case. But however that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances, viz. to accept the surrender from the shareholder who cannot pay, and to release him from further liability, that might be good, although incidentally and to a small extent it may be said to diminish the capital." In the case which gave rise to these observations, a company having one hundred and fifty thousand shares issued, passed a special resolution that the directors should have power to apply the company's assets to purchase from shareholders willing to sell any number of shares not exceeding one hundred thousand, and that such shares should not be reissued by the directors without the authority of a general meeting. The Court of Appeal, affirming Vice-Chancellor Bacon, held that this scheme was invalid. Lord Justice James said: "Either this is a pur-

chase of shares in the sense of trafficking in shares, which is a purchase not authorized by the memorandum of association, or it is an extinguishment of the shares, and therefore a reduction of the capital of the company." And the present Master of the Rolls made the following observations: "I agree with the Lord Justice that the dilemma is made perfect; for if you assume that there was to be a re-issue of these shares, the shares are not cancelled, they are existing shares, and the only way of getting rid of them again is to sell them. It is said that a selling of shares is not in itself a trafficking in shares. Well, that may be quite true. If I make a present of a horse, I cannot be said to be dealing in horses, but I apprehend if I buy a horse for the purpose of selling it again, I do deal in a horse. So here, if you take that to be the reasonable meaning of the resolution, then the resolution is this, that the company are to buy the shares for the purpose of re-issuing them, that is, for the purpose of selling them again. They do not say so in terms, but that is the necessary effect of what they intend to do by the resolution. That seems to be a trafficking in shares and a carrying on of the business which is not within the terms of the memorandum of association. It is true that that may not be a continuing business, but no more was that which was done in the case of the *Ashbury Railway Carriage and Iron Company v. Riche* (Law Rep. 7 H. L. 653). That was only to be one transaction, but because the transaction was a business transaction not contemplated or mentioned in the memorandum of association, it was not allowed. If that therefore was the intention of this resolution, then it broke the rules, by enabling or forcing the company to enter upon a business which is not mentioned in the memorandum of association. But if it was not intended to re-issue these shares, then it seems to me to follow that the amount of capital represented by them was necessarily extinguished."

It appears to me that every word which I have just quoted from the judgment of the Master of the Rolls is strictly applicable to the circumstances of the present case. Again, in the case of *Guinness v. Land Corporation of Ireland* (22 Ch. D. 349, 375), Lord Justice Cotton, after referring to section 38 of the Companies Act, said: "From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion, it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid."

The learned judges of the Court of Appeal in the present case did not purport to depart from the views thus expressed, but their judgments were based upon the decision of that Court in the case of *In re Dronfield Silkstone Coal Company* (17 Ch. D. 76). In that case dis-

putes having arisen as to the conduct of the business, the directors agreed with Ward, one of the largest shareholders, to purchase his shares, and also his interest as landlord in the mines worked by the company. This arrangement was confirmed by an extraordinary general meeting of the company, and was carried into effect in March, 1872. The business of the company was very prosperous for several years, but in 1879 it was ordered to be wound up, and the question then arose whether Ward was liable to be placed on the list of contributories. The late Master of the Rolls held that he was, on the ground that the company had no power to purchase the shares; but this decision was reversed by the Court of Appeal. Upon the question whether the company had the power contended for, I agree with the reasoning of the Master of the Rolls rather than with that of the Court of Appeal. But I am not prepared to say that the judgment of the Court of Appeal refusing to make Ward a contributory was erroneous, looking at the circumstances which intervened subsequent to the purchase, and prior to the winding-up. It is not necessary, however, to detain your Lordships by a consideration of this question, as it can have no application to the present case. The transaction here is inchoate, and the Court is asked to compel its completion. This, I think, for the reasons I have given, they would not be justified in doing.

I ought to notice one other case, as it was much relied on by the learned counsel for the respondents. I refer to *Phosphate of Lime Company v. Green* (Law Rep. 7 C. P. 43). In that case the learned judges appear to have considered that the transaction amounted to a purchase of shares in the company, which was prohibited by its articles of association, but they held that it had been ratified by the shareholders. No question was raised in argument or determined as to the powers conferred by the memorandum of association, and it is to be observed that at that time it was not so clearly settled as it has been since the judgment in *Ashbury Railway Carriage and Iron Company v. Riche* (Law Rep. 7 H. L. 653), that a transaction not within the scope of the memorandum is incapable of ratification.

I move your Lordships that the judgment appealed from be reversed, and the judgment of the Vice-Chancellor restored, and that the respondents do pay to the appellants the costs in the Court of Appeal and in this House, and do repay to the appellants any moneys and costs received from them.¹ *Order appealed from reversed.*

¹ The concurring opinions of LORD WATSON, LORD FITZGERALD, and LORD MACNAGHTEN are omitted.

COPPIN *v.* GREENLESS COMPANY.(38 *Ohio St.* 275. 1882.)

ERROR to the District Court of Hamilton County.

The original action was brought by William Coppin, plaintiff in error, against the Greenless and Ransom Company, defendant in error, in the court of common pleas of Hamilton County, and the cause of action was thus stated in the petition:—

“The plaintiff states that the defendant is and for several years past has been a corporation, duly incorporated under the laws of the State of Ohio, for manufacturing purposes.

“That it has been the custom for said corporation that its officers and others, actively engaged in its service, should be holders of shares of its stock, and upon ceasing to be connected with said company, such persons have been accustomed to sell, and said company to buy their said stock.

“That the plaintiff was formerly in the employ of said company as a workman, and that while so engaged he became the holder of shares of the capital stock of said company, to the amount, at its par value, of \$3,300.

“That having ceased to work for said company, he sought a purchaser for said stock, and offered to sell the same to the defendant for two lots of land, hereinafter described, valued respectively at \$1,100 and \$700, and the balance of \$1,500 in manufactured work to be made by the defendant, at ten per cent off their bill of prices, to which the defendant assented and agreed, and to carry the same into effect the plaintiff on May 28, 1875, caused to be prepared a written contract, which the defendant then duly executed and delivered to the plaintiff, of which the following is a copy:—

CINCINNATI, May 28, 1875.

For and in consideration of thirty-three shares of the capital stock in the Greenless & Ransom Company, the receipt whereof is hereby acknowledged, said Greenless & Ransom Company promise to pay, or cause to be paid, to William Coppin the sum of three thousand three hundred dollars, payable, viz: said Coppin to take a lot of ground, No. 46 on the plat of the Wyoming Land and Building Co.'s subdivision of the Burn's farm, Wyoming, Ohio, in part payment, amounting to \$1,100.00; also a lot of ground on the north side of Wyoming Avenue owned by ——— Caruthers, and next to Mr. Beeson's house, fifty feet front by two hundred and forty-five feet deep, more or less, for the sum of \$700.00; leaving a balance of \$1,500.00 to be paid in manufactured work, joist, scantling, etc., the manufactured work at ten per cent off their bill of prices; the other material at the usual rates; the work and material to be delivered from time to time to him as said Coppin may order it.

GREENLESS & RANSOM COMPANY,

By E. P. RANSOM, *President.*

"And the plaintiff says that afterwards, in the month of June, 1875, he tendered said shares of stock to the defendant, and offered to transfer the same to it, and demanded performance of said contract; but the defendant refused to accept the same, and refused to convey said lots, or either of them, or to deliver said manufactured goods, although the plaintiff then demanded the same.

"Wherefore he now brings said stock into court, and offers to transfer the same to the defendant, and prays that the defendant may be compelled to convey said lots by a perfect title, and to deliver said goods, and for such other and further relief as in equity and good conscience he may prove to be entitled to."

To this petition an amendment was afterwards allowed and filed as follows:—

"And now comes the plaintiff, William Coppin, and by leave of court files this amendment to his petition herein, and for such amendment says that the value of said land, and of said building material, was thirty-three hundred dollars.

"That said lots were worth respectively \$1,100 and \$700, and reaffirming all the allegations of his petition except such as may be inconsistent herewith, prays a judgment for said value of said land and building material, to wit: the sum of \$3,300, with interest from the 28th day of May, A. D. 1875, against the said defendant, and withdraws his prayer for specific performance."

After an issue of fact joined by answer the cause was tried, and verdict and judgment rendered in favor of the plaintiff for \$3,817.00.

On petition in error, the district court reversed the judgment of the common pleas, and caused it to be certified on the record, "that the judgment of the court of common pleas was reversed by this court on the ground that the petition and amendment to the petition failed to show a sufficient cause of action, and on the ground that the verdict was contrary to law," and not on the ground that the verdict was contrary to the evidence.

This proceeding is now prosecuted to reverse the judgment of the district court.

McILVAINE, J.:—

Whether the defendant corporation was bound by its executory agreement with the plaintiff to purchase shares of its own stock, under the circumstances detailed in the petition, was, undoubtedly, the question upon which the case turned in the district court.

The power of a trading corporation to traffic in its own stock, where no authority to do so is conferred upon it by the terms of its charter, has been a subject of much discussion in the courts; and the conclusions reached by different courts have been conflicting. Of course, cases wherein the power is found to exist by express or implied grant in the charter, furnish no aid in the solution of the question before us; unless the claim of the plaintiff can be sustained, that

such power was conferred on the defendant by section 63 of the corporation act of 1852 (S. & C. 301), as amended, which confers on manufacturing corporations the powers enumerated in section 3 of the act, and among others, the power "to acquire and convey at pleasure, all such real and personal estate as may be necessary or convenient to carry into effect the objects of the corporation." We think, however, that this claim cannot be maintained. The sole object of the defendant organization was "for manufacturing purposes;" and it cannot be said, in any just sense, that the power to acquire or convey its own stock was either necessary or convenient "for manufacturing purposes."

The doctrine that corporations, when not prohibited by their charters, may buy and sell their own stocks, is supported by a line of authorities; and prominent among them may be mentioned the cases of *Dupee v. Boston Water Power Co.* (114 Mass. 37), and *C. P. and S. R. R. Co. v. Marseilles* (84 Ill. 145). But nevertheless, we think the decided weight of authority both in England and in the United States, is against the existence of the power unless conferred by express grant or clear implication. The foundation principle upon which these latter cases rest is that a corporation possesses no powers except such as are conferred upon it by its charter, either by express grant or necessary implication; and this principle has been frequently declared by the Supreme Court of this State; and by no court more emphatically than by this court. It is true, however, that in most jurisdictions, where the right of a corporation to traffic in its own stock has been denied, an exception to the rule has been admitted to exist, whereby a corporation has been allowed to take its own stock in satisfaction of a debt due to it. This exception is supposed to rest on a necessity which arises in order to avoid loss; and was recognized in this State as early as *Taylor v. Miami Exporting Co.* (6 Ohio, 176), and has been incidentally referred to as an existing right since the adoption of our present constitution. *State v. Building Association* (35 Ohio St. 258).

But, however that may be, the right of a corporation to traffic in its own stock, at pleasure, appears to us to be inconsistent with the principle of the provisions of the present constitution, article 13, section 3, which reads as follows: "Dues from corporations shall be secured by such individual liability of stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." Now, it is just as plain, that a business or trading corporation cannot exist without stock and stockholders, as it is that the creditors of such corporations are entitled to the security named in the constitution. *State, ex. rel. Att'y-Gen. v. Sherman* (22 Ohio St. 411). The corporation itself cannot be a stockholder of its own stock within the meaning of this provision of the constitution. Nobody

will deny this proposition. And if a corporation can buy one share of its stock at pleasure, why may it not buy every share? If the right of a corporation to purchase its own stock at pleasure exists and is unlimited, where is the provision intended for the benefit of creditors? This is not the security to which the constitution invites the creditors of corporations. I am aware, that the amount of stock required to be issued is not fixed by the constitution or by statute, and also that provision is made by statute for the reduction of the capital stock of corporations; but of these matters, creditors are bound to take notice. They have a right, however, to assume that stock once issued, and not called back in the manner provided by law, remains outstanding in the hands of stockholders liable to respond to creditors to the extent of the individual liability prescribed. In this view it matters not whether the stock purchased by the corporation that issued it, becomes extinct, or is held subject to be reissued. It is enough to know that the corporation, as purchaser of its own stock, does not afford to creditors the security intended. And surely, if the law forbids the organization of a corporation without stock, because the required security is not furnished, it cannot be, that having brought the corporation into existence, it invests it with power to assume, at pleasure, the identical character or relation to the public, that was an insurmountable objection to the giving of corporate existence in the first place.

Plaintiff in error lays much stress on the averments in the petition, that it had been the custom of the corporation that its officers and others, actively engaged in its service, should be holders of shares of its stock, and upon ceasing to be connected with the company such persons had been accustomed to sell, and the company to buy such stock; and that the plaintiff had purchased the stock for the price of which suit was brought while in the employment of defendant.

We cannot see why these averments should take the case out of the general rule.

If it were averred that the plaintiff had purchased this stock from the defendant, or from others, under an agreement with the company that it would buy the same from him when he quit its employment or if the contract of purchase by the defendant had been executed, very different questions would arise.

It is not even averred, that the plaintiff relied upon such custom either in making the purchase or the sale of the stock; so that, in fact, he is unaffected by the alleged custom. But if such custom had been relied on by the plaintiff when he purchased the stock, it would not have made the executory contract of the defendant to buy the stock binding, which, without such custom, would be void. The usage of a corporation does not become the law of its existence, or the measure of its powers. The general law of the State, of which all persons are presumed to have knowledge, is the source and limit of all its powers and duties; and these cannot be varied either by usage or contract.

The doctrine of estoppel has no application in the case. Nor is there any such equity in the case as would have arisen between the parties in case the contract had been executed.

Judgment affirmed.

NATIONAL BANK v. STEWART.

(107 U. S. 676. 1882.)

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

The administrators of the estate of Daniel McMillan, deceased, brought an action against the First National Bank of Xenia, Ohio, a corporation formed under the National Bank Act of the United States, to recover the sum of \$4,200, with interest. The complaint alleges that in October, 1876, the bank was in possession of thirty shares of its capital stock belonging to the deceased; that it then unlawfully converted them to its own use and sold them, receiving therefor the sum mentioned, which it refuses to account for or deliver to the plaintiffs, although a demand for it has been made.

The bank, in its answer, avers that in April, 1876, McMillan was owing to it a debt previously contracted, greater in amount than the value of the shares of capital stock; that it being necessary to secure the bank from loss, he delivered to it certificates of the shares with other property, as collateral security for the debt; that in October, 1876, the debt being unsatisfied and overdue, the bank sold the shares at their full market value, and applied the proceeds as a credit upon it, and that after such application, a large amount remained due to the bank, which is still unpaid. The evidence produced at the trial tended to show that the shares were delivered by McMillan to the bank as collateral security for money loaned to him at the time, and were thus held until they were sold. The court charged the jury that if they found from the evidence that the stock was delivered by him to the bank as a pledge or collateral security for a present loan of money made to him by the bank at the time of such delivery, the plaintiffs were entitled to recover the amount of the proceeds, with interest, from the time of sale; as the defendant was prohibited by the currency act from thus receiving its own stock. To this charge the defendant excepted. The plaintiffs recovered a verdict, and, to review the judgment entered thereon, this writ of error was brought.

MR. JUSTICE FIELD delivered the opinion of the court:—

Section 5201 of the Revised Statutes declares that “no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so pur-

chased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association."

While this section in terms prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a loan upon such security be made. If, therefore, the prohibition can be urged against the validity of the transaction by any one except the government, it can only be done before the contract is executed, while the security is still subsisting in the hands of the bank. It can then, if at all, be invoked to restrain or defeat the enforcement of the security. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not interfere with the matter. Both bank and borrower are in such case equally the subjects of legal censure, and they will be left by the courts where they have placed themselves.

There is another view of this case. The deceased authorized the bank, in a certain contingency, to sell his shares. Supposing it was unlawful for the bank to take those shares as security for a loan, it was not unlawful to authorize the bank to sell them when the contingency occurred. The shares being sold pursuant to the authority, the proceeds would be in the bank as his property. The administrators, indeed, affirm the validity of that sale by suing for the proceeds. As against the deceased, however, the money loaned was an offset to the proceeds. In either view the administrators cannot recover.

The judgment of the court, therefore, must be reversed, and the cause remanded for a new trial; and it is

So ordered.

CHAPTER X.

POWERS AND LIABILITIES OF A CORPORATION.

IN RESPECT OF PARTNERSHIP AND THE EFFECT OF IRREGULAR INCORPORATION.

WHITTENTON MILLS v. UPTON.

(10 Gray, 582. 1858.)

PETITION by a manufacturing corporation to set aside proceedings in insolvency, instituted against the corporation and William Mason, of Taunton in the county of Bristol, as partners, upon Mason's petition; to restrain the assignees appointed under those proceedings from further interfering with their estate; and to compel the judge of insolvency to entertain a petition of the corporation for the benefit of the insolvent laws respecting insolvent corporations. The facts of the case, as appearing by the report of a special master in chancery, were as follows: —

The Whittenton Mills were incorporated by St. 1836, c. 19, for the purpose of manufacturing cotton goods at Taunton; and, at the time of organizing under their charter, adopted by-laws, extracts from which are copied in the margin.¹

¹ The officers of the corporation shall be a treasurer, agent, clerk, and three directors. The agents, under the authority of the directors, shall superintend and manage all the active business of the company — the erection of buildings, construction of machinery, purchasing stock, manufacturing and selling goods, and receiving and paying debts; and they shall have power to make all such contracts as may be necessary for the purposes aforesaid, and to settle and adjust the same. The directors may call meetings of their board in such manner as they shall prescribe, and, at any such meeting, two shall constitute a quorum for the transaction of business. They shall have power to purchase mills and mill sites, and any real estate necessary or convenient for carrying on the business of the corporation. They shall have power to appoint agents, and remove them from office; to appoint a clerk or treasurer *pro tempore* in case of vacancy or absence; to appoint, or authorize the agent to appoint, all other needful officers under him; to fix salaries and compensations for all the officers and agents employed by the company; to direct the number and extent of buildings to be erected, the extent and kind of machinery to be constructed or purchased, and the extent and kind of manufactures to be carried on; to declare divi-

The Taunton Manufacturing Company, a corporation authorized by their charter (St. 1822, c. 44) to manufacture iron, copper, cotton, and wool, failed in 1836, and their property was divided among their creditors. The Whittenton Mill, one of their establishments, was taken by certain persons who had been stockholders in the Taunton Manufacturing Company and became stockholders in the Whittenton Mills corporation.

Leach & Keith and Crocker & Richmond, occupying a machine shop, foundry, tools, and machinery which had previously belonged to the Taunton Manufacturing Company, furnished the greater part of the machinery required for the Whittenton Mill from 1836 until 1842, when they failed, and their foundry, machine shop, tools, machinery, and stock passed into the hands of officers of the law for sale and distribution among their creditors, and the tools, machinery, and stock were purchased, and the foundry and machine shop hired by Mason.

On the 28th of May, 1842, the Whittenton Mills and Mason made an agreement in writing, that the corporation should advance to him the money necessary to pay for said tools, machinery, and stock, and for the rent of the shop and foundry, and for the stock and labor which might be required in carrying them on, and be paid interest on the advances; and that, after paying a certain annual salary to Mason, the profits on patents then held or afterwards obtained by him, and all other profits derived from the manufacture of machinery or other work of the machine shop, should be equally divided between the parties, for five years. On the 1st of June, 1845, the parties further agreed in writing that their joint business should be done and their joint property held in the name of William Mason & Company; and the shops hired by them and their stock of tools and machinery being insufficient, that land should be purchased, buildings erected, and machinery and tools purchased or constructed forthwith to supply the deficiency; that Mason, besides an annual salary, should receive a certain sum on each spindle made by the parties under his patents, or sold to others; that the firm and their successors should have the right to use, without charge, all inventions and improvements in machinery made by Mason during the continuance of the agreement; that interest should be allowed to each party on all sums furnished for the use of the partnership; that the accounts should be stated annually, and be at all times open to the examination of the parties; that the profits, after deducting the allowance to Mason, should be equally divided between him and the Whittenton Mills; and that the agreement

dends; to call meetings of the corporation; to instruct the agents and other officers. and regulate and control their doings, and exercise a general superintendence and control over all the officers of the corporation. Meetings of the directors may be holden at any time and place for the transaction of any business when all the board are present without any previous notice.

should continue in force for seven years from its date, unless sooner cancelled by mutual consent. And it was afterwards by agreement in writing extended for three years more.

It was a great convenience for the Whittenton Mills to have the control of a foundry and machine shop, situated as this foundry and shop were, within two miles of their factory, and to have the right to use the patterns in the shop, and the patents of Mason. The officers of the corporation made these agreements with the sole object of realizing profits from the manufacture and sale of machinery, and at the time of executing the agreement of 1842, the Whittenton Mill was in full operation, and was supplied with all the machinery required.

Under and in pursuance of these agreements the firm of William Mason & Company, composed of Mason and the Whittenton Mills, carried on a very extensive business (averaging \$175,000 a year, and amounting in one year to \$350,000), confined to the manufacturing of machinery for cotton mills till 1852, when they built one locomotive engine. From this time, the manufacture of locomotive engines received an increasing share of their attention till their insolvency in 1857, when it constituted about one half of their business.

During the period of the partnership, the greater part of the machinery required by the Whittenton Mills was manufactured and sold to them by William Mason & Company. In the purchase and sale of this machinery the parties dealt with one another as strangers. Mason & Company also made repairs upon the machinery of the Whittenton Mills to the amount of \$4,000 during that time. And Mason & Company manufactured and sold to other persons and corporations large quantities of tools and machinery; and stated and rendered to the Whittenton Mills, as partners, annual accounts of the copartnership business, which resulted every year until 1852 in large profits, half of which, according to the terms of said agreements, was paid over or credited annually to the Whittenton Mills, and was by that corporation distributed, with their other profits, among their stockholders. Since 1852, the firm have been doing a losing business.

The capital stock of the corporation was divided into two hundred shares, the par value of which was five hundred dollars. The nature of the business in which Mason & Company were engaged, and the manner of conducting it, were throughout known to all the officers of the corporation; and to all the stockholders, except one, who was the owner of four shares from the time of the organization until 1854, when he transferred them to one of the other stockholders, and who never attended a meeting of the corporation, but was a relative of a majority of the officers and of the stockholders, and with two of them was in the habit of consulting on his business affairs, and greatly relied on their judgment.

At and for some time before the insolvency aforesaid, William Mason & Company were employed in making machinery, which they had contracted to furnish to the Whittenton Mills, to the value of \$35,000. The materials had all been procured, and the work was about three quarters done. It was generally known, in the shop of Mason & Company, and in the town of Taunton, and to many of the persons who furnished the materials and performed the labor on this machinery, that it was building for the Whittenton Mills. And debts for such materials and labor, to the amount of \$4,000, have been proved against the estate of Mason & Company.

Mason contributed to the copartnership nothing but his skill and patent rights. The Whittenton Mills contributed all the capital required, and advanced to Mason & Company all the money to pay for the machinery, stock, and tools originally purchased; and afterwards, from time to time, made further advances to pay the accruing rents, and for the stock and labor, as well as for the land purchased, and the tools and machinery required in carrying on the copartnership business, and were credited with these sums, and with interest thereon in the annual accounts stated and rendered by Mason & Company. The advances were made with the expectation that they would be reimbursed out of the profits. The lands were all conveyed to William Mason and his heirs, but were purchased for copartnership purposes, and the purchase-money was charged in the copartnership account.

The general agent of the corporation (who was also their treasurer for a portion of the time) and Mason represented to third persons, with whom the partnership was dealing, that the corporation was a member of the partnership. Two of the directors testified that they never heard a doubt suggested that this partnership was a valid one till said insolvency proceedings were commenced; and there was no evidence that its validity was ever questioned until that time, by any person. One person, acting under a power of attorney, executed by Mason, and by the Whittenton Mills through their general agent and with the knowledge of their clerk, on the 12th of January, 1857, purporting to authorize him to use their partnership name "in signing and making checks and drafts and receipts, and indorsing drafts, checks, bills receivable, and bills of exchange," represented to those with whom he was negotiating for money and supplies for the shop that the Whittenton Mills was a member of the partnership, and upon the faith of such representations obtained money and materials to a large amount.

The Boston Manufacturing Company, incorporated in 1813 (St. 1812, c. 92), "for the purpose of manufacturing cotton, woollen, and linen goods," erected at Waltham the first power loom mill in this country; and have a machine shop, in which they made the machinery for their own mill and for the two cotton mills of the Merrimack Company, the first erected in Lowell; and have also made machin-

ery, in large quantities, for cotton mills in Baltimore, Lowell, and other places. The Elliot Manufacturing Company, incorporated in 1823 (St. 1823, c. 11), "for the purpose of manufacturing cotton goods," furnished from their shop the machinery for one of the mills in Nashua, N. H. Cotton Manufacturing companies generally have connected with their mills, machine shops, or "repair shops," as they are called; and it is customary for such companies, when they have a good mechanic, and the patterns for a valuable machine, to furnish such machines to other factories.

THOMAS, J. :—

This is a petition to this court, sitting in equity, and as such having by the St. of 1838, c. 163, the jurisdiction and the supervision of all proceedings in insolvency. The averments of the petition are admitted by the answers of the respondents. Nor is there a question upon the facts agreed that a copartnership was entered into by the Whittenton Mills and the said Mason, and for the purposes stated, if the corporation was capable in law of entering into and forming such partnership and for such ends.

But the petitioners say, first, that the Whittenton Mills could not enter into any legal partnership; secondly, that if it were so capable, it could not form a copartnership for the prosecution of a business foreign to the purpose for which alone it was created; thirdly, that if such legal partnership existed, the petitioners were not liable to be declared insolvent upon the petition of Mason and under the St. of 1838, c. 163, and the acts in addition thereto; such acts respecting only natural persons and making no provision for bodies corporate.

At the threshold of the cause and of its elaborate discussion is the question, Was this corporation capable of forming a partnership, of entering into the contract? This question presents itself in two forms. The more general one is: Has a corporation, as one of its usual inherent powers, the capacity to form a contract of copartnership? The narrower question, but for this case the practical and pertinent one, is, Can a manufacturing corporation in this Commonwealth, incorporated since February, 1831, and subject to the provisions of the thirty-eighth and forty-fourth chapters of the Revised Statutes, enter into a contract or society of copartnership?

This corporation was created in March, 1836, as a manufacturing corporation, for the purpose of manufacturing cotton goods in the town of Taunton, and for that purpose was invested with all the powers and privileges, and made subject to all the duties, restrictions, and liabilities set forth in the thirty-eighth and forty-fourth chapters of the Revised Statutes, passed on the fourth of November preceding, but not to take effect till the first of May, eighteen hundred and thirty-six (St. 1836, c. 19). This charter, with the provisions of the chapters referred to and made part of it, is the origin and source of the powers and functions of the corporation.

What powers are granted expressly, or by implication, because necessary or usual for the purposes which this charter was given to effect, the corporation has, and no more.

There is one obvious and important distinction between such a society as this charter creates, and that of a partnership. An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation, as such, can bind the society. In a partnership each member binds the society as a principal. If then this corporation may enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property.

The second section of c. 38 of the Rev. Sts. provides that the business of every such manufacturing corporation shall be managed and conducted by the president and directors thereof, and such other officers, agents, and factors as the company shall think proper to authorize for that purpose. It is plain that the provisions of this section cannot be carried into effect where a partnership exists. The partner may manage and conduct the business of the corporation, and bind it by his acts. In so doing he does not act as an officer or agent of the corporation by authority received from it, but as a principal in a society in which all are equals, and each capable of binding the society by the act of its individual will.

Indeed, in examining this chapter, it will be found that there is scarcely a provision for the conduct of the business of a manufacturing corporation that is not inconsistent with the existence of a contract by which the power to manage the business of the company and to bind the corporation by his acts is vested in one not a member of the corporation nor its officer or agent. Such are the third, fourth, and fifth sections, providing how the president and directors, and other officers, agents, and factors of the corporation shall be chosen. Such too is the sixth section, which authorizes every such company to make by-laws for its own regulation and government. Such are the several provisions authorizing the stockholders to fix the amount of the capital stock, to increase the same within the limit fixed by law, or to reduce it. §§ 9, 11, 19. And such is the provision requiring the president and directors to give annual notice of the amount of the debts of the corporation; the means of stating which would not be in their power if another principal had the power of creating the debt. § 22. Of the same character is the twenty-fifth section, by which it is declared that the whole amount of the debts which the corporation shall at any time owe shall not exceed the amount of the capital stock actually paid in, and which renders the directors, under whose administration an excess shall occur, liable personally to the extent of such excess; a provision evidently

based upon the ground that the exclusive power to contract debts is vested in such directors, and that they cannot be divested of it, and which is wholly inconsistent with the existence of a power in the corporation to enter into a contract of partnership, by which another principal would be created, having equal power to contract debts and to bind the partnership and the corporation *in solido*.

Indeed the effect of all our statutes, the settled policy of our Legislature, for the regulation of manufacturing corporations is that the corporation is to manage its affairs separately and exclusively; certain powers to be exercised by the stockholders, and others by officers who are the servants of the corporation and act in its name and behalf. And the formation of a contract, or the entering into a relation, by which the corporation or the officers of its appointment should be divested of that power, or by which its franchises should be vested in a partner with equal power to direct and control its business, is entirely inconsistent with that policy.

The power to form a partnership is not only not among the powers granted expressly or by reasonable implication, but is wholly inconsistent with the scope and tenor of the powers expressly conferred; and the duties expressly imposed, upon a manufacturing corporation under the legislation of the Commonwealth.

The difficulties would be obviously greater in holding such a partnership to be valid, when formed and carried on for the prosecution of a business other than that, if not foreign from that, for which the corporation was created. It is difficult to see how the corporation should engage in such business, even when under its own control, still less to enter into copartnership with third persons for that purpose.

By the St. of 1852, c. 195, not adverted to in the argument, corporations created for the manufacture of woollen and cotton goods are authorized to carry on certain other manufactures, but this only when four fifths of the stockholders shall, by vote at a special meeting called for the purpose, consent to the same. This statute furnishes a pretty strong implication that the power to carry on a different business from that for which the corporation was chartered, did not exist before the statute was passed.

We are therefore all of opinion that in the formation of the alleged partnership the corporation exceeded the powers given by its charter expressly or by implication, and that the contract of copartnership was illegal and void.

It is said, however, by the respondents, that if this be so, such violation of the charter can only be alleged by the Commonwealth, upon proceedings for a forfeiture of the charter, and that the validity of the partnership cannot be called in question by the corporation or by its creditors or debtors.

As the basis of proceeding against the Whittenton Mills in insol-

veny, upon the petition of Mason under the St. of 1838, c. 163, § 21, even supposing that the provisions of that statute are not limited to natural persons, it was necessary to show the existence of an actual copartnership between Mason and the corporation. It was not sufficient to show that they had so conducted as to be liable to third persons as partners; they must be partners *inter sese*. *Hanson v. Paige* (3 Gray, 239). There must be a contract of copartnership between them. Into such a contract the petitioners were incapable of entering.

But the case rests upon broader grounds. The charter of the corporation is part of the public law. Rev. Sts. c. 2, § 3. Those who deal with the corporation must take notice of the extent of its powers, and that the corporation is legally incapable of entering into the contract of partnership; that that contract was beyond the scope of its authority; and that this incapacity resulted from considerations not personal or peculiar to this corporation or its members, but from general grounds of public policy, which the corporation and those dealing with it cannot be permitted to contravene and defeat. That policy is to confine these corporations within the limits prescribed by law, to protect the stockholders from liabilities which the charter and laws do not create, and, while it imposes upon the stockholders of the corporation heavy responsibilities, to retain to them the legal control of its business and conduct of its affairs.

The precise point at issue before us is the validity of these proceedings in insolvency. That depends, as before remarked, upon the existence of the partnership between the Whittenton Mills and Mason. Upon that only could the petition of Mason be sustained.

It is necessary for this purpose to decide how far these considerations will affect those claiming to be the creditors or debtors of the alleged partnership. It is in this point of view only, that the cases of *Chester Glass Co. v. Dewey* (16 Mass. 94), *Quincy Canal v. Newcomb* (7 Met. 276), and *White v. South Shore Railroad* (6 Cush. 412), can be deemed material. They have the tendency to show the existence of a contract between the Whittenton Mills and Mason, which the former is estopped to question.

In the case of *Chester Glass Co. v. Dewey*, one ground of defence to the recovery for goods sold and delivered by the plaintiff corporation was, that the corporation was prohibited from trading. The court held, that the Legislature did not intend to prohibit the supply of goods to those employed in the manufactory. That certainly was the end of the matter. The court however added, that the defendant could not refuse payment on this ground, but that the Legislature may enforce the prohibition by causing the charter to be revoked. This suggestion will be entitled to consideration if a question should arise as to the right of the alleged company to recover for goods sold,

but it certainly is not conclusive upon the relation of the partners *inter sese*.

In *Quincy Canal v. Newcomb*, it was held, that, where a canal was opened and toll claimed, and the defendant used the canal, he was liable to the payment of such toll, and could not avoid such payment by showing that the canal had not been made so deep as the statute required.

In *White v. South Shore Railroad*, it was held, that the defendants were liable for damages in constructing their road through and across a mill-pond authorized by the general court to be raised in a navigable river, though in erecting the dam for raising the pond the condition of the act permitting it had not been complied with. The court said, that the railroad company could not take the petitioners' pond from them because the dam was not constructed in compliance with the act; that whether it had been so constructed was a matter between the government and the petitioner.

If the assent of all the stockholders were shown to the formation of the partnership,—which is not the fact,—it could not enlarge the powers of the corporation, or make that legal which was inconsistent with the law limiting their powers and prescribing their duties. Whether, if such assent were available, it could be manifested in any other mode but by a vote of the stockholders, it is not necessary to inquire.

The decision of the question as to the existence of the partnership between the Whittenton Mills and William Mason in the negative renders unnecessary the inquiry whether, if a partnership had existed, the petitioners could be subjected to the provision of the insolvent law of 1838, c. 163, and the acts in addition thereto.

The proceedings in insolvency founded upon the petition of Mason as the partner of said Whittenton Mills, under the firm of William Mason & Company, were illegal, and must be vacated and set aside, so far as they affect the estate of the Whittenton Mills. A mandamus must issue to the judge in insolvency for the county of Bristol to proceed, upon the petition of the Whittenton Mills, to hear the parties, and, good cause being shown, to issue his warrant thereon.

Decree accordingly.

METHODIST CHURCH v. PICKETT.

(19 N. Y. 482. 1859.)

APPEAL from the Supreme Court. Action to recover a subscription towards rebuilding the plaintiff's church. On the trial at the Wayne Circuit before Mr. Justice Wells, the only question of any interest was, whether the plaintiff established its corporate charac-

ter. For this purpose it gave in evidence a certificate, duly acknowledged and recorded April 6, 1827, in these words:—

Agreeably to a law of the State of New York, passed on the 5th day of April, 1813, authorizing the incorporation of churches, the male members of the Methodist Episcopal Union Church, agreeably to public notice given, met on the 15th day of May, 1826, in the village of Lyons, Wayne County, New York, at their meeting-house, and by plurality of votes chose Richard Jones and Orra Bennett to preside; then proceeded to the choice of five trustees. On canvassing the votes it was found the following persons were duly elected, viz.: Richard Jones, &c. [naming four others]. We the returning officers do certify that Richard Jones, &c. [repeating the names] were legally elected trustees for the Methodist Episcopal Union Church, in the village of Lyons, agreeably to a statute passed April 5, 1813.

Given under our hands, &c.

[signed]	RICHARD JONES.	(Seal.)
	ORRA BENNETT.	(Seal.)

To this certificate it was objected that it did not show the time, place, manner, nor by whom notice of the meeting therein mentioned was given; nor that the persons appointed to preside were elders, or church wardens, or that there were no such officers, or that the persons presiding were members of the church or society; that they were not stated to have been elected by a majority of votes, but by a plurality of votes; that the certificate does not particularly mention and describe the name or title by which the trustees and their successors should thereafter be called and known; that it does not show that there were any persons present at the meeting, except those who signed the certificate, nor that those who were present had the requisite jurisdiction, or had taken the steps necessary to incorporate a religious corporation under the act of 1813 (3 R. S. 294).

The plaintiff proved that certain persons were trustees of its society in 1850; that it then had had a house of worship; that at a meeting therein of the trustees it was resolved to demolish that building for the purpose of erecting a new church on the same site; that a subscription was made by the defendant and numerous others, by which the subscribers promise to pay the plaintiff, by its corporate name, the sums set opposite to their respective names, to be used and applied by the plaintiff in removing the old and erecting the new house of worship. There was evidence of another meeting of trustees in 1851. This was all the evidence of the plaintiff's incorporation. A nonsuit was asked and denied, under exception by the defendant. The plaintiff had a verdict. The exceptions were heard in the first instance at a general term in the seventh district, where judgment was rendered for the plaintiff, and the defendant appealed to this court.

SELDEN, J.:—

The answer in this case having denied that the plaintiffs were ever incorporated as alleged in their complaint, it was incumbent upon them to prove their incorporation upon the trial. The defendant's counsel insists that the certificate introduced for that purpose was insufficient to support the issue on the part of the plaintiffs; because the act for the incorporation of religious societies requires certain preliminary acts in order to incorporate under it, which acts, being virtually conditions precedent to the creation of such a corporation, must be proved before its existence can be established.

The preliminary acts referred to are: The giving of the notice in the manner required by the third section of the act; the assembling of the male members of the church or congregation, pursuant to such notice; the selection in the proper manner of the proper persons to preside at such meeting; the election of trustees; and the making, acknowledging, and recording of the certificate of the presiding officers.

It is obvious, that if religious corporations are bound, whenever they bring suit, to prove a strict compliance with the statute in respect to all these preliminary circumstances, it would be impossible for them in most cases to enforce their rights in a court of law. If these facts must be proved in one case, they must in all, and corporations may thus be called upon fifty years after the events took place to furnish proof of their occurrence. The statute has provided for no record evidence on the subject, except in respect to those facts required to be inserted in the certificate of organization.

But a rule so inconvenient as that contended for by the defendant's counsel, has never yet been established in regard to any class of corporations. On the contrary, it has been repeatedly held, that, as against all persons who have entered into contracts with bodies assuming to act in a corporate capacity, it is sufficient for such bodies to show themselves to be corporations *de facto*. This cannot be done by simply showing that they have acted as corporations for any period of time, however long. Two things are necessary to be shown in order to establish the existence of a corporation *de facto*, viz.: 1. The existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and, 2. A user, by the party to the suit, of the rights claimed to be conferred by such charter or law. *United States Bank v. Stearns* (15 Wend. 314).

The rule established by law as well as by reason is, that parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization or any subsequent abuse of their powers not connected with such dealing. As long as these are overlooked or tolerated by the State it is not for individuals to call them in question. In the case of *Trustees of Vernon Society v. Hills* (6 Cow. 23), which was an action brought

by the trustees of a religious corporation, Savage, C. J., used the following language: "The plaintiffs have acted as trustees upon the matter in question, and in bringing their suit, *colore officii*; and before an objection to their right can be sustained by the defendant, on the ground that they were not regularly elected, he must show that proceedings have been instituted against them by the government, and carried on to a judgment of ouster." And in the case of *Brouwer v. Appleby* (1 Sandf. 158), in the Superior Court of the city of New York, an action brought by the receiver of a corporation upon a promissory note, and where the defence was that the corporation was never duly organized, Oakley, C. J., said: "The defendant, as a contracting party with this corporation, cannot object to the want of the requisite organization; and any defect in that respect, if valid, is only available in behalf of the sovereign power of the State." *Eaton v. Aspinwall* (19 N. Y. 119). I have said that a party to a suit, in order to show itself to be a corporation *de facto*, must prove the existence of a law authorizing its incorporation, — that is, it must appear that such authority exists, — if by special charter it must be proved; but when there is a general law of our State, authorizing a particular class of incorporations, the courts, I think, will take judicial notice of it. If, however, it were otherwise, it is to be inferred that the statute authorizing the incorporation of religious societies was introduced upon the trial, as it was referred to, and relied upon by the counsel upon both sides.

But it is insisted by the defendant's counsel that there was no proof of user. The degree of proof required on this subject depends to some extent upon the nature of the incorporation, and the law under which it is organized. Where no provision is made for any permanent evidence of the fact of organization, more proof of user would be necessary than where, as in this case, the essential steps by which the organization is accomplished are required to be made a matter of record.

In such cases, if the record is perfect, then perhaps nothing else need be shown; but if imperfect, it may still stand in place of, and be equivalent to, a very considerable degree of evidence of user. The imperfection of the record cannot be taken advantage of by a private individual, who has entered into engagements with the corporation. The rightfulness of its existence not being in issue, of course evidence of any irregularities or defects in its organization, short of such as would show a want of good faith on the part of those concerned in the proceedings, would be wholly irrelevant. If the law exists, and the record exhibits a *bona fide* attempt to organize under it, very slight evidence of user beyond this is all that can be required.

We have in this case, in addition to the certificate of incorporation in 1826, first, the subscription paper signed by the defendant and others, and dated in April, 1850; then a meeting of trustees and

building committee in May, 1850; and another, of the trustees alone, in August, 1851; with the resolutions passed at both these meetings.

But it is said by the counsel, that there is no evidence that these acts of 1850 and 1851 were acts of the same body organized or attempted to be organized by the proceedings in 1826. Let us see. In the first place the name is the same; in the next place, the location is the same, as is shown by the subscription papers and the certificate, viz., the village of Lyons; then again we find the trustees resolving in 1850 "to demolish and remove" their church for the purpose of erecting "a new church" upon the same site: thus affording some ground at least for the presumption that the society had been some time in existence. Under these circumstances, it is, I think, safe to infer, in the absence of any evidence to the contrary, that the society thus acting in 1850 is the same as that organized by the same name, in the same place, in 1826. If this is so, more proof of user can hardly be requisite to establish the existence of a corporation *de facto*. It is unnecessary, therefore, to inquire whether the certificate recorded in 1826 is or is not in strict accordance with the provisions of the statute. Were it otherwise, however, I should be of opinion, as held by the Supreme Court, that the certificate does substantially conform to the requisitions of the act. The other objections made to the judgment of the Supreme Court are, I think, clearly untenable.

The judgment, therefore, should be affirmed.

JOHNSON, C. J., COMSTOCK, ALLEN, GRAY, and STRONG, JJ., concurred on both grounds taken by SELDEN, J.; DENIO and GROVER, JJ.. concurred on the ground of the sufficiency of the certificate.

Judgment affirmed.

RAILROAD COMPANY v. CARY.

(26 N. Y. 75. 1862.)

APPEAL from the Superior Court of Buffalo. Action upon the subscription of the intestate to the capital stock of the plaintiff. The plaintiff undertook to become incorporated under the general railroad act of 1850. In May, 1853, its articles of association were filed, and the intestate, June 8th, thereafter, became a subscriber for one thousand dollars of the capital stock, and paid ten per cent at the time of subscription, and died in September, 1853. The directors, after his death, made seven calls upon the stock of one hundred dollars each, and for this seven hundred dollars, claimed to be due, this action was brought. The affidavit indorsed upon and filed with the articles of association was conceded to be defec-

tive; it containing no statement of an intention in good faith to construct or operate the road mentioned in the articles. In 1858 a law was passed by the Legislature of this State authorizing the plaintiff to sell its property and effects to another railroad company; and, by the second section of the act, the plaintiff was declared to be a valid corporation, duly organized under the act to authorize the formation of railroad corporations and to regulate the same, passed April 2, 1850, and the several acts amending the same, notwithstanding any error, informality, insufficiency, act. or omission, on the part of such company or any of its stockholders in the proceedings to become incorporated, and the said corporation and all the proceedings of its stockholders and officers were thereby legalized and confirmed. By another section, it was provided that nothing contained in this act should affect any suit before then commenced in any court. Upon the trial, the plaintiff offered in evidence certified copies of the articles of association filed with the county clerk and comptroller, and they were objected to, on the ground of the defect in the affidavit. The plaintiff then read in evidence the Act of 1858, and thereupon the court overruled the objection, and the articles of association were read in evidence, and the defendant excepted. The plaintiff then gave evidence of the election of directors and officers, June 1, 1853, and the purchase of the route of the proposed road after such election, and that contracts were made for its construction, and that the contractors entered upon the work, and that money was paid on various subscriptions to the capital stock, and expended on the road, and liabilities incurred in the construction. Evidence was given of the various calls for payment upon the stock, counted upon in the complaint. At the close of the evidence the defendant moved for a nonsuit, on the ground that the plaintiff had failed to prove its corporate existence at any time prior to the passage of the Act of 1858, if at all; and that the defendant was not liable on the subscription of the intestate. The motion was denied, and the defendant excepted. Judgment was given for the plaintiff for the full amount claimed, which was affirmed at general term, and the defendant appealed to this court.

DENIO, C. J., DAVIES, WRIGHT, GOULD, and SMITH, JJ., were for affirming the judgment. Their reasons were not put in writing. Those of the court were delivered as follows by

MASTEN, J.:—

The defendant contends that the plaintiff's organization is defective, because the affidavit annexed to the articles of association does not contain the allegation required by the statute, "that it is intended in good faith to construct or to maintain and operate the road mentioned in the articles of association," and that it is not therefore a corporation. The articles of association are in due form, and the affidavit annexed to them, while it does not come

up to the requirement of the statute in the particular specified, is colorable. The articles and affidavit were filed and recorded in the office of the Secretary of State; the capital stock was subscribed and partly paid in; the route of the road was surveyed and located; the right of way obtained; a contract for the construction of the whole road entered into, and liabilities incurred which have not been satisfied. This was sufficient to constitute the plaintiff a corporation *de facto*, so that neither it nor its stockholders can object that it is not strictly a corporation *de jure*.

I am of the opinion that, under this and similar general acts for the formation of corporations, if the papers filed, by which the corporation is sought to be created, are colorable, but so defective that, in a proceeding on the part of the State against it, it would for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution, collaterally, by any person.

Any other rule, it seems to me, must be fraught with serious consequences and great public mischief. Most of the persons who subscribe in good faith for the stock do not examine to see whether all the requirements of the statute in the organization of the corporation have been complied with; and if they did examine would not probably discover a defect like the one now pointed out. The stock is sold in market from hand to hand without any such examination. The corporation may carry on its business for years, and its stock have entirely changed hands, when its property may be destroyed by a trespasser, and in an action against him in the name of the corporation, his only defence, "you are not legally a corporation by reason of a defect in your constitution," would (upon the doctrine contended for by the defendant) be successful. The doctrine of estoppel could not be applied in that case, as it has been in some cases, to counteract an erroneous decision upon the question now before me.

I am aware that there are decisions in the Supreme Court, beginning with *The First Baptist Society v. Rapalee* (16 Wend. 605), upon the point now presented to us, in conflict with the opinion I have here expressed. Their error is, in not recognizing the distinction between what is sufficient to constitute a corporation *de facto* and what is necessary to constitute one *de jure*, and how and by whom a corporation *de facto* may be shown not to be a corporation *de jure*. The State alone can take advantage of a defect in the constitution of a corporation like the one in this case. In its action it will be governed by public policy and considerations. And it has declared that it will not take advantage of the defect in the plaintiff's constitution. I think the Court of Appeals has settled the principle as I have stated it. *Eaton v. Aspinwall* (19 N. Y. 119).

ALLEN, J. (dissenting): —

The plaintiff's right to recover must, I think, depend upon the validity and sufficiency of the proceedings for their incorporation under the general Act of 1850. The question is upon the validity of the contract alleged to have been made by the intestate by his subscription on the 8th of June, 1853; and the tests of its validity must be applied as of that date. There is no evidence that he did anything, after that time, recognizing the existence of the corporation, and up to that time there had been no user of the franchise which would estop any one from disputing the corporate existence of the plaintiff. All that had been done under the articles of association was, that the persons named as directors had come together and chosen from their number a president, secretary, treasurer, and other officers. This was in no sense a user of any corporate franchise extended to the body as a corporation by the laws of the State. By thus getting together, calling themselves a corporation and electing officers, they did not become a corporation *quoad* third persons and the people, so that their corporate existence could only be questioned by the Attorney-General upon a *quo warranto*. Had they, on the 2d day of June, 1853, brought an action as a corporation, no one would claim that this formal election of officers was such a user of a corporate franchise as to constitute them a corporation *de facto*. And yet that was all there was when the plaintiff subscribed; and if they were not then a corporation, either *de jure* or *de facto*, the contract was invalid, and the subsequent acquisition by the plaintiff of certain corporate rights, as against third persons and the public, by usurpation, could not inure by relation to establish a contract against an individual having no subsequent concern or dealing with the company. A single act in the exercise of the franchise claimed would not be a user, within the rule that makes a user evidence of corporate existence; still less is the preparation to enter upon the user sufficient to establish the existence of a corporation. The user of a corporate franchise has never, so far as cases have come to my notice, been relied upon or regarded as evidence of corporate existence in actions upon subscriptions to the capital stock. Indeed it could not be, for the reason that contracts of that character are incident to the creation of the corporation. In some cases a person dealing with a corporation is estopped from denying its existence. Angell & Ames on Corp., § 94. But in this court, as well as in other courts, in actions upon subscriptions to the capital stock, the question of the creation and existence of the corporation has been regarded as an open question, and the subscriber has not been concluded by his subscription. The questions made in the cases that have been before this court would have been very easily disposed of, had the doctrine of estoppel been deemed applicable; and the fact that the proceedings for the incorporation have been examined and cases disposed of upon the merits, is very high evidence that the

subscriber is at liberty to controvert the existence of the corporation. *Eastern Plankroad Co. v. Vaughan* (14 N. Y. 546); *Buff. and Pittsburgh R. R. Co. v. Hatch* (20 id. 157). There is good reason why the party should not be held to have admitted the existence of the corporation by his subscription. The consideration of his undertaking is the shares of stock which he receives, or expects to receive, from the corporation. If the company has not been legally incorporated, the stock, as such, is of no value; it has no existence. He agrees to pay for what he cannot get, and hence his promise is *nudum pactum*. It was decided, in *The First Baptist Society v. Rapalee* (supra), that a promise in writing to pay a certain sum to the trustees of a certain church did not estop the promisor from requiring proof, or, in other words, from denying the incorporation of the church: *Welland Canal Co. v. Hathaway* (8 Wend. 480); *Central Turnpike Corporation v. Valentine* (10 Pick. 142); *Proprietors of Norwich and Lowestaff Navigation v. Theobald* (1 Mood. & Malk 151); *Schenectady and Saratoga Plankroad Company v. Thatcher* (1 Kern. 102); *Rensselaer and Washington Plankroad Co. v. Wetsel* (21 Barb. 56); *Hamilton and Deansville Plankroad Co. v. Rice* (7 id. 157); all of which, with the exception of the first, were actions upon stock subscriptions, and in all of which the question of the proper organization and incorporation of the plaintiff was made by the defendants and considered by the court. *Valk v. Crandall* (1 Sandf. Ch. 179) was the case of a subscription intermediate an irregular organization of a banking association, by a certificate not in conformity with the statute, and a formal perfect organization by filing a certificate as required by law; and it was held that the subscription and the mortgage given as security were void. It does not need the citation of authority to the proposition that a party, seeking to avail himself of a special privilege or franchise under a statute, must bring himself strictly within the terms of the act the benefit of which he seeks. The principle is elementary. The statute authorizing the creation of corporations, by the voluntary association of individuals for that purpose, must be strictly pursued. A compliance with the statute is a condition precedent to the existence of the corporation. No act required by the statute as a preliminary to the formation of the corporation can be omitted as non-essential. In *The Eastern Plankroad Company v. Vaughan* (supra), stress was laid upon the fact that the documents mentioned and called for by the statute contained all that was, in terms, required to be inserted in them; thus conceding that any departure from the statute, in omitting to comply with a positive requirement, would have been fatal. In *Buffalo and Pittsburgh Railroad Company v. Hatch* (supra) judgment was given for the plaintiff, for the reason that there was a substantial compliance with the statute in all respects; and the same remark applies to the case of *The Schenectady and Saratoga Plankroad Company v. Thatcher*.

It is only on compliance with the provisions of this act that the articles of association may be filed in the office of the Secretary of State, and the associates become a corporation (Laws of 1850, p. 211, § 1). Section 2 of this act forbids the filing and recording of the articles of association and the incorporation of the associates, until there is indorsed upon or annexed to such articles an affidavit, made by at least three of the directors named in the articles, stating, among other things, that "it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association." This is omitted in the affidavit filed with the plaintiff's articles of association. The statute required some evidence of the good faith of the associates, and prescribed this as the evidence to be presented. When the Legislature parted with their discretion and supervisory control in the matter of creating railroad corporations, it was fit and proper that the public should, so far as was practicable, be protected against fraudulent or speculative organizations under the general act; and hence the requirement of not only the subscription and payment of a given sum per mile of the proposed road, but an affidavit of the *bona fide* intent to carry into effect the object of the proposed corporation. The omission of this part of the required affidavit was fatal to the proceedings for the incorporation of the plaintiff. It was so regarded by the plaintiff and by the Legislature, and hence the Act of 1858 was passed. That act legalized the acts of the corporation from the first, and to some extent and for some purposes gave them the same rights as against third persons and the public which they would have had if the proceedings for their incorporation in the first instance had been perfect and regular. But the act could not have a retroactive effect so as to give vitality to an executory contract with a stranger void in its inception, for the reason that there was no corporation capable of contracting. If the intestate was not bound by his promise when made, no subsequent act of the Legislature could create a liability. The Legislature can neither make nor unmake contracts for parties. The Constitution, as well as the well-defined limits of legislative power, aside from the express prohibition of the Constitution, forbid this.

The judgment should be reversed and a new trial granted, costs to abide event.

SUTHERLAND, J., also dissented; SELDEN, J., expressed no opinion.

Judgment affirmed.

HEASTON v. RAILROAD COMPANY.

(16 Ind. 275. 1861.)

APPEAL from the Randolph Circuit Court.

PERKINS, J. : —

The Cincinnati and Fort Wayne Railroad Co. sued David Heaston, on an alleged subscription to the capital stock of said company, of \$1,500. His subscription appears to the original articles of organization, and a copy of them is filed as the foundation of the action. The defendant answered in sixteen paragraphs. To a part of those paragraphs the plaintiff demurred; the Court sustained the demurrer, the defendant excepted, and the cause was continued. At a subsequent term, the Court permitted those demurrers to be withdrawn, and others to be filed, argued and decided upon.¹

A corporation may sue in this State, in its corporate name, and need not aver in the complaint how it became a corporation, nor that it is such. And a default, or answer in denial of the cause of action, admits the capacity of the plaintiff to sue. *Harris v. The Muskingum, &c. Co.* (4 Blackf. 267) and cases cited; *Hubbard v. Chappel* (14 Ind. 601.)

But there may be an answer of *nul tiel* corporation, at the commencement of the suit. The cases *supra*; and *Morgan v. Lawrenceburg, &c.* (3 Ind. 285); (Ind. Dig. p. 318). Such answer, it is now settled in this State, is an answer in abatement, and must therefore precede answers to the merits. *Jones v. The Cincinnati, &c. Co.* (14 Ind. 89); *McIntyre v. Preston* (5 Gil. (Ill.) 48), *Phoenix Bank, &c. v. Curtis* (14 Conn. 437). And upon the trial of an issue of fact on such answer, or on a reply thereto, the proof is limited to the question of the existence, *de facto*, of a corporation, under an authority sanctioning such a corporation, *de jure*. In other words, mere irregularities in organization cannot be shown collaterally, where there is no defect of power. *The Bank of Toledo v. The International Bank* (21 N. Y. (Court of Appeals), 542); and the authorities *supra*. See the cases cited in Abb. Pl. (N. Y.) p. 179; also *Ewing v. Robeson et al.* (15 Ind. 26). And where such answer denies the existence at the commencement of the suit, of a corporation which is shown to have once existed, the answer should particularly set forth the manner in which the corporate powers ceased (Ind. Dig. § 63, p. 319). A faulty answer in this respect was erroneously held good in *Morgan v. Lawrenceburg, &c.* (3 Ind. *supra*).

¹ Part of the opinion relating to a question of practice is omitted.

We have asserted above, that the issue of *nul tiel* corporation is upon the existence of a *de facto* corporation, where one *de jure* is authorized; and upon this fact rests the doctrine of estoppel to deny the existence of a corporation, in certain cases. The estoppel goes to the mere *de facto* organization, not to the question of legal authority to make an organization. A *de facto* corporation that by regularity of organization might be one *de jure*, can sue and be sued. And a person who contracts with such corporation, while it is acting under its *de facto* organization, who contracts with it as an organized corporation, is estopped, in a suit on such contract, to deny its *de facto* organization at the date of the contract; but this does not extend to the question of legal power to organize. Hence, if an organization is completed where there is no law, or an unconstitutional law, authorizing an organization as a corporation, the doctrine of estoppel does not apply. *Harriman v. Southam* (16 Ind. 190); *Brown et al. v. Killian* (11 Ind. 449). See 15 id. 395. So, if the plaintiff suing in a name importing *prima facie* a corporation, in fact is not assuming to act as a corporation, but only as a partnership, this fact may be raised by an answer alleging want of parties in interest to the suit. *Farnsworth v. Drake* (11 Ind. 101). See *Brown et al. v. Killian* (*supra*). The sixteenth paragraph of the answer averred the non-performance of a condition precedent by the corporation, it having failed to tender to the defendant a certificate of stock. The paragraph was bad. *The New Albany Co. v. McCormick* (10 Ind. 499).¹

Considering the amount recovered in this case, the circumstances attending the trial, the evidence given, and that which was absent, and all the surroundings, we think the Court should have sustained the motion that was made for a new trial.

PER CURIAM:—The judgment is reversed, with costs. Cause remanded, with leave to amend, &c.

DOOLEY v. CHESHIRE GLASS COMPANY.

(15 Gray, 494. 1860.)

ACTION of contract. Answer, no corporation duly organized in this Commonwealth under the name of the Cheshire Glass Company. Trial and verdict for the plaintiff in the superior court before Putnam, J., to whose rulings the defendant alleged exceptions, which are stated in the opinion.

DEWEY, J.:—

1. To meet the denial that the defendants are a corporation duly organized, and liable to be sued upon their promissory notes pur-

¹ Part of the opinion is omitted.

porting to be signed by them, the plaintiff gave the defendants' attorney notice to produce the books of the corporation containing the records of the organization, which not being produced, he then offered to establish the same by the testimony of witnesses, and to prove the fact that they had acted as such corporation, and a copy of the certificate filed with the secretary of the Commonwealth, and also of a like certificate filed with the town-clerk of Cheshire, both such certificates being in the form required by St. 1851, c. 133, authorizing the formation of corporations in certain cases by voluntary association and upon complying with the provisions of that act. This evidence was, in the opinion of the court, competent, after notice to the defendants to produce their book of records, and an omission on their part so to do. The case of *Narragansett Bank v. Atlantic Silk Co.* (3 Met. 287) is strong to this point. Says Chief Justice Shaw in that case: "The maxim of law is that all things shall be presumed to have been rightly and correctly done until the contrary is proved. As the corporation could not proceed lawfully until duly organized, and as they did proceed to act as a corporation, this presumption has its effect."

2. It was proposed to show that such certificate, so filed in the office of the secretary of the Commonwealth, although purporting to be under an oath duly administered before "James N. Richmond, a justice of the peace," resident in Cheshire, was in fact administered by him, in the city of New York, to the three directors whose names appear on the same, and who are residents of that city. The court properly rejected the evidence. After placing this certificate, with the oath annexed in the form in which it is, upon the public records, as a compliance with the statute, these directors or other officers of the corporation are to be estopped from setting up its falsity to aid in defeating an action against the corporation.

3. The next objection relied upon in the defence was, that there had not been a publication of said certificate three several times in a newspaper published in the county of Berkshire, as required by St. 1851, c. 133, § 4. However this omission might have affected the corporation had they been plaintiffs seeking the aid of the law to enforce a contract against another party, we think the corporation cannot set it up as a defect in their organization to defeat a recovery against them, but that they might be charged in the present action, although they had omitted the act of publication of the certificate in a newspaper.

4. We take a similar view of the remaining objection urged, viz. that there was evidence offered by the defendants tending to show that, prior and up to January 1st, 1853, an association had been carrying on business under the name of the "Cheshire Glass Company," and that the same person acted as their agent who acted as agent for the defendant corporation. The adoption of a similar name with that of any other corporation or company is forbidden by

§ 6 of this statute. But as regards the creditors of the company, an omission to comply therewith would furnish no defence. Objections like these are certainly not to be favored when made by a company holding themselves out as a corporation, and contracting liabilities as such.

Exceptions overruled.

BANK v. McDONALD.

(130 Mass. 264. 1881.)

CONTRACT upon a promissory note for \$450, dated April 22, 1875, payable on demand to the order of the plaintiff, and signed by Bernard O'Reilly, the defendant's testator. The writ described the plaintiff as a corporation duly established and organized under the laws of the State of Missouri.

At the trial in the Superior Court, before Bacon, J., without a jury, it appeared that, at the time the note in suit was given, the plaintiff was doing business as a *de facto* corporation; and the only issue in controversy was whether the requirements of the Gen. Sts. of Missouri of 1866, cc. 62, 68, were fully complied with before the plaintiff commenced its business. On this issue the judge ruled that the plaintiff had shown sufficient evidence of its corporate existence to enable it to maintain this action; and found for the plaintiff accordingly. The defendant alleged exceptions which stated all the evidence bearing upon this issue, which, being immaterial to the point decided, is omitted.

BY THE COURT:—

The plaintiff being a corporation *de facto*, and the defendant having contracted with it as such, the legality of its organization cannot be impeached by him when sued upon his contract. *Appleton Ins. Co v. Jesser* (5 Allen, 446); *Commissioners of Douglas v. Bolles* (94 U. S. 104).

Exceptions overruled, with double costs.

FAY v. NOBLE.

(7 Cushing, 188. 1851.)

THIS was replevin for seventy-two tons of pig iron. The defendants pleaded the general issue, and specified in defence a title in themselves under a mortgage from the West Boston Iron Company.

At the trial in the Court of Common Pleas, before Wells, C. J., the following facts were in evidence: Prior to May, 1848, Leonard Fuller and one Kendall owned and carried on at Boston a machine

shop and an establishment for making iron castings. On the 22d of March, 1848, they, with others, were incorporated as a manufacturing corporation, under the name of the West Boston Iron Company, for the purpose of carrying on the same business (St. 1848, c. 70, 8 Special Laws, 879); and in May, 1848, attempted to and supposed they did organize as such corporation; and Fuller and Kendall then transferred the real and personal estate employed by them in said business to the corporation, receiving payment therefor in shares of stock in the corporation. The shares so received by Fuller amounted to more than three-fourths of the whole number of shares, into which the capital stock purported to have been divided. From the time of this supposed organization until November, 1848, Fuller acted as the general agent of the company, and, on the 25th of September, 1848, purporting to act in that capacity, borrowed money of the plaintiffs, gave the note of the company therefor, and conveyed the pig iron in question to the plaintiffs, as collateral security for its payment.

The plaintiffs put into the case the records of said supposed organization, and of the proceedings under the same; and contended that, from an inspection of these records, it appeared the company had not been legally organized as a corporation; and so the court ruled, against the objection of the defendants. Two witnesses, called by the plaintiffs, testified, in answer to questions by the defendants, that the proceedings therein recorded were truly set forth. To this evidence the plaintiffs objected; but the judge admitted it as evidence of the actual agreement of the associates among themselves, whether they were to be regarded as incorporators, as partners, or otherwise, as to the manner in which the business should be transacted, and of the extent of the authority given to Fuller as their agent.

In November, 1848, a reorganization of the company, as a corporation, took place; and, on the 14th of that month, the corporation, so reorganized, conveyed all their property to the defendants, by the mortgage relied on by the defendants, who took possession, under this mortgage, of the iron in controversy.

The plaintiffs requested the judge to instruct the jury, among other things, that, as there had been no legal organization of the corporation at the time of the conveyance to the plaintiffs, the parties then holding shares therein, and conducting the business for their common benefit, were in law to be deemed partners, and could not, by any agreement among themselves, limit the power of the members as such, so as to affect the plaintiffs, unless knowledge of such limitation was brought home to the plaintiffs, the burden of proving which was on the defendants; that Fuller, as one of the partners, and the managing partner and principal owner, had full powers to give the notes of the company to raise money, and pledge their property for the payment thereof; and that, although Fuller dealt with the plaintiffs as agents, they were not estopped to show and avail

themselves of the fact, that he was actually a partner and principal owner.

The presiding judge submitted the case to the jury, with instructions upon this point, of which the following is the material part : —

“The proceedings, prior to November, 1848, did not prove a legal organization of the corporation, and consequently no corporate acts were done prior to November, 1848, when the new organization was effected. But, although not acting as a corporation, the individual associates were acting as an association connected together for the purpose of carrying on business; this association was not necessarily a partnership, with the usual powers and liabilities of a partnership, but it was a question of fact what were the terms of this agreement of association; and it being testified and proved, that the writings offered as records of the corporation contained a true statement of the acts of the associates, these writings were admissible evidence to prove the actual agreement of the associates as between themselves: and it was for the jury, from this and other evidence, to determine what this agreement of association was. If it was a partnership, without any limitation as to the powers of the individual members, each partner had a right to bind the partnership by a contract made for partnership purposes; and, among other powers, had a right to borrow money in the name of the partnership, and pledge the partnership property as security for repayment. It was, however, competent for partners to limit the powers of individual members of the company, by an agreement that the conduct of the business should be confided wholly to the management of agents chosen for that purpose; and where this was done, a partner not selected as agent could not bind the company by an agreement with an individual who knew the fact that the power of transacting the business of the concern had been delegated to these agents.”

The jury returned a verdict for the defendants, and the plaintiffs excepted.

BIGELOW, J. : —

Upon the evidence introduced at the trial of this case in the court below, the presiding judge ruled that, prior to November, 1848, there was no legal organization of the corporation called the West Boston Iron Company, and therefore no corporate acts were done prior to that time. The whole case was tried and submitted to the jury on this assumption. As this point was so ruled at the request of the plaintiffs, and as the verdict was in favor of the defendants, no exception was taken thereto, and we are not called upon to determine its correctness.

The plaintiffs contended and asked for the court to rule, that, inasmuch as there had been no legal organization of said corporation prior to November, 1848, the parties holding shares in said unorganized corporation were in law to be deemed copartners, and subject to

all liabilities as such. The court did not give this precise instruction to the jury; but directed them in substance, that said parties, by virtue of their being subscribers for and holders of stock in said company, were either general copartners, with the usual powers and liabilities as such, or copartners acting under certain restrictions and limitations as to the rights and duties of individual members, and through an agent with limited authority; and it was left to the jury to determine upon the nature and character of this copartnership, and also the authority of Fuller, as agent or copartner, to act in its behalf.

It seems to us, upon a careful consideration of the case, that these instructions were not warranted by the facts proved; and although they do not form the precise ground of the exceptions taken by the plaintiffs, yet we think them so erroneous, as to render it necessary to order the case to a new trial.

We are not aware of any authority, certainly none was cited at the argument, to warrant the instruction, that, in consequence of an omission to comply with the requisitions of law in the organization of a corporation by which its proceedings were rendered void, persons who had subscribed for and taken stock in the company thereby became copartners. The doctrine seems to us to be quite novel and somewhat startling. Surely it cannot be, in the absence of all fraudulent intent (and none was proved or alleged in this case), that such a legal result follows as to fasten on parties involuntarily, for such a cause, the enlarged liability of copartners; a liability neither contemplated nor assented to by them. The very statement of the proposition carries with it a sufficient refutation. No such result can follow, unless a principle of law be established, founded on no authority, and required by no public exigency. Corporations are known and recognized legal entities, with rights and powers clearly defined and well understood, and wholly distinct and different from those of individuals and copartnerships. Persons who subscribe for and take stock in them are subject to certain fixed and limited liabilities, which they voluntarily assume, and these liabilities are not to be extended and enlarged, so as to affect innocent parties, beyond the letter of the law. A copartnership cannot take upon itself the functions of a corporation, nor can a corporation or its members be made subject to the liabilities of a copartnership, in the absence of all statutory provisions imposing such liabilities. The personal liability of the members of a joint stock company or copartnership is inconsistent with the character and nature of a corporation, of which the law properly recognizes only the creature of the charter, and knows not the individuals (*Ang. & Ames on Corp.* 535, 536). On looking into *Rev. Sts. cc. 38 and 44*, to the provisions of which the corporation in question was made subject, we find various enactments by which officers and members are made individually liable for debts contracted by corporations, in case of non-compliance with certain

requisitions; but no provision is made by which such individual liability attaches, by reason of any omission to organize in the manner prescribed by law. The statute, it is true, prescribes the mode of organization, but it annexes no penalty or liability to the neglect or omission to comply with it. We are unable to see, therefore, any principle of law, upon which the instructions given to the jury on this point can rest.

It follows, as a necessary consequence of what we have already said, that the records of the corporation were improperly admitted and submitted to the jury, as evidence of an agreement or understanding among the shareholders in the corporation, as to their own rights and liabilities as members of a copartnership, and of the extent of authority given to Fuller, as agent of such copartnership. They were not made or kept for any such purpose. They were only the records and by-laws of a corporation, not the agreements of individuals, in the nature of articles of copartnership; and they could have no legitimate tendency to prove the facts for which they were offered and used at the trial.

Without examining at greater length the rulings of the court set out in the bill of exceptions, we think it manifest, that the whole trial proceeded under a misapprehension. If the court were correct in deciding that there was no organization of the corporation, and that all its proceedings were void, the case resolved itself into a few simple elements. Being unorganized, and incompetent to act as a corporation, it could not create agents, or confer any authority on any one to act in its behalf, and therefore all those who acted or purported to act as its agents, were acting without authority. There was no principal to appoint an agent. It is a familiar principle of law, that a person who acts as agent without authority or without a principal, is himself regarded as a principal, and has all the rights and is subject to all the liabilities of a principal. Story on Agency, § 264. If a person, purporting to act as an agent of a corporation, which had no valid legal existence, makes contracts and does other acts as its agents, he becomes the principal, and is personally liable therefor. If he purchases property, as agent, without authority, the title vests in him, so far at least as regards third persons, and he has the sole right to dispose of it to others. Story on Agency, § 264, a, note; *Hampton v. Speckenagle* (9 S. & R. 212).

Applying this principle to the case at bar, it is very clear, that Fuller was not the agent of a copartnership, for none existed; he was not the agent of individuals, as such, because he was not authorized so to act; he was not the agent of the West Boston Iron Company, because if the court were right in deciding that it had never organized, and that its proceedings were void, it never had the power to appoint him agent. Clearly, then, he acted without authority from any one. If he purchased, he purchased for himself. In him only did the property vest, and as against all but the vendors, he had

the sole right to dispose of it to others. In this view, the question of copartnership, which was submitted to the jury, was wholly immaterial, and diverted their attention from the real point in issue. We are therefore of opinion that there was a mistrial, and that the verdict must be set aside, and a new trial had at the bar of this court.

CHAPTER XI.

POWERS AND LIABILITIES OF A CORPORATION.

IN RESPECT OF LIABILITY FOR TORTS.

YARBOROUGH v. BANK OF ENGLAND.

(16 *East*, 6. 1812.)

THE plaintiffs declared in trover against the corporation of the Governor and Company of the Bank of England, for three promissory notes of the Bank of England, payable on demand, each for £100, describing them by their dates and numbers; to which the defendants pleaded the general issue; and after a verdict for the plaintiffs before Lord Ellenborough, C. J., at Guildhall, it was moved in the last term to arrest the judgment, on the ground that the action of trover, which was founded in tort, did not lie against a corporation: but it was at the same time explained by Bosanquet, who made the motion, that the objection did not originate with the Bank, who merely lent their names upon this occasion to protect the true owner of the notes, Mr. Sidney of Furnival's Inn, who had been robbed of them on the 22d of June last, and had immediately given notice to the Bank to stop payment of them, under his indemnity. That the plaintiffs, who were bankers at Doncaster, had several months afterwards received them in the course of their business in exchange for their own notes, from a person who gave in the name of Captain Johnson, but whom they did not know; and consequently all means of tracing the property were lost. And the real contest in this action was between Mr. Sidney and the plaintiffs; Mr. Sidney imputing negligence to them in the transaction.

The case was argued on Saturday last by Taddy, against the rule, and by Garrow and Bosanquet, in support of it; when the court said that they would look into the authorities before they delivered judgment; which was now pronounced by

LORD ELLENBOROUGH, C. J.:—

In this case, which was argued on Saturday, the only question was whether an action of trover is maintainable against a body cor-

porate; in other words, whether a corporation can be guilty of a trespass or a tort. As a corporation they can do no act, not even affix their corporate seal to a deed, but through the instrumentality and agency of others; they cannot, as a corporation, be subject to a *capias* or exigent (the process in trespass), because the remedies which attach upon living persons cannot be applied to bodies merely politic and of an impersonal nature. But wherever they can competently do or order any act to be done on their behalf, which as by their common seal they may do, they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others. A corporation having the return of writs, or to which any writ, or a mandamus, for instance, is directed, is liable eventually to an action for a false return. The case of *Argent v. The Dean and Chapter of St. Paul's*, in this court about the year 1781, was an action for a false return to a mandamus respecting an election to a verger's place in that cathedral; and no objection was made that the action would not lie. Vidian's Entries, p. 1, is an action for a false return against the mayor and commonalty of the city of Canterbury, for a false return to a writ of mandamus to restore an alderman to his precedency of place, etc. It states the mayor and corporation as attached to answer, and the return as falsely and maliciously made. The instances of actions against corporations for false returns to writs of mandamus, which are so often directed to them, must be numberless, though I have not found many of them in the books of entries. Bro. Corporations, pl. 48. A corporation cannot be aiding to a trespass, nor give a warrant to do a trespass without writing; and cites 4 Hen. 7, 9: and certainly it appears by that case, and by the sequel of it in 4 Hen. 7, 16, that a corporation cannot give a command to enter into land, without deed, nor do a thing which vests or divests a freehold, nor accept a disseisin made to their use, without deed. But many little things, it is said, require no command; by which must be meant no special commanding, as a command to servants to chase cattle out of their lands, or to make hay; being things which it is incident to a servant to do, and which he is bound to do without command; and if he do it, it is good, and the command is not material, for he may do it without command. A corporation cannot do a tort but by their writing under their common seal; per Fitzjames's Justice; Bro. Corporations, pl. 34, cites 14 Hen. 8, 2, 29; which imports that by their writing they may. A corporation may be defendants in an action of *quare impedit*, and the hindrance is an act of tort. *Butler v. The Bishop of Hereford and the University of Cambridge* (Barnes C. P. 350). To which a multitude of other instances may be added. Rast. 497; Ast. 378; 2 Mod. En. 291; Winch. 625, 700, 721, 733; 2 Lut. 1100; 3 Lev. 332. The stat. 9 H. 4, c. 5, recites the practice, in assizes of novel "disseisin and other pleas of land, of naming the mayor and bailiffs and commonalty of a franchise as disseisors, in order to oust them

of holding plea thereof; and directs the inquiry before the judges of assize, whether they be disseisors or tenants, or be named by fraud;” which plainly proves that they may be considered as disseisors; and there are instances of trespass against corporations. In 44 Ed. 3, 2, pl. 5, which was after 22 Ass. pl. 67, cited in the argument, trespass was brought against the Mayor and Commonalty of Hull and another person; and the objection made was not that trespass would not lie against the corporation, but that as a natural person was joined with them, there must be different processes; a distress against the former, and a *capias* against the latter. But the objection does not appear to have prevailed. In 8 H. 6, 1, 14, trespass was brought against the mayor, bailiff, and commonalty, and one of the commonalty; and the objection was not that trespass would not lie against the corporation, but that it could not be supported against them and an individual of their body; and Bro. Corporations, pl. 24, says, the better opinion was that the writ was good; and 14 Hen. 8, 2, says it was so awarded, and that in that case all the justices agreed to it. Brook also puts the case, “if mayor and commonalty disseise me, and I release to 20 or 200 of the commonalty; this will not serve the mayor and commonalty;” and the reason is because the disseisin is in their corporate character, and the release is to the individuals. And the case is put “that if mayor and commonalty disseise one of their own body, he shall have assize against them;” which clearly imports that the corporation, as such, might be disseisors. Also, in 4 Hen. 7, 13, trespass was brought against the Mayor and Commonalty of York; they justified under a right in the inhabitants to have common: but this was adjudged no plea, because the right in natural persons gave no right to the corporation, that the trespass was alleged in the corporation. They then pleaded as bailiffs in aydant: but it was adjudged they could not be bailiffs aiding to a trespass, “nor could they give warrant without writing to commit a trespass;” which implies that by proper writing, namely, by deed under their common seal, they might. In the present case, which is after verdict, it must be presumed that a competent conversion was proved; and if it be essential to such conversion that there should have been an authority from the company under seal to detain the notes on their behalf, that such authority was proved. The fact, by reference to my notes, is that it was admitted that the bank detained the notes in question, under an indemnity; and as no objection was taken to the terms of the admission, a competent detention, i. e., through the means of servants properly authorized to detain on their behalf, was thereby admitted; and therefore the presumption of due proof, after verdict, is in effect warranted by the facts of the case, if it had been material, which it by no means is, to resort to them. In the case of *The King v. John Biggs* (3 P. Will. 419), it was made a question upon a special verdict in a case of capital felony, for erasing an indorsement upon a bank note,

whether a person intrusted and employed by the Governor and Company of the Bank of England to sign notes on their behalf, was competently authorized for that purpose, not having been, as the special verdict expressly found, so entrusted and employed under their common seal. There is a long and learned argument of the reporter, Mr. Peere Williams, in which the authorities, as to what acts a corporation may do by their servant without an authority under their common seal, are drawn together. The majority of the judges who sustained the conviction must have been of opinion that an authority under their common seal was not essentially necessary for such a purpose; indeed, according to the report in 1 Stra. 18, of the same case, the doubt of the judges must have turned upon another point, namely, upon the import of the word "indorsement" (i. e., the writing alleged to be erased); and whether it could be satisfied by an erasure of what was written on the face of the note. As to which Sir John Strange in his report says, "That it was held by all the judges that the defendant was guilty; for the writing on the face of the note was of the same effect as an indorsement, and being introduced by the company instead of writing on the back, and always accepted and taken to be an indorsement, was within the words of the indictment." The objection of the want of authority under the common seal is not even noticed in the report of this case by Sir John Strange. However, if there would have been anything in the objection in this case, if made at the trial, there is nothing in it after verdict, when it must be presumed, as I have already stated, that all the competent proof which could be made in support of the action was made, and of course that an authority under seal for the detention of the notes was proved, if such proof were at all necessary.

Rule discharged.

MAUND v. CANAL COMPANY.

(4 Man. & Gr. 452. 1842.)

TRESPASS, for breaking and entering locks on a canal, and seizing and carrying away barges and coal. Pleas: not guilty (by statute) 36 G. 3, c. cii., and payment of money into court.

At the trial, before Cresswell, J., at the last assizes for Monmouthshire, it was proved that the trespasses in question had been committed by one Cooke, who was the agent of the company, which was incorporated by act of Parliament, 36 G. 3, c. cii.; and that the barges and coal had been seized for tolls claimed to be due to them. The only question raised was whether trespass would lie against a corporation aggregate for an act done by their agent within the scope of his authority. A verdict was taken for the plaintiff, damages £50, leave being reserved to move to enter a verdict for the defendants.

Talfourd, Serjt., in last term obtained a rule *nisi* accordingly, or to arrest the judgment. He cited the case of *Sutton's Hospital* (10 Co. Rep. 32, *Anon.* 12 Mod. 559); *Morgan v. The Corporators of Carmarthen* (3 Keb. 350), *Thusfeild and Jones' Case* (Skin. 27); Com. Dig. tit. *Franchises* (F. 19), 6 Vin. Abr. tit. *Corporations* (B. a).

Ludlow, Serjt., now showed cause. The act of Parliament by which the company is incorporated provides that they may sue and be sued: it also empowers them to enter on lands. If they enter improperly, it would seem that they may be sued for the trespass. The whole doctrine that a corporation cannot be sued in trespass rests on one passage in Bro. Abr. *Corporations*, 43; where the reason given is, that neither *capias* nor *exigent* can go against them. A *distringas*, however, may be issued against a corporation. It has been decided that *trover* will lie against a corporation; *Yarborough v. The Bank of England* (16 East, 6), where Lord Ellenborough, C. J., in giving the judgment of the court, reviews all the authorities upon the subject. [Tindal, C. J. That case was after verdict. It was a motion in arrest of judgment; no leave appears to have been reserved.] But the broad doctrine is laid down that *trover* would lie; and there is no difference in principle between that action and trespass. The payment into court in this case admits that the action is rightly brought. An indictment will lie against a corporation, although all the ordinary consequences cannot follow. Various instances are collected in Kyd on *Corporations*, (vol i., pp. 223-225), where trespass has been brought against a corporation. Other authorities are mentioned in 1 Wms. Saund., 340, n. The principle that a corporation is liable in tort for the tortious act of its agent, done in its ordinary service, is further carried out in *Smith v. The Birmingham Gas Company* (1 A. & E. 526). [Tindal, C. J. The process is the same, both in case and in trespass, — namely, by attachment, distress, *capias*, and outlawry. If case will lie, it is difficult to see why trespass should not lie also.]

Talfourd, Serjt., was then called upon to support the rule, and admitted that he had nothing to rely upon but the old authorities: and that in *Regina v. The Birmingham and Gloucester Railway Company*, the court of Queen's Bench had, in this term, refused to quash an indictment against a corporation. The doctrine in Bro. Abr., however, is imported into Com. Dig. tit. *Franchises* (F. 19).

TINDAL, C. J.: —

The process in case and trespass being the same, it is impossible to see any distinction between the two actions.

PER CURIAM.

Rule discharged.

CHESTNUT HILL TURNPIKE COMPANY v. RUTTER.

(4 *Serg. & Rawle*, 6. 1818.)

THIS was an action of trespass on the case, in the Common Pleas of Montgomery County, for stopping a water-course.

The declaration stated, that the defendants below, the plaintiffs in error, were incorporated by an act of Assembly, passed on the 5th day of March, 1804, entitled, "An Act to enable the Governor of this Commonwealth, to incorporate a company to make an artificial road, from the top of Chestnut Hill, through Flourtown, to the Spring House Tavern, in Montgomery County;" that the plaintiff was seised of a messuage, tanyard, and tract of land, through which a rivulet from time immemorial, had flowed, etc.; and that the defendants contriving, and wrongfully, and injuriously intending to injure the said plaintiff, and to deprive him of the benefit of working and tanning leather, in the said tanyard, and of the profit that might accrue therefrom, did wrongfully and unjustly erect and set up certain jetties or piers, on each side of the said rivulet, by reason whereof the said rivulet was thrown back, and overflowed the said tanyard, and destroyed a great quantity of hides, etc.

By the 9th section of the act of incorporation, Pamph. L. 215, the company had power "to erect permanent bridges over all the waters crossing the said road."

The jury found a verdict in favor of the plaintiff, for 305 dollars.

The errors now assigned were, 1. That the Court below permitted an action to be maintained against a body corporate for a tort.

2. That the declaration, if such an action could be maintained, set forth no cause of action.

The opinion of the Court was delivered by

TILGHMAN, O. J.:—

This is an action on the case, brought by James Rutter against the Chestnut Hill & Spring House Turnpike Company, for an injury done to the plaintiff's land and tanyard, in consequence of certain piers erected by the defendants, on each side of a stream of water, by which the stream was obstructed and thrown back, and overflowed the plaintiff's land.

The defendants below, who are plaintiffs in error, rely on two objections. 1. That a corporation is not suable in this kind of action. 2. That the declaration does not state a good cause of action, even if the defendants were liable to an action in this form.

1. Corporations have lately been so multiplied in the United States, that they stand a very prominent part in the business of the country. It has, therefore, been necessary to consider, with great attention,

their nature, and their rights, both as to suing and being sued. And as it would be extremely inconvenient that they should do wrong without being amenable to justice, the inclination of the Court has been to hold them responsible. There was a time, when it seems to have been supposed, that they could make no contract but by writing under their common seal. The reason assigned was, that being incorporeal, and consequently incapable of speaking, it was impossible that they should enter into a parol contract. But upon reflection, this reason has been thought insufficient; for, if pursued to its full extent, it would prove that a corporation could not act at all. It has no hand to affix a seal, and must therefore employ an agent for the purpose. But this agent must receive his authority previous to his affixing the seal. It is necessary, therefore, that the corporation should have the power to act without seal, so far as respects the appointment of a person to affix the seal. Now, if it can appoint an agent without seal, for one purpose, there is no reason why it may not for another. Accordingly, in the case of *The King v. Biggs* (3 P. Wms. 419), on a special verdict in a case of capital felony, it was held, that the Bank of England might, without seal, authorize a person to sign notes in its behalf. And it was decided by the Supreme Court of the United States, in the case of *The Bank of Columbia v. Patterson's Administrators* (7 Cranch, 299), that a corporation may, without seal, enter into a contract, express, or even implied. In the words of Judge Story, by whom the opinion of the Court was delivered, "When a corporation is acting within the scope of the legitimate purpose of its institution, all parol contracts made by its authorized agents are express promises of the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for which an action lies." By this decision, I consider the law as settled. It does, indeed, seem to have been the opinion of this Court, in the case of *Breckbill v. The Lancaster Turnpike Company* (3 Dall. 496), that an action of assumpsit would not lie against a corporation. But the law had not been at that time fully considered, and I may say that our late brother Yeates, who was on the bench when *Breckbill v. The Lancaster Turnpike Company* was decided, was satisfied as to the propriety of acquiescing in the authority of *The Bank of Columbia v. Patterson's Administrators*.

But it is objected that the present action is not on contract but on tort, and a very refined argument is brought forward, to prove that a corporation cannot be guilty of a tort. A corporation, say the defendant's counsel, is a mere creature of law, and can act only as authorized by its charter. But the charter does not authorize it to do wrong, and therefore it can do no wrong. The argument is fallacious in its principles, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company may do great injury, by means of laborers who have no property to answer the damages recovered against them. It is much

more reasonable to say, that when a corporation is authorized by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible, in the same manner that an individual is responsible for the actions of his servants, touching his business. The act of the agent is the act of the principal. There is no solid ground for a distinction between contracts and torts. Indeed, with respect to torts, the opinion of the courts seem to have been more uniform than with respect to contracts. For it may be shown, that from the earliest times to the present, corporations have been held liable for torts. Many cases have been cited from the Year Books. Upon examination, they do not all answer the citations, but enough appears to show that the law was so understood. In 4 Hen. 7, p. 13, pl. 11, we find an action of trespass against the Mayor and Commonalty of York. Plea, that all the inhabitants had a right of common in the land where the trespass is supposed to have been committed: held, not good, because the action is against the corporation, and the plea is a justification as to individuals. In a subsequent part of this case, it is said that a corporation cannot give a warrant to commit a trespass without writing. This, if it be law, proves that a warrant may be given by writing, which is sufficient for the plaintiff's purpose, the point being, whether a corporation can commit a trespass. In 8 Hen. 6, p. 1, pl. 11, and p. 14, pl. 34, trespass was brought against the Mayor and Bailiffs, and Commonalty of Ipswich, and one J. Jabez. It was objected, that a corporation and an individual cannot be joined in one action; but it was not objected that trespass does not lie against a corporation; and the objection is said to have been overruled in 14 Hen. 8, 2. In the book of Assizes (31 Ass. pl. 19), it appears that an assize of novel disseisin was maintained against the Mayor and Commonalty of Winton. Brook lays it down, that if the mayor and commonalty disseise one who releases to several individuals of the corporation, this will not serve the mayor and commonalty, because the disseisin is in their corporate capacity. In the old books of entries are numerous precedents of writs of *quare impedit* against corporations, and in Vidian's Ent. 1, is a declaration in an action on the case (16 Car. 2) against the Mayor and Commonalty of the city of Canterbury, for a false return to a mandamus. To come to more modern times, it was held in the *Mayor of Lynn, &c. (in error) v. Turner* (Cowp. 86), that an action on the case lies against a corporation for not cleansing and keeping in repair a stream of navigable water, which it was bound to do by prescription, in consequence of which the plaintiff was injured. This was in the year 1774, a little before our Revolution. The laws of the Commonwealth forbid my tracing this point through the English courts, since the Revolution, but we shall find abundant authority in the courts of our own country. In *Gray v. The Portland Bank* (6 Mass. Rep. 364), it is laid down, that the bank was responsible for wrongs done by itself or its agents. In *Riddle v. The Proprietors of*

the Locks, &c. on Merrimack River (7 Mass. Rep. 169), an action was maintained against the company for damage suffered by the plaintiff in consequence of the locks not being kept in repair. And in *Townsend v. The Susquehanna Turnpike Company* (6 Johns, 91), an action was supported for the loss of a horse killed by the falling of a bridge, which the company had built of bad materials. These authorities put it beyond doubt that the form of action, in the present case, is good.

The objection to the declaration remains to be considered. It is said that the act of Assembly, by which this company is chartered, gives them power to erect bridges over all the streams which cross the road, and, therefore, they are not responsible for any damages which may be suffered in consequence of these bridges. But this is too broad a proposition; for, granting that they would not be responsible for damages unavoidably resulting from a bridge built in the best manner, and obstructing the passage of the water, no more than was necessary for its proper construction, it would not follow that they should not be answerable for damages arising from a bridge so carelessly or inartificially built, as to occasion an unnecessary and wanton obstruction. Now, the declaration alleges, that the defendants, contriving, and wrongfully and injuriously intending to injure the plaintiff, etc., did wrongfully and unjustly set up certain piers, etc. So that we are bound, after verdict, to suppose that it was proved the defendants were in fault, in the manner of erecting the piers. To say, now, that they were guilty of no wrong, would be to declare that it is impossible for them to be made answerable for any injury which may arise from any kind of bridge or piers. This is going farther than I can permit myself to do, being satisfied that the law never intended to authorize damage without necessity. Whether the company would be answerable for damages occasioned by a bridge or piers, of proper construction, is a point of great importance, on which I give no opinion, as it does not arise in this case. I am of opinion, on the whole, that the judgment should be affirmed.

Judgment affirmed.

RAILWAY COMPANY v. BROOM.

(6 Exch. 314. 1851.)

ERROR on a bill of exceptions. This was an action of trespass brought by William Broom against the Eastern Counties Railway Company and Benjamin Richardson.

The declaration stated that the defendant, to wit, on the 29th of February, 1848, with force and arms, etc., assaulted the plaintiff, and compelled him to go in custody from a certain railway station to a

certain police office, and there imprisoned him, etc., and compelled the plaintiff to go from thence to two other police offices, and there again imprisoned him, each of such several imprisonments being contrary to law and against the will of the plaintiff, etc.

The defendants below pleaded, first, not guilty; issue thereon; secondly, as to so much of the declaration as alleged the assault up to the time of taking the plaintiff to the second police office, that the plaintiff assaulted the defendant, Richardson, then being a servant of the company, and that he was consequently taken into custody by a constable who had view of the assault, at the instance of the defendants, and necessarily was detained to answer the charge before a magistrate. — Verification.

The third plea, to the same portion of the declaration, alleged, that the plaintiff, on, etc., was a passenger in a railway train which ran from Colchester to London; that, on arriving at the Stratford station, the defendant Richardson, then being a servant of the company duly authorized to collect the tickets of passengers, requested the plaintiff to produce and deliver up his ticket. That a by-law of the company provided, "that each passenger booking his place would be furnished with a ticket, which he was to show when required by the guard in charge of the train, and to deliver up before leaving the Company's premises, upon demand of the guard or other servant of the Company duly authorized to collect tickets; and that each passenger not producing or delivering up his ticket would be required to pay the fare from the place whence the train originally started." The plea then alleged that the plaintiff did not deliver up his ticket; that thereupon Richardson requested the plaintiff to pay the fare from the place from which the train had started, according to the by-law; that the plaintiff refused to do so; that Richardson then requested the plaintiff to quit the carriage; that the plaintiff refused, and thereupon, in order to remove the plaintiff from the carriage, Richardson used the necessary force only to do so; that, after the plaintiff had been removed from the carriage, but while on the premises of the company, he in revenge assaulted Richardson; and that thereupon he was given into custody. — Verification.

The fourth plea set out a by-law, which provided, that any person in a state of intoxication in the carriages or stations of the company, wilfully interfering with the comfort of the passengers, and every person obstructing the company's officers in the discharge of their duty, should be subjected to a penalty not exceeding 40s., and at the first opportunity be removed from the company's premises, and forfeit his fare. It then averred, that the plaintiff was intoxicated, and wilfully interfered with the comfort of the other passengers; that, on the plaintiff's refusing to quit the carriage, the defendant Richardson, as servant of the company, removed him. It is then alleged an assault by the defendant, and an arrest, as in the previous plea. — Verification.

The fifth plea, to the same causes of action as in the second plea, alleged as a justification, that the plaintiff wilfully impeded Richardson, an officer of the company, in the execution of his duty; and that Richardson detained him to answer for the offence. — Verification.

The sixth plea, to the same cause of action, justified the removal, on the ground that the plaintiff was making a disturbance and doing damage in one of the company's carriages. — Verification.

The plaintiff replied *de injuria* to the special pleas. — Issue thereon.

At the trial, before Pollock, C. B., at the Middlesex Sittings after Trinity Term, 1849, a bill of exceptions was tendered to the ruling of the Lord Chief Baron, which stated what occurred at the trial as follows: "And therefore, in order to maintain the said issues, the counsel for the said plaintiff gave the evidence following, — that is to say, the said counsel called and examined divers witnesses, who proved that the plaintiff was a passenger in a carriage of the defendants, the company as alleged in the pleas; and that the plaintiff was assaulted in the said carriage, and forcibly taken out of the same carriage, and imprisoned by the defendant Richardson, then an inspector in the service of the company, professing to act in so doing as the servant of the company, and under the assertion by the said defendant Richardson, of the cause of justification set forth in the defendants' several pleas of justification; but which several pleas, except the several by-laws therein mentioned, were disproved by the evidence, and were not sought to be maintained by the counsel learned in the law of the defendants. That the said imprisonment of the plaintiff, after taking him into custody at the railway station, for refusing to give up his ticket, consisted, amongst other things, of causing the plaintiff to be imprisoned at the police station at Stratford, upon a charge, made by the said defendant Richardson, professing to act in so doing as servant of the said defendants, the Company, of refusing to give up his ticket or pay his fare, and also of assaulting the said defendant Richardson in the execution of his duty as such inspector, at the said railway station. That subsequently, upon the hearing of the said charge, the said company, by Mr. Duncan, their attorney, appeared before the magistrate in support of the said charge; and the plaintiff also called witnesses to prove that the plaintiff was sober on the occasion mentioned in the evidence (of the said Peter Rogerson); and also to prove the damages sustained by the plaintiff by reason of the trespasses complained of, and gave no further evidence. And the counsel for the plaintiff, after the aforesaid evidence was given, closed the case of the plaintiff, and gave no further or other evidence. And the counsel for the said defendants then submitted to the Lord Chief Baron, that, upon the matters and facts so given in evidence as aforesaid, there was no evidence to go to the jury that the said defendants, the Eastern Counties Railway Company, were guilty of the trespasses in the

declaration alleged, or any of them; and that, notwithstanding the matters and facts so given in evidence as aforesaid, they were entitled to a verdict upon the first plea, so far as related to them, the Eastern Counties Railway Company. And the counsel for the plaintiff then insisted on the contrary thereof. And the Lord Chief Baron then ruled, and so directed the jury, that the matters and facts so given in evidence as aforesaid were sufficient evidence to go to them for their consideration, and whereon they might find that the defendants, the Eastern Counties Railway Company, were guilty of the trespasses in the declaration alleged; and then left it to the jury to say, upon the said evidence, whether the said Eastern Counties Railway Company were guilty of the said trespasses. And he directed the said jury, that there was some evidence for their consideration, upon the question whether the said defendants, the Eastern Counties Railway Company, had authorized the trespasses complained of; and in so directing the jury, told them, that if the said company had given general directions to their servants applicable to persons who were passengers on the railway, as the plaintiff was on the occasion in question, the acting by the defendant Richardson, as their servant, on such general directions, would be evidence for the consideration of the jury of such authority to commit the trespasses complained of; and that they were at liberty to take into consideration the fact, that the company, by their attorney, had appeared, as aforesaid, before the said magistrate to support the said charge, as some evidence that the company were guilty of the trespasses complained of. And the said Lord Chief Baron then and there further stated to the jury that the said company would be liable in one of two ways: if beforehand they gave instructions to their servants to remove from the carriages of the company anybody who disobeyed the by-laws, and commit him to the custody of the policeman. If they gave their directions generally, there was no doubt they would be liable. That they would also be liable, if, discovering that their servant, acting on their behalf, had given the plaintiff into custody, they adopted the act, and directed their attorney to follow that up and prosecute the charge; that the attorney, merely as attorney of the company, would have no such authority; that he thought there was some evidence that that which was done was either done by their authority, or was adopted by them after it was done; that he, therefore, left it to the jury for them to consider, whether the act that was done by those persons was done by the authority of the company. And the said counsel for the defendants, the Eastern Counties Railway Company, then requested the Lord Chief Baron to direct the jury, that the defendants, the Eastern Counties Railway Company, could not be made liable as trespassers by a subsequent ratification of an act of trespass of the said other defendant; but the said Lord Chief Baron then declined so to do, and stated that, in his judgment, there was some evidence for the jury to determine whether

the company were guilty or not. And the said Lord Chief Baron then left the case to the jury upon the evidence aforesaid, with the direction aforesaid; and the jury, upon that direction, found their verdict that the defendants, the Eastern Counties Railway Company, were guilty of the trespasses in the declaration alleged, and found the issues upon the first plea against the defendants, the Eastern Counties Railway Company, with £50 damages, as by the record thereof appears. And the counsel for the defendants, the said Eastern Counties Railway Company, at the trial, before the said verdict was given, made their exception to the said direction of the said Lord Chief Baron, and also their other exceptions to his declining to direct the jury as aforesaid."

PATTERSON, J. : —

I have conferred with my learned brothers upon this case, and we are all of opinion that there is no reason why we should defer our judgment. The first question arises on the declaration itself, and is quite independent of the particular circumstances of this case. It is alleged, on the part of the plaintiffs in error, as a general broad proposition of law, that in no case can an action of trespass for assault and battery lie against a corporation aggregate. Whatever may be the effect of the authorities in the Year Books, it has been expressly held, in modern times, that trespass will lie against a corporation aggregate for breaking and entering a close, and for seizing goods. This has been decided by several recent cases. Then the question is, whether trespass for assault and battery may lie against a corporation; and it has been contended that it cannot; for it is said, that it can neither beat nor be beaten. No doubt that proposition is true of it as respects its corporate capacity. But it does not therefore follow, that if a corporation, by authority under seal, direct a servant to apprehend and imprison a particular person, an action for assault and battery cannot be maintained against the corporation. The learned counsel who appears for the plaintiffs in error must contend, in order to show that this declaration cannot be supported, that no such action would lie. But we are all clearly of opinion that it is not so, and that an action of trespass for assault and battery will lie against a corporation, whenever the corporation can authorize the act done, and it is done by their authority. We are therefore of opinion that the declaration is good; and we do not think it necessary to go through the several authorities upon this question. The next question is, whether, in order to render the corporation liable for the act of their servant, it was necessary that that servant should have an authority by deed. It has been decided, many years ago, that a corporation may be liable in tort for the acts of their servants, although their authority be not under seal. It is not necessary, therefore, further to advert to this point. It has been urged that there is no exception taken on the ground of want of evidence of previous authority or of ratification. It is true that the bill of

exceptions is very inartificially drawn, and that the intended exceptions might have been pointed out in a much more specific form; but, taking it altogether, the meaning of the bill of exceptions seems to be, that there was no evidence for the jury; and we think that the objection is sufficiently pointed to enable us to go into that question. Is there any evidence to go to the jury? The evidence is, that there were certain by-laws; but it was not shown whether there had been any directions given to Richardson or to the servants of the company in general to enforce the by-laws. Looking to all the facts stated, we think that there was no evidence of any previous authority given by the company. Then comes the question, was there any ratification? All the facts that are set forth show, that after Richardson had taken the plaintiff out of the carriage, he took him into custody on the several charges of not producing his ticket, of not paying his fare, and of annoying the company by being intoxicated. Before the magistrate, the charges were, that the plaintiff did not produce his ticket, did not pay his fare, and that he had assaulted Richardson. The charge of intoxication was not investigated, but that is not material. The only act of ratification contended for was this, that the attorney of the company attended before the magistrate in support of the charge against the plaintiff; but it must be remembered, that this was a charge against the plaintiff, not by the plaintiff against the company, and that the charge was for having refused to produce his ticket or pay his fare, and for having assaulted Richardson. Not a word is said to show that the fact that Richardson had apprehended the plaintiff, and that the plaintiff had been taken into custody on those charges, was known either to the company or to their attorney. We think, therefore, that there was no evidence of ratification by the company of the act of Richardson. With respect to the point, whether the company could ratify the act, if the act can be said to have been done for the use or benefit of the company, there can be no doubt that they could ratify it. The assault and imprisonment of a party liable to the company for not having paid his fare, was an act of a servant of the company, which manifestly might have been for the benefit of the company. Therefore, we are clearly of opinion that there might have been a ratification of that act. The law is well laid down in distinct terms in the passage from the 4 Inst. 317, "He that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment." The question of liability by ratification depends upon this, whether the act was originally intended to be done to the use or for the benefit of the party who is afterwards said to have ratified it. We are with the plaintiff in this case, that the action might lie, and the act, though not done with the knowledge of the company in the first instance, might have been ratified by them; but we are

of opinion that there was no evidence of any such ratification, and that the direction of the Lord Chief Baron was wrong in this respect. The result therefore is, that there must be a *venire de novo*.

Venire de novo.

GREEN v. OMNIBUS COMPANY.

(7 Com. Bench, N. S. 290. 1859.)

THIS was an action against the defendants for wrongfully and maliciously obstructing the plaintiff in his business of an omnibus proprietor.

The declaration stated, that, before and at the time of the committing the grievances thereafter mentioned, the plaintiff carried on the trade and business of a carrier of passengers for hire in certain public streets, roads, and highways, to wit, etc., by means of certain omnibuses of the plaintiff drawn by horses and driven and conducted by the servants of the plaintiff, for the profit and benefit of the plaintiff, and which said omnibuses of the plaintiff had full liberty and right to run respectively from etc., to etc., and to stop for a reasonable time at all points and places on and along the said public streets, roads, and highways, for the purpose of taking up and putting down passengers, and at certain points and places in the said streets, roads, and highways, where numerous passengers were accustomed to enter the omnibuses passing such points and places, the said omnibuses of the plaintiff and all other omnibuses passing that way were, by the police regulations then lawfully enforceable and enforced, permitted to wait for a certain space of time, to wit, for the space of four minutes, to look for passengers, unless by their so doing any actual obstruction to the thoroughfares or nuisance to the inhabitants near the places was caused thereby. Yet the defendants, well knowing the premises, but contriving and intending to injure, impoverish, and ruin the plaintiff, and to prevent him from carrying on his said business, at divers times before this suit, wrongfully, vexatiously, and maliciously placed and drove in the public streets, roads, and highways aforesaid, certain other omnibuses and carriages just before and just behind the said omnibuses of the plaintiff, whilst the same, with the plaintiff's horses drawing the same, were plying for passengers for hire in the public streets, roads, and highways, as aforesaid, and with which the plaintiff was then carrying on his said business, in such a manner as to hinder and prevent, frighten, and deter great numbers of persons from entering the plaintiff's said omnibuses and becoming passengers therein for hire, as they otherwise might and would have done, and so as to hinder and prevent the plaintiff from having the free use of the said streets, roads, and highways with his said omnibuses and horses in so large and ample a manner as he otherwise

might and would have done, and so as to retard, delay, and stop the said omnibuses of the plaintiff, and so as greatly to obstruct and encumber the said highways, to the nuisance of the Queen's subjects then lawfully using the same. And further the plaintiff said that the defendants wrongfully, vexatiously, and maliciously drove and placed in the public streets, roads, and highways aforesaid, certain other carriages and omnibuses upon and against the said omnibuses and horses of the plaintiff, and upon and against the servants of the plaintiff then conducting the same, while the said omnibuses, with the plaintiff's horses harnessed to the same, and the plaintiff's said servants conducting the same, were plying and waiting for passengers for hire in the public streets, roads, and highways aforesaid, and with which the plaintiff was then carrying on his said business as aforesaid, in such a manner as thereby to bruise, damage, and injure the said omnibuses and horses of the plaintiff, and to prevent the doors of the said omnibuses from being opened, and to obstruct and block up the access of passengers into the said omnibuses of the plaintiff, and to hinder and disable the said servants of the plaintiff from freely and fully performing their duties to the plaintiff in the conduct and management of the said omnibuses of the plaintiff, and whereby they were so hindered and disabled as aforesaid accordingly. And the plaintiff further said that the defendants also, contriving and intending as aforesaid, at the several times aforesaid, also wrongfully, vexatiously, and maliciously, in the said public streets, roads, and highways, thrust and pushed themselves, and caused their servants to and they did thrust, push, and place themselves between the said omnibuses of the plaintiff while plying and waiting for passengers as aforesaid, in the way of the plaintiff's said business, and divers persons who were desirous to enter and get into and on to the same as passengers for hire, so as thereby to obstruct the entrance and access of such passengers into and upon the said omnibuses of the plaintiff, and to hinder, deter, and prevent them from entering the same or becoming passengers therein. And further, in continuation of this count, the plaintiff said that the defendants also, contriving and intending as aforesaid, at the several times aforesaid, wrongfully, vexatiously, and maliciously insulted, hissed, and assaulted, beat and ill-used the plaintiff's servants in the said public streets, roads, and highways, while they were employed in driving, conducting, and managing the said omnibuses in the way of the plaintiff's said business, and were plying and waiting for passengers therewith in the said public streets, roads, and highways. And in continuation of that count the plaintiff further said that the defendants, well knowing the points and places in the said respective roads at which the plaintiff's omnibuses, by the said police regulation in the introductory part of that count mentioned, were permitted to remain for a certain space of time, to wit, for the space of four minutes as aforesaid, wrongfully, maliciously, and vexatiously, and for the ex-

press purpose of annoying the plaintiff, and causing such an obstruction of the thoroughfares at the said points and places in the said public streets and roads as aforesaid as would induce and oblige the police there stationed to order off the omnibuses of the plaintiff from the said points and places before the said omnibuses had remained at the said points and places for the said space of time which by the police regulations aforesaid they were permitted to remain, and thereby prevent passengers who, if the plaintiff's omnibuses had so remained, would have come and entered into and mounted upon the plaintiff's said omnibuses, from so doing, caused one or more of their, the defendant's omnibuses, drawn by their horses, and driven and conducted by their drivers and conductors, to precede and follow each omnibus of the plaintiff as such omnibus approached near to and arrived at each or any of the said points and places in the said public streets, roads, and highways, in such a manner as to cause such an obstruction to the thoroughfares at such points and places, and such a nuisance to the inhabitants near the said points and places, as would induce and oblige, and which did induce and oblige, the police there stationed to order and command that the plaintiff's omnibuses should move off from the said points and places in the said public streets, roads, and highways before they had remained there for that space of time which but for the defendants' wrongful contrivance and conduct they otherwise might and would have done, and thereby they the defendants prevented numerous passengers from entering and riding upon the plaintiff's said omnibuses for hire, as they otherwise might and would have done; by reason of which said several grievances in that count respectively mentioned, great numbers of persons were on the several days and times aforesaid hindered, deterred, and prevented from becoming passengers for hire by the plaintiff's said omnibuses, as they otherwise would have done, and the plaintiff's omnibuses and horses were greatly injured, etc., and the plaintiff was greatly damaged, hindered, and obstructed in carrying on his said business, etc.

To this declaration the defendants demurred; and the plaintiff joined in demurrer.

ERLE, C. J., now delivered the judgment of the court:—

We are of opinion that our judgment in this case ought to be for the plaintiff. This is an action against the defendants for wrongfully, vexatiously, and maliciously interfering with the plaintiff's rights, by causing their vehicles to be driven in such a manner as to obstruct and molest the plaintiff in the use of the highway. The declaration alleges various grievances of that general character. To this declaration there is a demurrer raising for our decision the question whether the action will lie. The ground of the demurrer is that the declaration charges a wilful and intentional wrong, and that the defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie. But the whole of the acts that

are charged against the defendants are acts connected with driving vehicles; and, the defendants are a company incorporated for the purpose of driving omnibuses, and therefore, the acts alleged to have been done by them are all acts which are within the scope and object of their formation. Unless the acts charged were wrongfully done, the plaintiff of course would have no ground of complaint. We are clearly of opinion that the action lies; and there are abundant authorities to warrant that opinion. The whole course of the authorities, from the case of *Yarborough v. The Bank of England* (16 East, 6), down to *Whitfield v. The South Eastern Railway Company* (1 Ellis, Bl. & E. 115) E. C. L. R. vol. 96, — which was in reality an action against the Electric Telegraph Company, shows that an action for wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual. The doctrine relied on by Mr. Giffard, — that a corporation, having no soul, cannot be actuated by a malicious intention, — is more quaint than substantial. In coming to the conclusion we arrive at, we have no intention in the smallest degree to interfere with any of the decided cases; but, on the contrary, we found our judgment upon the numerous class of cases of which *Yarborough v. The Bank of England* — where there is a most learned and elaborate argument of Lord Ellenborough, going fully into all the previous authorities — is by no means the first, and which afford abundant examples of the application of the principle we now rely on. We may add that we dwell the less upon the grounds which have been urged by Mr. Giffard against the maintenance of the action, by reason of the extreme mischief and inconvenience which would follow from our holding that these companies, incorporated for the purpose of carrying on trade, were exempt from liability for intentional acts of wrong. We think it extremely important that these companies should be held responsible where they admit they have intentionally done a wrongful act, and that those whom they have injured should not be driven to seek a doubtful remedy against their officers or servants, who may be wholly unable to answer the compensation which the jury may award to the injured party. For these reasons, we are of opinion that the plaintiff is entitled to judgment. *Judgment for the plaintiff.*

GOODSPEED *v.* BANK.

(22 Conn. 530. 1853.)

THIS was an action on the case, for a vexatious suit, brought against the East Haddam bank, described in the plaintiff's declaration, as a "corporation, established by the laws of the State of

Connecticut, with power to sue and be sued." The declaration alleged that the defendants, on the 24th day of January, 1849, without probable cause, and with a malicious intent unjustly to vex, harass, embarrass, and to trouble the plaintiff, caused to be issued against him a writ of attachment, in due form of law, directed to the sheriff of Middlesex County, his deputy, or either constable of the town of East Haddam, in said county, commanding them to attach, to the value of five thousand dollars, the goods or estate of the present plaintiff, and for want thereof, to attach his body; alleging in their declaration, in said suit, that the plaintiff had made certain false, deceitful, and fraudulent representations, with the intention of defrauding, and whereby the plaintiffs in said suit had been defrauded, to their damage, to the amount of five thousand dollars. It then recited the writ and declaration, which were founded on certain alleged fraudulent representations, made for the purpose of procuring the discount of certain notes by said bank, the makers and indorsers of which were insolvent at the time of such discount, and so known to be by the plaintiff; and proceeded to allege, that, before the superior court for the county of Middlesex, on the fourth Tuesday of February, 1850, said bank still prosecuting said suit, with the same intent as before averred, the defendant therein, upon a full trial of said cause, upon the general issue, by a verdict of the jury and the judgment of said court, was found not guilty, and wholly acquitted of the charges and pretended causes of action in said suit, and recovered a judgment therein for his costs. The declaration contained an allegation of the want of probable cause, and concluded with the usual averment of damage to the plaintiff.

The cause came on for trial before the jury, at Haddam, at the August term, 1852.

The plaintiff, to prove the allegations in his declaration, introduced in evidence the record of the court in the cause referred to in his declaration, showing the institution and prosecution of said suit, by the defendants, and the final determination thereof in favor of the present plaintiff; and to show that said suit was instituted and prosecuted by said bank, without probable cause, and maliciously, to the injury of the plaintiff, several witnesses were introduced, and also the record of the court in the cause referred to in the plaintiff's declaration. After the plaintiff had produced all his evidence, and rested his case, the defendants moved for judgment, as in case of nonsuit, and the court being of opinion that the plaintiff had failed to make out a *prima facie* case, granted the motion of the defendants, and ordered a judgment, as in case of nonsuit, to be entered in said cause.

The plaintiff moved to set aside such nonsuit; which the court refused to grant. Whereupon, the plaintiff, by motion in error, brought the case before this court.

CHURCH, C. J.:—

This action is based upon the provisions of our statute, entitled, "An act to prevent vexatious suits," and is subject to the same general principles as are actions on the case for malicious prosecutions, at common law.

The plaintiff alleges, that the defendants, the East Haddam Bank, a body politic and corporate, without probable cause, and with a malicious intent unjustly to vex, harass, embarrass, and trouble the plaintiff, commenced by a writ of attachment, and prosecuted against him, a certain vexatious suit or action for fraudulent representations, to the injury of said bank, and which action resulted in a verdict and judgment against the bank, and in favor of the present plaintiff.

On the trial of this cause, by the Superior Court, the defendants moved for a nonsuit, on the ground that the plaintiff by his evidence had failed to make out a *prima facie* case; which motion the court granted, and judgment of nonsuit was entered against the plaintiff, which he now moves to set aside.

The judgment of the Superior Court, in granting the nonsuit, as we understand, was founded solely upon the ground that a corporation aggregate was not, by law, liable for such a cause of action as was set up by the plaintiff, in his declaration, — at least, no other ground of nonsuit or objection to the plaintiff's action had been argued before us. And, therefore, irrespective of the evidence detailed in the motion, we confine ourselves to what we suppose to be the sole question in the case.

We assume that the plaintiff has sustained the damage he claims, by reason of the prosecution of the vexatious suit, and the question is, has he a legal remedy against the bank?

The claim of the defendants is, that the remedy for this injury is to be sought against the directors of the bank, or the individuals, whoever they might have been, by whose agency the vexatious suit was prosecuted, and not against the corporation. We think, that, to turn the plaintiff round to pursue the proposed remedy, would be trifling with him and with his just rights, and would be equivalent to declaring him remediless; and, in this case, at least, that there was a wrong where there is no remedy. It is notorious that, ordinarily, the action of bank directors is private, — that their records do not disclose the names of the individuals supporting or opposing any resolution or vote, and if they do, that the offending persons may be irresponsible and insolvent. The language of Tilghman, C. J., in a case very similar to the present, in which it was urged that a corporation was not liable for a suit, but only the individuals committing it, is applicable here "This doctrine," he said, "was fallacious in principle, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company might do great injury, by means of laborers having no

property to answer damages," &c. (4 Serg. & Rawle, 16). To the same effect is the language of Shaw, C. J., in the case of *Thayer v. Boston* (19 Pick. 511). He says, "The court are of opinion, that this argument, if pressed to all its consequences, and made the foundation of an inflexible practical rule, would often lead to very unjust results."

Still more explicit is the opinion of the court, in the case of *The Life and Fire Insurance Company v. Mechanics' Fire Insurance Company* (7 Wend. 31). There, as here, it was contended, that the act was unauthorized, and must therefore be considered as the act of the officers of the company, and not of the company itself. And the court says, "This would be a most convenient distinction for corporations to establish: that every violation of their charter or assumption of unauthorized power, on the part of their officers, although with the full knowledge and approbation of the directors, is to be considered the individual act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established."

The real nature, as well as the law, of corporations, within the last half century, has been in a progress of development, so that it has grown up, from a few rules and maxims, into a code. In the days of Blackstone, the whole subject of corporations, and the laws affecting them, were discussed within the compass of a few pages; now, volumes are required for this purpose. These institutions have so multiplied and extended within a few years, that they are connected with, and in a great degree influence, all the business transactions of this country, and give tone and character, to some extent, to society itself. We do not complain of this; but we say, that, as new relations from this cause are formed, and new interests created, legal principles of a practical rather than of a technical or theoretical character, must be applied.

And so, in the course of this progress, it has been. It was said by Lord Coke, "that corporations had neither souls nor bodies;" and by somebody else, "that they had no moral sense;" and from thence, or for some other equally insufficient reason, it was inferred, and so repeatedly adjudged, that they could not be subjected in actions of trover, trespass, or disseisin, and indeed, that they could not commit wrongs, nor be liable for torts, with a few exceptions, as we shall see.

Had Lord Coke lived in this age and country, he would have seen, that corporations, instead of being the soulless and unconscious beings he supposed, are the great motive powers of society, governing and regulating its chief business affairs; that they act, not only upon pecuniary concerns, but, as having conscience and motives, to an almost unlimited extent. they are entrusted with

the benevolent and religious agencies of the day, and are constituted trustees and managers of large funds promotive of such objects.

The views of the old lawyers regarding the real nature, power, and responsibilities of corporations, to a great extent are exploded in modern times, and it is believed, that now these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically, and consistently with their respective charters. And no good reason is discovered why this should not be so; nor why it cannot be done, in a case like this, without violating any sensible or useful principle.

And although it was truly said, and for obvious reasons, that corporations could not be punished corporally, as traitors or felons, yet they may be, and have often been, subjected to fines and forfeitures, for malfeasance, and even to the loss of corporate life, by the revocation of their charters. And now it seems to be generally admitted, that they are civilly responsible, in their corporate capacities, for all torts which work injury to others, whether acts of omission or commission; for negligence merely, and for direct violence. *Yarborough v. Bank of Eng.* (16 East, 6); *Beach v. Fulton Bank* (7 Cowen, 486); *Foster v. Essex Bank* (17 Mass. 503); *Riddle v. Proprietors of Locks and Canals* (7 id. 187); *Chestnut Hill Turnpike v. Rutter* (4 Serg. & Rawle, 16); 4 Hammond, 500, 514; 10 Ohio Rep. 159; *Dater v. Troy Turnpike Co.* (2 Hill, 630); (23 Pick. 139), 2 Bl. Com. 476; Ang. & Ames, 392; 2 Kent Com. 290; 1 Sw. Dig. 75; 15 Ohio Rep. 476; 18 id. 229. And indeed, no actions are now more frequent, in our courts, than such as are brought against corporations, for torts, either in case or trespass. *Hooker v. New Haven & Northampton Canal Co.* (14 Conn. 146), and the cases there cited, and many others since reported. In a late case in England, it has been adjudged, adversely to former opinions, that an action of assault and battery may be sustained against a corporation. *Eastern Counties Railway Co. v. Broom* (2 Eng. Law & Equity, 406). And it was decided long ago, that a corporation was liable to an action for a false return to a writ of mandamus, alleged to have been made falsely and maliciously. 16 East, 8; 14 Eng. Com. Law, 159; 3 Mees. & Wels. 244; Ang. & Ames, ch. 10, sec. 9.

In all the cases, wherein it has been holden that corporations may be subjected to civil liabilities for torts, the acts charged as such have been the acts of their constituted authorities. — either the directors, or agents, or servants, employed by them. We do not intend here to discuss or decide the frequently suggested question, how far, or when a principal, whether an individual person or a corporation, becomes responsible for the wilful or malicious act of his servant or agent, as distinguished from his mere negligence, although it has been brought into the argument of this case, because we do not

admit that the present case falls within the operation of the rule of law on this subject, even as the defendants claim it.

The truth is, the action complained of as vexatious was instituted by the bank, in the name of the bank, and, as should be presumed, in just the same way and by the same agencies and means, as all other suits by these institutions are commenced and prosecuted, and nothing appears here, showing any different procedure than is usual, in actions by corporations. The action was brought for the sole benefit of the bank, for the recovery of money to which the bank was entitled, if anybody, and for an injury sustained by the bank in its corporate capacity. The bank, by its charter and the general laws, had power to sue for such a cause of action; and what seems to us yet more conclusive, is, that if this suit was originated by the misconduct of directors, or any officer of the company, it has never been repudiated, and may, by the acquiescence of the bank, be considered as sanctioned by it. Ang. & Ames, ch. 10, sec. 9. No act of agency appears here, which does not appear in all suits brought by corporations, and nothing to show that any individuals are, or ought to be, made responsible for the institution and prosecution of the groundless suit, as distinct from the corporation itself.

The doctrine, that principals are not responsible for the wilful misconduct of their agents, as seems to have been sanctioned in the cases of *McManus v. Cricket* (1 East, 106), *Wright v. Wilcox* (19 Wend. 343), *Vanderbilt v. Richmond Turnpike Co.* (2 Comstock, 470); but denied by Chief Justice Reeve in his *Domestic Relations*, 357, we think, has never been applied to such a case as this, but only to the acts of agents or servants, properly so called; or such as act under instructions and a delegated authority, — persons whose duty it is to obey, not to control; as attorneys, cashiers, or others employed by the corporation. The president and directors of a bank, instead of being mere servants, are really the controlling power of the corporation, — the representatives, standing and acting in the place of the interested parties. Indeed, they are the mind and soul of the body politic and corporate, and constitute its thinking and acting capacity. In the case of *Burrell v. The Nahant Bank* (2 Met. 163), Shaw C. J., expresses and defines the true rule of appreciating the character and powers of bank directors. He says, "We think the exception takes much too limited and strict a view of the powers of bank directors. A board of directors is a body recognized by law. By the laws of these corporations, and by the usage, so general and uniform as to be regarded as a part of the law of the land, they have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, the corporation. We think they do not exercise a delegated authority in the sense to which the rule applies to agents and attorneys," &c. The same principle is very distinctly recognized, in the cases of *Bank Commissioners v. Bank of Buffalo* (6 Paige's Ch. 502), and

Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co. (7 Wend. 31). It has been said, that the stockholders constitute the corporation. It may be so, to the extent to which they have the power to act, — and this is only in the choice of directors, and no more. Beyond this, they can only be considered as the persons for whose ultimate individual interests the corporation acts. The directors derive all their power and authority from the charter and laws, and none from the stockholders.

But the fear is expressed, that, by thus considering and treating the character and acts of the directors of a bank or other corporation, the stockholders are subject to loss, without fault of their own. This may to some extent be true; but the protection of the law in this matter is not to be confined to stockholders; the public and strangers have rights also. The stockholders are volunteers, and they have consented to assume the risk of the faithful or unfaithful management of the corporation. If, in this case, one of two innocent persons or classes is to suffer, which should it be, — that one which is brought in to suffer loss, without its consent or power to prevent it, or the one which has created the power and selected the persons to enforce it?

But, after all, the objection to the remedy of this plaintiff against the bank, in its corporate capacity, is not so much, that, as a corporation, it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort which essentially consists in motive and intention. The claim is, that, as a corporation is ideal only, it cannot act from malice, and therefore, cannot commence and prosecute a malicious or vexatious suit. This syllogism, or reasoning, might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one, — they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned by the bank, in the usual modes of its action; and still to claim, that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application.

It is asked, how can the malice of a corporation be proved? It must be proved, it is said, as well as alleged, in an action for a malicious prosecution, as a distinct and essential fact; and the declarations and admissions of individual members, whether directors or others, are not admissible to prove it. True, malice must be proved, and, as

we suppose, very much in the same manner as it is proved in other cases of a similar nature, against individual persons. The want of probable cause of action is proof of malice, and for aught we know, also, the records of the bank may show it. It is enough to say, in this, as in all other cases, that if the plaintiff cannot, in some legitimate way, prove the malice he has alleged, he cannot recover; but we have no right to assume it as a legal principle, that it cannot be proved. We do not know that it has ever been adjudged that a corporation is civilly responsible for a libel. But, among the great variety and objects of these institutions, it is probable that the newspaper press has come in for its share of the privileges supposed to be enjoyed under corporate powers. Proof of the falsehood of slanderous charges is evidence of malice, and which must, as in this case, be proved; but, would it be endured that an association, incorporated for the purpose suggested, could, with impunity, assail the character and break down the peace and happiness of the good and virtuous, and the law afford no remedy, except by a resort to insolvent and irresponsible type-setters, and for no better reason than that a corporation is only an ideal something, of which malice or intention cannot be predicated? And, if, as we have suggested, the directors are, for all practical purposes, the corporation itself, acting at least as its representatives, we can see no greater difficulty in proving their motives good or bad, than in thus proving the motives of other associated or conspiring bodies. We are sure, that this objection of the defendants was not discovered, or was not regarded as sufficient, nor the difficulty of proving malice upon a corporation felt, when the case of *Merills v. The Tariff Manufacturing Co.* (10 Conn. R. 384), was tried at the circuit, and discussed and decided by this court. That was an action against a corporation for a malicious injury, and the sole question in this court was, whether, by reason of the malicious intent, the company was liable for aggravated or vindictive damages; and it was holden to be thus liable, in a very elaborate opinion, drawn up, and strongly expressed, by Huntington, J.

The interests of the community, and the policy of the law demand that corporations should be divested of every feature of a fictitious character which shall exempt them from the ordinary liabilities of natural persons, for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others, and they are entitled to an equal protection, for all their rights and privileges, and no more.

For the reasons suggested, a majority of the court is of opinion, that the nonsuit granted by the Superior Court should be set aside, and a new trial granted.

In this opinion, WAITE, J., concurred.

ELLSWORTH, J.:—

I do not feel quite satisfied that the plaintiff can recover against

the defendants, for a malicious suit brought, in fact, by the directors of the bank. Certainly, no such action has been found in the books, though I admit there are analogous cases which show that courts have gone very far in subjecting corporations for wrongs, by their agents, but I think there are none going to the extent now claimed.

An indispensable requisite in an action for a malicious suit, is malice, — malice in fact, — a wicked criminal purpose. An unsuccessful suit is not sufficient. It must have originated in malice; and this idea of actual, as contradistinguished from legal malice is in my judgment deserving of the highest consideration. It gives character to the action. The language of Greenleaf (2 Greenl. Ev. 367) is, "To sustain this averment (malice), the charge must be shown to have been wilfully false." Now I ask, in view of this essential requisite, if any such malicious intent can be said to belong to a body of stockholders (the corporation), whose affairs are conducted by their agents, under the provisions of the charter of the company, and who, themselves, are in no way or manner really implicated in the supposed malicious intent? Again I ask, whose malice is the ground of the action? not the malice of the president and cashier, — not that of the directors; this is not even admissible in proof against the company. Whose malice then? Certainly not that of the ideal corporation; for this is a mere fictitious entity, and cannot entertain malice. It must never be forgotten, that malice, as already said, is the very ground and gist of the action, and no case has been read to us, of a recovery against a corporation, where there was not a perfect cause of action, independent of any malicious intention. Doubtless the directors may be guilty of malice, and of a malicious injury; but to proceed further, and subject stockholders, for their malice, is quite another question.

It is likewise to be kept in mind, that this action does not belong to that class of actions against corporations or other principals for injuries sustained, through a false confidence reposed by strangers in the supposed authority of agents. This action is for an original unauthorized wrong of the directors, and is in no way the result of any false confidence. It is a mere malicious contest between the directors themselves. The stockholders may well say: We cannot be involved in this malicious contest. We entertain no malice against Mr. Goodspeed, and no one can entertain it for us.

I think it has been incorrectly assumed, by counsel, that the malicious suit was brought by the East Haddam Bank. It was, in fact, brought by the major vote of the directors. They made use of the company name for their own malicious purpose, while they were only intrusted with the powers delegated, for a lawful and laudable purpose. The company do not at all admit that they are represented in this instance, — no more than they would, had the directors voted that the cashier should inflict personal chastisement upon Mr. Goodspeed, wherever he could find him.

But if this objection is unsound and capable of being surmounted, there is still another, by no means to be overlooked. The act of the defendants is conceded to be wilful and designed; indeed, this is the very ground of the action — a malicious wrong. But no principle of law is better settled, than that the principal is not liable for the intentional torts of the agent. For his negligence he is liable, but nothing more. To go beyond this, and make him liable for criminal conduct, though in a civil form, would jeopardize the safety of all employers, whether corporations or others, or would prevent the employment of all agents, because of the great responsibility. It may be politic to hold principals to greater carefulness on the part of their agents, or servants, but this is all that has hitherto been found expedient or necessary. If now this admitted rule of law, as a general rule, is to be applied to this case, it puts an end to the controversy at once; for a more palpable or wilful wrong, or tortious act, cannot be imagined, than the officers of a bank maliciously and without cause using the corporate name to oppress and destroy a fellow-director. Of course, I do not say this is so in this instance; but the plaintiff makes this assumption, in order to recover on this declaration. That the above principle of law is applicable to corporations, as well as to other principals who employ agents, is most learnedly argued, and fully decided in the court of appeals of the State of New York: *Vanderbilt v. The Richmond Turnpike Co.* (2 Com. 481), which was the case of an intentional collision of steamboats in the harbor of New York.

Suppose, in the late catastrophe at Norwalk, the engineer had designedly run the train into the creek, to sink a steamboat passing underneath; would the company have been liable to the owners of the steamboat? True, they would have been liable to the passengers in the cars, because they undertook to carry them safely to the end of the route; but there is no such undertaking as to strangers. Suppose the engineer had intentionally run over a man on the road, to break his bones; would the company be liable? Suppose the president and directors had themselves conducted the engine with the same intention, and had done the same injury, would the company be liable? Is a town liable for a malicious suit by its selectmen? Or a savings bank, for the malicious conduct of its trustees? I answer, in all these cases, no. It is asked, will you not hold corporations to the same rule of justice and law, as you do all others? I answer, yes, where the cases are parallel. Now, this interrogatory assumes two things, which are not entirely clear or conceded, viz., that you can pass by the only actual malice in the case, and assume malice in the stockholders, or corporation, who are avowedly ignorant and innocent; and further, that the principal is liable for the wilful wrongs perpetrated by his agent. Now, I go for the same rule to all, and therefore, I hold, that those who in fact do the wrong must answer for it. If a different view of the case is taken,

and corporations are held liable for the malicious acts of the directors, and other inferior agents, I insist, that a different rule is made to apply to them from others, and that the property of stockholders, vested under the exact limits and provisions of the charter, will be subjected to very great and alarming hazards.

These are, briefly, my views, expressed with no little distrust, since some of my brethren feel well satisfied the plaintiff is entitled to recover.

In this opinion, HINMAN, J., concurred. STORRS, J., having tried the cause in the court below, was disqualified.

Nonsuit set aside, and new trial to be granted.

RAILROAD COMPANY v. QUIGLEY.

(21 How. (U S.) 202. 1858.)

MR. JUSTICE CAMPBELL delivered the opinion of the court:—

The plaintiff (Quigley), a citizen of Delaware, complained of the defendants, “a body corporate in the State of Maryland, by a law of the General Assembly of Maryland,” for the publication of a libel by them, in which his capacity and skill as a mechanic and builder of depots, bridges, station-houses, and other structures for railroad companies, had been falsely and maliciously disparaged and undervalued. The defendants pleaded the general issue. On the trial of the cause, it appeared that in 1854, the president and directors, then in charge of the affairs of the defendants, instituted an inquiry into the administration and management of a person who had been the superintendent of their railroad for ten years. Among other subjects, the nature of his connection and dealings with the plaintiff, who had likewise been in the service of the corporation as “general foreman of all their carpenters,” engaged the attention of the committee of investigation. The president of the company, who conducted the inquiry before this committee on behalf of the corporation, seems to have been convinced that the superintendent had exhibited partiality for the plaintiff, and had allowed him extravagant compensation for service, and the privilege of free transit over the road for himself, his workmen, and freight, to the detriment of the company, and in breach of his duty as superintendent. The superintendent defended himself against these and other imputations, and produced testimony to the skill and fidelity of the plaintiff while in the service of the company; also, to the value of his services, and to the effect that no unusual or improper favor had been extended to him.

The president of the company, in the course of the investigation, addressed a letter to an architect, who had some acquaintance with the plaintiff, to request his opinion of his skill as a mechanic, and

whether the services of the plaintiff could have had any peculiar value to a railroad company. The reply of this architect was very pointed and depreciative of the plaintiff, affirming that "he was not entitled to rank as a third-rate workman," and "was unable to make the simplest geometrical calculations." All the testimony collected by the committee, as produced by the superintendent, was carefully reduced to writing, and printed; first, for the use of the president and directors, and afterwards was submitted to the company at their meeting on the 8th of January, 1855, with a report, which exonerated in a great measure the superintendent from any malpractice in consequence of his relations with the plaintiff. The investigation was searching, and testimony, which, with the report of the committee, fills two printed volumes, was submitted to the company. The letter of the architect, in answer to the letter of the president, is printed in one of these volumes, and this publication is the libel complained of. Several of the directors testify they were not aware of the publication, and evidence was adduced that the plaintiff had declared that the investigation had resulted in increasing his business. A verdict was returned in favor of the plaintiff. The defendants are a company incorporated by the Legislatures of Delaware and Pennsylvania, as well as of Maryland, to construct a railroad to connect the three cities which contribute to form its name, and a portion of their directors and stockholders are citizens of Delaware.

The defendants contend that they are not liable to be sued in this action; theirs is a railroad corporation, with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that, being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; that this action should have been instituted against the natural persons who were concerned in the publication of the libel. To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and therefore that no crime or offence can be imputed to it. That although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by the direction of their dominant body, — that such acts, not being contemplated by the charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents; and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation, for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence of the States of the Union relative to these artificial persons. Legislation has encouraged their organization, as they concentrate and employ the intelligence, energy, and capital of society, for the development of enterprises of

public utility. There is scarcely an object of general interest for which some association has not been formed, and there are institutions whose members are found in every part of the Union, who contribute their efforts to the common object. To enable impersonal beings — mere legal entities, which exist only in contemplation of law — to perform corporal acts, or deal with personal agents, the principle of representation has been adopted as a part of their constitution. The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives.

With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their governing body, and their agents, with the natural persons with whom they are brought into contract or collision. The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances. At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety. Trespass *quare clausum fregit* was supported in 9 Serg. and R. 94; 4 Mann. & G. 452; Assault and Battery, 4 Gray, Mass. R. 465; 6 Ex. Ch. 314. For damages by a collision of railcars and steamboats, 14 How. 465; 19 How. 543. For a false representation, 34 L. and Eq. R. 14; 11 Wheat. 59.

The case of the *National Exchange Co. of Glasgow v. Drew* (2 Macqueen H. of L. Cas. 103), was that of a company in failing circumstances, whose managers sought to appreciate its stock by a fraudulent representation to the company, and a publication of the report as adopted by it, that its affairs were prosperous. Two of its stockholders were induced to borrow money from the company to invest in its stock. The question in the cause was, whether the company was responsible for the fraud. In the House of Lords, upon appeal, Lord St. Leonards said: "I have come to the conclusion, that if representations are made by a company fraudulently, for the purpose of enhancing the value of stock, and they induce a third person to purchase stock, those representations so made by them bind the company. I consider representations by the directors of a company

as representations by the company, although they may be representations made to the company." . . . The report "becomes the act of the company by its adoption and sending it forth as a true representation of their affairs, and if that representation is made use of in dealing with third persons, for the benefit of the company, it subjects them to the loss which may accrue to the party who deals, trusting to those representations."

It would be difficult to furnish a reason for the liability of a corporation for a fraud, under such circumstances, that would not apply to sustain an action for the publication of a libel.

The defendants are a corporation, having a large capital distributed among several hundred of persons. Their railroad connects large cities, and passes through a fertile district. Their business brings them in competition with companies and individuals concerned in the business of transportation. They have a numerous body of officers, agents, and servants, for whose fidelity and skill they are responsible, and on whose care the success of their business depends. The stock of the company is a vendible security, and the community expects statements of its condition and management. There is no doubt that it was the duty of the president and directors to investigate the conduct of their officers and agents, and to report the result of that investigation to the stockholders, and that a publication of the evidence and report is within the scope of the powers of the corporation.

But the publication must be made under all the conditions and responsibilities that attach to individuals under such circumstances. The Court of Queen's Bench, in *Whitefield v. South East. R. R. Co.* (May, 1858), say: "If we yield to the authorities which say that, in an action for defamation, malice must be alleged, notwithstanding authorities to the contrary, this allegation may be proved by showing that the publication of the libel took place by order of the defendants, and was therefore wrongful, although the defendants had no ill-will to the plaintiffs, and did not mean to injure them." And the court concluded: "That for what is done by the authority of a corporation aggregate, a corporation ought as such to be liable, as well as the individuals who compose it."

The question arises, whether the publication is excused by the relations of the president and directors, as a committee from their board, to the corporation itself. It cannot be denied that the inquiries directed by those officers were within the scope of their power, and in the performance of a moral and legal duty, and that the communication to their constituents of the evidence collected by them, and their conclusions upon the evidence, was a privileged communication in the absence of any malice or bad faith. But the privilege of the officers of the corporation as individuals, or of the corporate body, does not extend to the preservation of the report and evidence in the permanent form of a book for distribution among the persons belong-

ing to the corporation or the members of the community. It has never been decided that the proceedings of a public meeting, though it may have been convened by the authority of law, or of an association engaged in an enterprise of public utility, could be reported in a newspaper as a privileged publication. But a libel contained in such proceedings, if preserved in the form of a bound volume, might be attended with more mischief to private character than any publication in a newspaper of the same document. The opinion of the court is, that in so far as the corporate body authorized the publication in the form employed, they are responsible in damages. The Circuit Court instructed the jury, —

1. If the jury find, from the evidence in this case, that the defendants, by the president and directors of said company, published the letter from John T. Mahoney to S. M. Felton, president, etc., dated March 3, 1854, in the declaration mentioned, and that any or all of the statements in the said letter respecting the plaintiff in his trade and occupation are false; and shall further find, that the said president and directors, at the annual meeting of the stockholders of said company, held 8th January, 1855, reported to the said stockholders their action in the premises, and that the proceedings of the committee of investigation (which contained the said letter) were then being printed, and, as soon as printed, would be distributed to the stockholders, and that said report was accepted by the stockholders; and if the jury shall further find, that, after the meeting of the stockholders had adjourned, the president and directors of said company distributed the book containing the said letter among the stockholders of this company, or any of them, then the jury may find for the plaintiff.

2. And if the jury find for the plaintiff under the first instruction, they are not restricted in giving damages to the actual positive injury sustained by the plaintiff, but may give such exemplary damages, if any, as in their opinion are called for and justified, in view of all the circumstances in this case, to render reparation to plaintiff, and act as an adequate punishment to the defendant.

The first instruction is erroneous, because the publication to which the court referred as blameworthy, and to authorize the jury to find a verdict against the defendant, took place after the commencement of this suit.

The second instruction contains the same error, and is objectionable for the additional reason that the rule of damages is not accurately stated to the jury.

In *Day v. Woodworth* (13 How. S. C. R. 371), this court recognized the power of a jury in certain actions of tort to assess against the tortfeasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed

against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations. Nothing of this kind can be imputed to these defendants.

The letter of Mahoney was reported to the company with other evidence that rendered it innocuous, and its statements were never adopted by them. The plaintiff has repeatedly affirmed that he had derived an advantage from the investigation by the company; and, upon reading all the evidence, as reported and published, we do not perceive how an impression unfavorable to him could have been made by it upon any candid mind. The circumstances under which the evidence was collected, and the publication made, repel the presumption of the existence of malice on the part of the corporation, and so the jury should have been instructed.

The averments in the declaration of the facts proper to give the Circuit Court jurisdiction over the parties, are identical with those which were fully considered by this court, and received the sanction of two-thirds of the judges in *Marshall v. The Baltimore and Ohio R. R. Co.* (16 How. 314). A repetition of the discussion that took place and was reported with that case is deemed to be unnecessary.

The only plea filed in this cause is the general issue. That plea raises an issue upon the merit of the complaint, and leaves the jurisdictional allegations without a traverse.

No question involving the capacity of the parties in the cause to litigate in the Circuit Court can be raised before the jury under such pleadings. *Conrad v. Atlantic Insurance Co.* (1 Pet. 386); *Evans v. Gee* (11 Pet. 80); *Owings v. Wickliffe* (17 How. 47). The testimony that the States of Delaware and Pennsylvania had respectively granted a corporate charter to the same corporators that form the corporation in Maryland, for the extension of the railroad through those States, to connect the cities that appear in the name of the corporation, and the testimony that some of the directors of the several corporations reside in Delaware, in the condition of the pleadings, was immaterial and irrelevant.

For the errors we have noticed, the judgment of the Circuit Court is reversed, and the cause remanded.

CHAPTER XII.

DISSOLUTION OF A CORPORATION.

MUMMA v. POTOMAC COMPANY.

(8 *Peters*, 281. 1834.)

.STORY, JUSTICE, delivered the opinion of the court:—

This is a writ of error to the circuit court of the District of Columbia, for the county of Washington. The case presented on the record is shortly this. The plaintiff in error, Mumma, in June 1818, recovered a judgment against the Potomac Company, for the sum of \$5,000. No steps were taken to enforce the payment of the judgment, nor any further proceedings had in relation thereto, until the 18th day of April, 1828, on which day a writ of *scire facias* was issued from the clerk's office of said court, against the said Potomac Company to revive said judgment, which case was continued, by consent of parties, from term to term, until December term of said court in the year 1830, at which term the following plea and statement were filed by consent of parties:

“The attorneys upon the record of the said defendants, now here suggest and show to the court, that since the rendition and record of said judgment, the said Potomac Company, in due pursuance and execution of the provisions of the charter of the Chesapeake and Ohio Canal Company, enacted by the States of Maryland and Virginia, and by the Congress of the United States, have duly signified their assent to said charter, etc., and have duly surrendered their charter, and conveyed, in due form of law, to the said Chesapeake and Ohio Canal Company, all the property, rights, and privileges by them owned, possessed, and enjoyed under the same; which surrender and transfer from said Potomac Company have been duly accepted by the Chesapeake and Ohio Canal Company, as appears by the corporate acts and proceedings of said company, and the final deed of surrender from the said Potomac Company dated on the 15th day of August, 1828, duly executed and recorded in the several counties of the States of Virginia and Maryland, and the District of Columbia, wherein said Potomac Company held any lands, and wherein the canals and works of said company were situated; which said corporate acts and proceedings, the said attorneys here bring into court, etc., whereby the said attor-

neys say, the charter of the said Potomac Company became, and is vacated and annulled, and the company and the corporate franchises of the same are extinct, etc.”

Whereupon the following statement and agreement were entered into and signed by the counsel for both parties, and made a part of the record. “The truth of the above suggestion is admitted; and it is agreed to be submitted to the court, whether, under such circumstances, any judgment can be rendered against the Potomac Company upon this *scire facias*, reviving the judgment in said writ mentioned, and that reference for the said corporate acts and proceedings, and the deed in the above suggestion mentioned, be had to the printed collection of acts, etc., printed and published by authority of the president and directors of the Chesapeake and Ohio Canal Company in 1828.” Upon this statement and agreement, the circuit court gave judgment, that the plaintiff take nothing by his writ; and the question now is, whether this judgment is warranted by law.

Two points have been made at the bar. 1. That the corporate existence of the Potomac Company was not so totally destroyed by the operation of the deed of surrender, as to defeat the rights and remedies of the creditors of the company. 2. That the deed of surrender violates the obligation of the contracts of the company, and that the legislative acts of Virginia and Maryland, though confirmed by the Congress of the United States, are on this account void; and can have no legal effect.

We think, that the agreement of the parties completely covers the first point, and precludes any examination of it. That agreement admits the truth of the suggestions in the plea of the attorneys for the Potomac Company; and by that it is averred, that the charter of the Potomac Company was duly surrendered to the Chesapeake and Ohio Canal Company, and was duly accepted by the latter; and that thereby the charter of the Potomac Company became, and is, vacated and annulled. And, if we were at liberty to consider the last averment, not as an averment of a fact, but of a conclusion of law, the same result would follow; for the 13th section of the Act of Virginia, of January, 1824, incorporating the Chesapeake and Ohio Canal Company, declares, that upon such surrender and acceptance, “the charter of the Potomac Company shall be, and the same is hereby vacated and annulled; and all the powers and rights thereby granted to the Potomac Company shall be vested in the company hereby incorporated.”

Unless, then, the second point can be maintained, there is an end of the cause; for there is no pretence to say, that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation. any more than against a dead man. We are of opinion, that the dissolution of the corporation, under the acts of Virginia and Maryland (even supposing the act of confirmation of Congress out of the way), cannot, in any just sense, be considered, within the clause

of the Constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those States, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bona fide* purchasers; but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws. Besides, the 12th section of the act incorporating the Chesapeake and Ohio Canal Company, makes it the duty of the president and directors of that company, so long as there shall be and remain any creditor of the Potomac Company who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company (which the act enables him to do), to pay to such creditor or creditors, annually, such dividend or proportion of the net amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said Chesapeake and Ohio Canal Company, as the demand of the said creditor or creditors, at that time, may bear to the whole debt of \$175,800 (the supposed aggregate amount of the debts of the Potomac Company). So that here is provided an equitable mode of distributing the assets of the company among its creditors, by an apportionment of its revenues, in the only mode in which it could be practically done upon its dissolution; a mode analogous to the distribution of the assets of a deceased insolvent debtor.

Independently of this view of the matter, it would be extremely difficult to maintain the doctrine contended for by the plaintiff in error, upon general principles. A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and non-user. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy, and the nature and objects of its charter.

Without going more at large into the subject, we are of opinion that the judgment of the circuit court ought to be affirmed. But as there is no such corporation *in esse* as the Potomac Company, there can be no costs awarded to it.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed without costs.

THORNTON v. RAILWAY COMPANY.

(123 Mass. 32. 1877.)

BILL IN EQUITY, filed February 2, 1877, against the Marginal Freight Railway Company and the Union Freight Railroad Company, alleging that the plaintiff, at July term, 1875, of the Superior Court for the county of Suffolk, recovered judgment against the Marginal Freight Railway Company, for money due from it to him before May 6, 1872, upon which judgment execution was duly issued, and remained unsatisfied; that the charter of the Marginal Freight Railway Company was repealed or attempted to be repealed, by the St. of 1872, c. 342, passed May 6, 1872, at which time it owned certain railroad tracks in the streets of Boston; that the Union Freight Railroad Company was incorporated by the same statute, and by virtue thereof took these tracks; that the Marginal Freight Railway Company, being dissatisfied with the estimate duly made of its damages by reason of such taking, filed a petition to the Superior Court for a jury to estimate such damages, which application was still pending; that the interest of the Marginal Freight Railway Company in its claim for damages could not be come at to be attached or taken on execution in an action at law against it; and that the Marginal Freight Railway Company neglected to press its application for a jury.

The prayer of the bill was that the Marginal Freight Railway Company might be ordered to prosecute, or to permit the plaintiff to prosecute, that petition to final judgment; that the Union Freight Railroad Company might be ordered to pay to the plaintiff so much of such judgment as might be recovered against it as might be necessary to satisfy the plaintiff's debt; that the defendants might be restrained from discontinuing or settling the action without first paying to the plaintiff the amount of his debt; and for further relief.

The Union Freight Railroad Company demurred, on the ground that the plaintiff's judgment against the Marginal Freight Railway Company was void, and that the bill could not be maintained against either defendant, because the charter of that corporation was repealed more than three years before the recovery of the judgment or the bringing of the bill; and for want of equity.

The Marginal Freight Railway Company file an answer, containing a demurrer for want of equity.

Hearing before Endicott, J., who reserved the case, on the bill and demurrers, for the consideration of the full court.

GRAY, C. J.:—

The bill is framed upon the theory that the plaintiff has recovered

a valid judgment against the Marginal Freight Railway Company; that that company has a claim for damages for the taking of its tracks by the Union Freight Railroad Company; and that the interest of the former company in this claim cannot be come at to be attached or taken on execution in a suit at law against it, and should therefore be applied in equity to the payment of the plaintiff's judgment debt. The difficulties in the way of maintaining this bill appear to us to be insuperable.

The St. of 1867, c. 170, by which the Marginal Freight Railway Company was incorporated, was subject to repeal at the pleasure of the Legislature, by virtue of the power expressly reserved by the Gen. Sts. c. 68, § 41, which was a part of the contract made between the Commonwealth and the corporation by its charter. That charter was expressly and legally repealed by the St. of 1872, c. 342, which incorporated the Union Freight Railroad Company, and authorized the latter corporation to take the tracks of the former, making compensation therefor in the manner provided by the laws relating to the taking of lands by railroad companies. *Crease v. Babcock* (23 Pick. 334); *Pennsylvania College Cases* (13 Wall. 190); *State v. Miller* (1 Vroom, 368, and 2 Vroom, 521); *Metropolitan Railroad v. Highland Railway* (118 Mass. 290).

Upon the absolute repeal of a charter by the Legislature acting within the limits of its constitutional authority, the corporation ceases to exist, and no judgment can afterwards be rendered against it in an action at law. But such repeal does not impair the obligation of contracts made by the corporation with other parties during its existence, or prevent its creditors or stockholders from asserting their rights against its property in a court of chancery, in accordance with the reasonable regulations of the Legislature, or with the general principles and practice in equity. *Foster v. Essex Bank* (16 Mass. 245); *Read v. Frankfort Bank* (23 Maine, 318); *Merrill v. Suffolk Bank* (31 Maine, 57); *Mumma v. Potomac Co.* (8 Pet. 281); *Curran v. Arkansas* (15 How. 304); *Bacon v. Robertson* (18 How. 480); *Lum v. Robertson* (6 Wall. 277).

Upon the repeal of the charter of the Marginal Freight Railway Company by the St. of 1872, c. 342, which was passed and took effect on May 6, 1872, the corporation was nevertheless, by virtue of the Gen. Sts. c. 68, § 36, continued a body corporate for the term of three years afterwards, for the purpose of prosecuting and defending suits by or against it, and of enabling it gradually to settle and close its concerns, to dispose of and convey its property, and to divide its capital stock. And, under § 37 of the same chapter, this court, sitting in equity, on the application of a creditor or stockholder, at any time within the three years might have appointed receivers, whose powers should continue as long as the court should deem necessary, to take charge of the estate and effects of the corporation, to collect the debts and property due and belonging to it, to

prosecute and defend suits, in its name or otherwise, and to do all other acts which might be done by the corporation, if in being, necessary for the final settlement of its unfinished business.

No application having been made for the appointment of a receiver, the Marginal Freight Railway Company, at the expiration of the three years, ceased to have any such existence that a valid judgment could be rendered against it in an action at law. We cannot regard the provision of the St. of 1876, c. 229, § 3, that "nothing in this act contained shall be construed as affecting the legal rights of" that corporation (which is not otherwise mentioned in the act), as a legislative recognition that it had, at the time of the passage of this statute, any rights or any existence. The judgment recovered by the plaintiff against the Marginal Freight Railway Company in July, 1875, was therefore wholly void, as if it had been rendered against a dead person.

This bill cannot be maintained under that clause of the Gen. Sts. c. 113, § 2, which confers upon this court jurisdiction of "bills by creditors to reach and apply, in payment of a debt, any property, right, title, or interest, legal or equitable, of a debtor, within this State, which cannot be come at to be attached or taken on execution in a suit at law against such debtor:" because that clause extends only to living debtors and existing corporations. And a court of equity has no general jurisdiction of a bill by a single creditor, who has not recovered a valid judgment against his debtor, and whose debtor has ceased to exist, to apply to the payment of his debt property of the debtor in the hands of a third party.

Although one passage near the end of the opinion in *Folger v. Columbian Ins. Co.* (99 Mass. 267), taken by itself, might seem to be inconsistent with this view, it is to be observed that that case, as well as the earlier one of *Taylor v. Columbian Ins. Co.* (14 Allen, 353), was submitted to the court upon an agreed statement of facts, waiving all questions of form, and was decided upon the ground that the corporation did not appear to have been dissolved.

The reasons above stated being conclusive against the right to maintain this bill, the demurrer of the Union Freight Railroad Company must be sustained, and the

Bill dismissed.

FOSTER v. ESSEX BANK.

(16 Mass. 245. 1819.)

ASSUMPSIT for 50,000 dollars had and received by the defendants, to the use of Israel Foster, the plaintiff's testator.

The action was entered at the last April term, and at this term the following suggestion was filed, viz. — "And now William Prescott

and Leverett Saltonstall, who were originally retained in this action by the Directors of the Essex Bank, suggest that, since the last term of the court, the corporation of 'the President, Directors, and Company of the Essex Bank' is dissolved by the expiration of the time limited for its duration in the act of incorporation; which said act is dated the eighteenth day of June in the year of our Lord one thousand seven hundred and ninety-nine.

WILLIAM PRESCOTT.

LEVERETT SALTONSTALL."

[By the act incorporating the defendants (Stat. 1799, c. 8), it was provided that the persons therein named, and their associates, successors, and assigns, should be created and made a corporation, by the name of, etc. and should "so continue from the first day of July, 1799, until the expiration of twenty years next following."

By an act passed on the 19th of June, 1819 (Stat. 1819, c. 43), it is enacted, "that all bodies corporate and politic, which now are, or hereafter may be established, and whose powers would expire, either by express limitation in their charters of incorporation, or otherwise, shall be, and they hereby are continued bodies corporate and politic, for the term of three years, from and after the day on which their powers would expire, as aforesaid, for the purposes of prosecuting and defending all suits, which now are, or may hereafter be instituted, and of enabling such bodies corporate and politic gradually to settle and close their concerns, and divide their capital stock; but not for the purpose of continuing the business for which such bodies corporate and politic have been, or may be established."]

The question arising out of the above suggestion was argued at Boston, March term, 1820 (the action having been continued *nisi* for argument and judgment), by Prescott and Saltonstall for the defendants, and Pickering and Webster for the plaintiffs.

PARKER, C. J. :—

The question arising from the suggestion filed in this action, at the last term in Essex, is, whether the statute of 1819, c. 43, has the force of law with regard to this corporation; so that it is still in existence, for the purpose of suing and being sued, and for other purposes mentioned in the act.

Acts of Legislature, constitutionally organized, are to be presumed constitutional; and it is only when they manifestly infringe some of the provisions of the Constitution, or violate the rights of the subject, that their operation and effect can be impeded by the judicial power. Whenever this shall happen, as it may from inadvertence, or in times of political conflict, when the passions domineer over reason, it is the duty of every court to protect those rights, and to vindicate the Constitution.

Thus, if the Legislature were to enact, that A. B. was guilty of treason, and that he should suffer the penalty of death; it would be

the sworn duty of the court, or of any member of it, to grant a *habeas corpus*, and discharge him. Or if they should enact that his estate should be confiscated, or transferred, or taken for the use of the public without an equivalent, such acts would not be laws; and they never could be executed, but by a court as corrupt, or as passionate, as the Legislature which should have passed them.

So, if the Legislature should attempt to destroy or impair the legal force of contracts, by declaring that those who were indebted should be discharged without paying their debts, or on paying a less sum than they owed, or in something different from what was agreed; such acts would be unconstitutional, although not expressly prohibited; because by the fundamental principles of legislation, the law or rule must operate prospectively only; unless in cases where the public safety and convenience require that errors and mistakes should be overruled, the power to do which has been immemorially exercised, and we believe, within the constitutional power of the Legislature. For it is doing no one wrong, to prevent his taking advantage of a mere error or mistake.

Now if the act in question impairs the force and obligation of contracts, or injures private property, or disturbs any vested rights, we ought to declare it void, and we should be ready to do so. But we are to be satisfied that it has this character.

In the first place, we see no pretence for saying that it impairs the force of contracts. Certainly it has not that effect on contracts made by or with the bank; but the very object of the statute is to enforce such contracts.

It is said, however, that the contract with the government was, that at the end of twenty years the corporation should be dissolved, and each member take his share out of the common fund. But it should be considered that, by the original charter, each member's share was liable for all the debts of the bank; and that he would have no moral right to withdraw it, until all the debts of the bank were paid: so that there was an equitable lien upon his share; and the Legislature, we think, had a right, if it was not their duty, to provide the means of enforcing this moral obligation.

The law complained of is a general law, operating upon all bodies corporate; and it is convenient for them and the public, that their power of suing and being sued should be continued beyond the period within which they are empowered to make contracts; in order that their concerns may be properly adjusted.

Nor do we think it an objection, that this additional term should be granted by an act made subsequent to the time when their charter was granted. A debtor to the bank could not object to a suit, on the ground that the original term of the charter had expired; for the very bringing of the suit would be an acceptance of the prolongation of the charter; and it would be absurd for him to say, that his debt was discharged, or that there was no means of recovering it, because

he contracted with the corporation on a supposition that it would continue in being only a certain number of years. We think it equally incompetent for such corporation to deny its existence, against a statute of the government, the object of which is to give a right of action on contracts, upon which they were legally and morally bound under their charter.

It is said that the members of such a corporation associated upon the faith that, after the time limited in their charter, they might separate, and take their shares of the stock. But it is to be answered that their stock is, in an equitable view, pledged for the payment of all debts due from the corporation; and that it would be fraudulent to withdraw the funds, knowing that there were debts to be paid; leaving no means of coercing the payment of those debts. What should be said of a banking company, which, just before its expiration, should divide all the stock, making no provision for the payment of its debts? Yet this might be done, if the Legislature have no authority to establish, by law, a mode by which it should be compelled to fulfil its obligations. For it is certainly doubtful whether any means exist, under our laws, of pursuing the funds into the hands of individual corporators, and subjecting them to the claims of creditors. We see no violation of the rights of the corporators, no impairing of the obligation of contracts; for it can never be the right of any person to withhold a just debt from his creditor.

Upon the whole, we cannot discern any principle by which it can be decided that this statute is void. It is not retrospective, in the proper sense of that term; for it provides for a future existence of the corporation, for limited and specific purposes. It does not infringe, or interfere with any of the privileges secured by the charter; unless it be considered a privilege to be secured from the payment of debts, or the performance of contracts; and this is a kind of privilege which we imagine the Constitution was not intended to protect. It does not impair the force or obligation of contracts; but on the contrary, provides a way of enforcing them, both in favor of, and against the corporation.

Many statutes have been referred to in the argument, which are much more questionable, as to their constitutionality, than the one under consideration:—The statutes of limitation, operating upon contracts already in force; the suspension of those statutes, after the debtor may have considered that he had a right to be discharged within a certain period; the statutes made for curing defects in the proceedings of courts, towns, officers, etc. when the party to be affected might be said to have a vested right to take advantage of the error. The truth is, there is no such thing as a vested right to do wrong; and a Legislature, which, in its acts not expressly authorized by the Constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.

It was an incumbent duty of the Legislature to provide that corporations should not avoid their obligations, by ceasing to exist; and the mode adopted in the act in question was certainly the most favorable. Had they provided that all corporations should cease to transact business, three years before the time for which they were created expired, in order that they might bring their affairs to a close, it might justly be said, that their privileges were taken away, and the grant of the government was impaired. But to provide for their continuance for such purpose, three years beyond their term, is no breach of their privileges; and is, in fact, nothing more than establishing a mode by which their business may be closed, and their contracts carried into execution. It is in the nature of an administration upon their estate, and is only doing, in a more convenient form, what a court of equity, with competent powers, might do; viz., making the common fund answerable for the debts which were created on the credit of that fund.

The suggestion filed in the case cannot have the effect to impede the progress of the suit.

BACON *v.* ROBERTSON.

(18 *Howard* (U. S.) 480. 1855.)

THIS was an appeal from the circuit court of the United States for the southern district of Mississippi.

The transaction to which the suit relates was partly and incidentally brought before the notice of this court in 16 How. 106.

MR. JUSTICE CAMPBELL delivered the opinion of the court:—

This bill was filed in the circuit court against William Robertson, a trustee, appointed to liquidate the affairs of the late Commercial Bank of Natchez, Mississippi, and such of the stockholders of the bank as are citizens of that State, and is prosecuted by a number of stockholders, owning one-fifth part of the capital stock, for themselves, and such of the stockholders as are not citizens of Mississippi, or defendants in the bill.

The Commercial Bank was incorporated and organized under enactments of the Legislature in 1836, with a capital of \$3,050,000, divided into shares of \$100 each, which are now distributed among two hundred and eighty persons.

The corporation carried on the business of banking through the agency of presidents, directors, cashiers, and other officers, at Natchez, and four other towns of Mississippi, for a number of years. During this time there was a temporary suspension of specie payments, which the bill avers to have been accidental, and to have formed the only ground for the proceedings taken against

the corporation. In June, 1845, the circuit court of Adams County rendered a judgment against the bank, upon an information in the nature of a *quo warranto* preferred pursuant to the act of the Legislature of July, 1843. By this judgment the bank was "prejudged and excluded from further holding or exercising the liberties, privileges, and franchises granted by the said charter;" "the liberties, privileges, and franchises granted to the bank were seized" by the State; the "property, books and assets of the bank" were adjudged to be seized and delivered to a trustee, who might have execution therefor. William Robertson was appointed that trustee, "to take charge of the books and assets of the bank." His duties are declared, conformably to the act of 1843, which will be considered in another part of this opinion.

The bank appealed from this judgment, and in the spring session of the high court of errors and appeals, in 1846, it was affirmed. William Robertson entered upon the office of trustee in July, 1846. He took possession of money, stocks, evidences of debt, and real estate having a nominal value of near four millions of dollars, and continues to hold them, except in so far as he has applied them to the payment of the charges of the trust and the debts of the corporation. The bill alleges that all the debts have been paid, and that only a small sum is due for costs, and that property of great value, consisting of money, stocks, evidences of debt, bonds, and personalty, remains with the trustee, who refuses to account for them to the stockholders. The object of the bill is to establish the title of the stockholders to this surplus, and to obtain the ratable shares of such of them as are able and willing to join as plaintiffs in this suit. The bill names a number of the stockholders as parties, and is fitted to embrace all by the representation of these.

The defendants joined in a general demurrer to the bill; a decree of dismissal was rendered at the hearing at the circuit, and, by appeal, was taken up to this court to revise that decision.

When the defendant, Robertson, assumed the office of trustee, his duties were defined by two acts of the Legislature of Mississippi. The act of July, 1843, directed the institution of suits against such of the banking corporations of the State as had violated their charters in such a manner as to incur their forfeiture, and prescribed the form of the suits for the enforcement of that forfeiture. It enacted, "that upon a judgment of forfeiture against any bank, the debtors of the bank shall not be released from their debts and liabilities to the same;" but it was made the duty of the circuit court, rendering the said judgment, to appoint one or more trustees to take charge of the books and assets of the banks; who should sue for and collect all debts due such bank, and sell and dispose of all property owned by it, or held by others for its use; and the proceeds of the debts, when collected, and of the property when sold, to apply, as may hereafter be directed by law, to the payment of the

debts of such bank. The trustee was made subject to a criminal prosecution for embezzlement, conversion of the trust property, as a failure to account for it according to law; and both acts prescribed a bond to be given to secure the faithful performance of his duty. The act of February, 1846, amended and enlarged the scope of the act of 1843, and was applicable to all trustees appointed under either.

This act provided a summary remedy in favor of the trustee to obtain the control of the corporate property; for an inventory to be made to the first court, after his appointment; for an order of sale of all the corporate property at auction, for cash, after a notice of ninety days, at specified places; for commissioners to audit the claims against the banks, and for their presentation to these commissioners; for early decisions upon the exceptions to their report; for a final decree of distribution, first, in the payment of expenses, then public dues, costs, and fees, the debts reported, and, lastly, "the surplus, if any shall be ratably distributed among the stockholders." There was a provision that the bills of the bank should be receivable for debts, and that the debtor might redeem from any purchaser of his debt or obligation (so sold), during two years, by paying the purchase-money, all costs, and twelve and a half per cent interest. The object of the two statutes can hardly be misconceived. They are parts of a system, the latter act being auxiliary to, and adopted in aid of, the provisions of the earlier act of 1843, — the two acts containing the full expression of the will of the Legislature. The circumstances of the Legislature enabled it to defer the promulgation of its entire policy until the year 1846. The exigencies of the State were entirely answered by the directions given in 1843 to the executive officers to take initiatory measures for placing these corporations under restraint, and for the security of their property. To effectuate these involved delay and litigation, and the Legislature might well await their issue, before unfolding their whole plan of liquidation and settlement. The two statutes which embody it have formed the subject of much discussion in the courts of Mississippi, and difficulty has been experienced there in carrying them into execution. No suit has been instituted there by the stockholders, though their rights have been incidentally debated, both at the bar and by the supreme appellate court. To comprehend the import of this legislation, we must consider the mischiefs it was designed to prevent or remove, and the mode adopted to accomplish the end; for the legislation is of a character wholly remedial. The common law of Great Britain was deficient in supplying the instrumentalities for a speedy and just settlement of the affairs of an insolvent corporation whose charter had been forfeited by a judicial sentence. The opinion usually expressed as to the effect of such a sentence was unsatisfactory and questioned. There had been instances in Great Britain of the dissolution of

public or ecclesiastical corporations by the exertion of the public authority, or as a consequence of the death of their members, and Parliament and the courts had affirmed in these instances that the endowments they had received from the prince or pious founders would revert in such a case. Stat. de terris Templariorum, 17 Edw. II.; Dean and Canons of Windsor, Godb. 211; *Johnson v. Norway* (Winch. 37); Owen, 73; 6 Vin. Abr. 280. What was to become of their personal estate and of their debts and credits had not been settled in any adjudged case, and as was said by Pollexfen in the argument of the *quo warranto* against the city of London, was perhaps "*non definitur in jure.*" Solicitor Finch, who argued for the crown in that cause, admitted "I do not find any judgment in a *quo warranto* of a corporation being forfeited." Treby, on behalf of the city, said, "The dissolving a corporation by a judgment in law, as is here sought, I believe is a thing that never came within the compass of any man's imagination till now; no, not so much as in the putting of a case. For in all my search (and upon this occasion I have bestowed a great deal of time in searching), I cannot find that it ever so much as entered into the conception of any man before; and I am the more confirmed in it because so learned a gentleman as Mr. Solicitor has not cited any one such case wherein it has been (I do not say adjudged, but) even so much as questioned or attempted; and, therefore, I may very boldly call this a case *primae impressionis.*" The argument of Pollexfen was equally positive. The power of courts to adjudge a forfeiture so as to dissolve a corporation was affirmed in that case, but the effect of that judgment was not illustrated by any execution, and the courts were relieved from their embarrassment by an act of Parliament annulling it. Smith's case, 4 Mod. 53; Skin. 310; 8 St. Tri. 1042, 1057, 1283. Nor have the discussions since the Revolution extended our knowledge upon this intricate subject. The case of *Rex v. The Amery* (2 D. & E. 515), has exerted much influence upon text-writers. The questions were, whether a judgment of seizure *quousque* upon a default was final, and if so, whether the king's grant of pardon and restitution would overreach and defeat a charter granting to a new body of men the same liberties intermediate the seizure and the pardon. The king's bench, relying upon the Year-Book of 15 Edw. IV., declared the judgment to be final and the new charter irrepealable. But the House of Lords reversed the judgment. The judges, upon an examination of the original roll of the case in the Year-Book, discovered that it did not support the conclusion drawn from it, and Chief Baron Eyre says, "that Lord Coke had adopted the doctrine too hastily." The discussions upon this case show how much the knowledge of the writ of *quo warranto* as it had been used and applied under the Plantagenets and Tudors, had gone from the memories of courts and lawyers. 4 D. & E. 122; Tan. on Quo Warranto, 24. In *Colchester v. Seaber* (3 Bur. 1866), where the suit was upon a bond, and the

defence was, that certain facts had occurred to dissolve the corporation, and that the creditor's claim was extinguished on the bond, Lord Mansfield said, "Without an express authority, so strong as not to be gotten over, we ought not to determine a case so much against reason as that Parliament should be obliged to interfere." The question occurs here, Could Parliament interfere? And the answer would be by their authorizing a suit to be brought notwithstanding the dissolution. These are all cases of municipal corporations where the corporations had no rights in the property of the corporation in severalty. The courts of Westminster have found much difficulty in applying the principles settled in regard to such, to the commercial and trading corporations that have come into existence during this century. The courts there within the last twelve months have been troubled to discuss whether a commercial corporation could recover damages for the breach of a parol contract, or whether the contract should have had a seal to make it valid. *Austra. R. M. N. Co. v. Marzetti* (32 L. & E. 572; 3 Ib. 420). It may be admitted that the courts of law could not give any relief to the shareholders of a corporation disfranchised by a judicial sentence in respect to a corporate right. Their modes of proceeding do not provide for the case, as they have not for many others. 1 Plow. 276, 277; *Richards v. Richards* (2 B. & Adol. 447); Will. Ex. 1129. But this concession does not involve an acknowledgment that the rights of the corporations are extinguished. Courts of chancery have been forced into a closer contact with these associations, and have formed a more rational conception of their constitution and a more accurate estimate of their importance to the industrial relations of society. Those courts have evinced a spirit of accommodation of their modes of proceeding so as to adapt them to the changing exigencies of society. Lord Cottenham, in *Walworth v. Holt* (4 M. & C. 635), in reference to the conduct of suits in which similar associations were concerned, said: "I think it is the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to rules and forms established under different circumstances, to decline to administer justice and to enforce rights for which there is no other remedy." In the same spirit, Sir James Wigram, V. C., observes: "Corporations of this kind are in truth little more than private partnerships; and in cases which may be easily suggested, it would be too much to hold that a society of private persons associated together in undertakings which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights *inter se*, because, in order to make their common objects more attainable, the Crown or Legislature have conferred upon them the benefit of a corporate character." *Foss v. Harbottle* (2 Hare, 491). These just views, which have afforded to wise chancellors a sufficient motive to enlarge the scope

and relax the rigor of the rules of chancery proceeding, so as to bring the civil rights of individuals in whatever form they may exist, or however complicated or ramified, under the protection of legitimate judicial administration, have been adopted in the United States, not simply for the improvement of methods of proceeding, but also for the adjustment of rights and the assertion of responsibilities among the members of such associations. In the *Bank of the United States v. Deveaux* (5 Cr. 61), this court held "that the technical definition of a corporation does not uniformly circumscribe its capacities, but that courts for legitimate purposes will contemplate it more substantially;" and the court in that case allowed the corporation to use its corporate name for the purposes of suit in the courts of the United States to represent the civil capacities of the persons who composed it. So the court has held that corporate acts need not to be evinced by writing, nor corporate contracts by a common seal; that corporations are liable on contracts made, or defaults or torts committed by their officers or agents in the course of their employment (12 Wheat. 40; *Ib.* 64; 6 How. 344; 14 *Ib.* 468). In *Lennox v. Roberts* (2 Wheat. 373), the court gave effect to a general assignment of a corporation of its choses in action made in anticipation of the expiration of its charter, and which was designed to preserve to the incorporators their rights of property. In the *Mumma v. Potomac Company* (8 Pet. 281), it held that the assignment of all the property of a corporation and the surrender and cancellation of its charter with the consent of the Legislature, did not defeat the right of the judgment creditor to satisfaction out of the property which had belonged to it. The power of courts of equity in cases like these was recognized as adequate to maintain the rights of the parties beneficially interested, and this doctrine was repeated and developed in *Curran v. Arkansas* (15 How. 304).

The tendency of the discussions and judgments of the court of chancery in Great Britain, and of the courts of this country, is to concede the existence of a distinct and positive right of property in the individuals composing the corporation, in its capital and business, which is subject in the main to the management and control of the corporation itself; but that cases may arise where the incorporators may assert not only their own rights, but the rights of the corporate body. And no reason can be given why the dissolution of a corporation, whether by judicial sentence or otherwise, whose capital was contributed by shareholders for a lawful and perhaps laudable enterprise, with the consent of the Legislature, should suspend the operation of these principles, or hinder the effective interference of the court of chancery for the preservation of individual rights of property in such a case. The withdrawal of the charter — that is, the right to use the corporate name for the purposes of suits before the ordinary tribunals — is such a substantial impediment to the prosecution of the rights of the parties interested, whether cred-

itors or debtors, as would authorize equitable interposition in their behalf, within the doctrine of chancery precedents. *Stainton v. The Carron Company* (23 L. and E. 315); *Travis v. Milne* (9 Hare, 141; 2 Ib. 491). For the sentence of forfeiture does not attain the rights of property of the corporators or corporation, for then the State would appropriate it. If those rights are put an end to, it would seem to be rather from a careless disregard, or hardened and reckless indifference to consequences, on the part of the public authority, than from any preconceived plan or purpose. For, according to the doctrine of the text-writers on this subject, the consequences are visited without any discrimination; the losses are imposed upon those who are not blameworthy, and the benefits are accumulated upon those who are without desert. The effects of a dissolution of a corporation are usually described to be, the reversion of the lands to those who had granted them; the extinguishment of the debts, either to or from the corporate body, so that they are not a charge nor a benefit to the members. The instances which support the *dictum* in reference to the lands consist of the statutes and judgments which followed the suppression of the military and religious orders of knights, and whose lands returned to those who had granted them, and did not fall to the king as an escheat; or of cases of dissolution of monasteries and other ecclesiastical foundations, upon the death of all their members; or of donations to public bodies, such as a mayor and commonalty. But such cases afford no analogy to that before us. The acquisitions of real property by a trading corporation are commonly made upon a bargain and sale, for a full consideration, and without conditions in the deed; and no conditions are implied in law in reference to such conveyances. The vendor has no interest in the appropriation of the property to any specific object, nor any reversion, where the succession fails. If the statement of the consequences of a dissolution upon the debts and credits of the corporation is literally taken, there can be no objection to it. The members cannot recover nor be charged with them, in their natural capacities, in a court of law. But this does not solve the difficulty. The question is, has the *bona fide* and just creditor of a corporation, dissolved under a judicial sentence for a breach in its charter, any claim upon the corporate property for the satisfaction of his debt, apart from the reservation in the act of the Legislature which directed the prosecution? Can the lands be resumed in disregard of their rights by vendors, who have received a full payment of their price, and executed an absolute conveyance? Can the careless, improvident, or faithless debtor plead the extinction of his debt, or of the creditor's claim, and thus receive protection in his delinquency? The creditor is blameless, — he has not participated in the corporate mismanagement nor procured the judicial sentence; he has trusted upon visible property acquired by the corporation, in virtue of its legislative sanction. How can the vendors of the

lands or the delinquent debtors resist the might of his equity? But, if the claims of the creditor are irresistible, those of the stockholder are not inferior, at least against the parties who claim to hold the corporate property. The money, evidences of debt, lands, and personalty acquired by the corporation were purchased with the capital they lawfully contributed to a legitimate enterprise, conducted under the legislative authority. The enterprise has failed under circumstances, it may well be, which entitle the State to withdraw its special support and encouragement; but the State does not affirm that any cause for the confiscation of the property, or for the infliction of a heavier penalty, has arisen. It is a case, therefore, in which courts of chancery, upon their well-settled principles, would aid the parties to realize the property belonging to the corporation, and compel its application to the satisfaction of the demands which legitimately rest upon it.

In our view of the equity of this bill we have the support and sanction of the Legislature of Mississippi. Their legislation excludes all the consequences which have been imputed as necessary to a sentence of dissolution on a civil corporation. From the plenitude of their powers for the amelioration of the condition of the body politic, and the supply of defects in their system of remedial laws, they have afforded a plan for the liquidation and settlement of the business of these corporations in which the equities of the creditors and shareholders respectively are recognized, as attaching to all the corporate property of whatever description. And the inquiry arises, who is authorized to obstruct the enforcement of these equities in so far as the stockholders of the Commercial Bank of Natchez are concerned? The creditors have been satisfied. The defendant in the present suit is the trustee appointed under these legislative enactments. His demurrer confesses that he has received money, stocks, evidences of debt, lands, and personal property, which he refuses to distribute. He claims that the stockholders have no rights since the dissolution of the corporation, and if any, they must be looked for in the circuit court of Adams County, Mississippi. But the trustee cannot deny the title of the stockholders to a distribution. To collect and distribute the property of the corporation among the creditors and stockholders, is his commission,—for this end he was placed in the possession of the property, and was armed with all the powers he has exercised.

His title is in subordination to theirs, and his duties are to maintain their rights and to consult their advantage. *Pearson v. Lindley* (2 Ju. 758); 3 Pet. 43; 4 Bligh, 1; Willis Trus. 125, 172, 173. He is estopped from making the defence of a want of title in the stockholders. Nor is the objection to the jurisdiction of this court tenable. Ten years have nearly elapsed since this trust was created. The acts of the Legislature contemplated a prompt and speedy settlement. They direct the reduction of all the property into ready

money, and an early distribution among the parties concerned. The trustee confesses that he has not sold the lands nor personal estate, and that he has refused to distribute the money. He has committed a palpable breach of trust according to the case made by the bill and as confessed by the demurrer. All the other trusts having been fulfilled, the stockholders are entitled to such an administration as will be most beneficial to them, or to a sale of the trust property in the manner prescribed by the statute of Mississippi. Nor is the objection to the form of the suit tenable. If the trust estate had been liquidated, and the interests of the stockholders ascertained, any stockholder might have maintained a suit for his aliquot share without including any other stockholder. *Smith v. Snow* (3 Mad. C. R. 310). But the trust estate has not been sold, nor are the names of all the stockholders ascertained; the trustee is called on to account, and the bill asks for the collection and disposal of the remaining property under the authority of the court of chancery.

The stockholders are interested in these questions, and are then proper parties to the bill. The number of the parties renders it impracticable to bring all before the court, and therefore the suit may be prosecuted in the form which has been employed in this suit. This court sustained such a bill in the case of *Smith v. Swormstedt* (16 How. 288).

We do not intend to decide any of the questions of the cause which may arise as to the mode of administering the relief prayed for in this bill. Our opinion is that the plaintiffs have shown a proper case for equitable interposition by the circuit court, and that the decree of that court dismissing the bill is erroneous.

Decree reversed, and cause remanded.

TITCOMB v. INSURANCE COMPANY.

(79 Maine, 315. 1887.)

BILL IN EQUITY to dissolve the defendant corporation and obtain an order for distribution of the fund remaining on hand.

WALTON, J. :—

The Kennebunk Mutual Fire Insurance Company was incorporated in 1856. It has issued no policies since 1877.

In 1884, its last policy having expired, the company voted to close up its affairs and to do no more business. A decree has been obtained at *nisi prius* dissolving the corporation, from which no appeal has been taken or claimed; and the only question before the law court is to determine what shall be done with the assets of the company. Our statutes contain ample provisions for the disposition of the assets of stock companies (R. S., c. 46, §§ 25, 26, 27 and 54).

But this is a mutual company and has no stockholders, and the provisions cited do not apply. According to the old settled law of the land, says Chancellor Kent, upon the civil death of a corporation, when there is no special statute to the contrary, all its real estate reverts to the grantors and their heirs, and all its personal estate vests in the people. 2 Kent (10th ed.), 385-386. To the same effect is Angell and Ames on Cor. c. 22, § 6 (2d ed.).

But it is said that in this class of cases the corporators named in the act of incorporation should be regarded as stockholders. They are not stockholders; and to hold that they are would be a fiction, and fictions are not favored, and are never resorted to except to work out some strong and inherent equity; and there is no such equity in favor of the corporators of a mutual insurance company. They contribute nothing towards its assets, and we think it would be against public policy to allow them to have a pecuniary interest in them. Such an interest would inevitably tend to create a temptation to fix the rates of insurance higher than would be necessary to meet losses; and then, when a surplus had been thus obtained, to divide it among themselves, and thus reap a profit from a business in which they had invested no capital and had taken no risks; and this at the expense of the policy-holders. We think there is a much stronger equity in favor of the former policy-holders, whose money has contributed to produce the assets. But we do not think they can be regarded as stockholders after their policies have expired and their premium notes have been cancelled or given up to them. They have then received in full the benefits for which they contracted, and are no longer members of the company; and to distribute among them a small amount of assets, and to determine what each former policy-holder's share ought in equity to be, would be attended with difficulties and an amount of labor which the end would not justify. When a man dies leaving no wife or kindred, his property descends to the state. And when a corporation, which, like a mutual insurance company, has no stockholders, ceases to exist, we are not prepared to say that the rule of the common law, which gives its surplus assets to the state, is not a wise one.

But it is said that unless the corporators can be regarded as stockholders, the court has no authority to decree a dissolution of the corporation. It is a sufficient answer to this argument to say that the question of dissolution is not before the law court. The court at *nisi prius* decreed a dissolution in May, 1885. From that decree no appeal was taken or claimed. It was made at the request of the corporators; and so far as appears, no objection was made by any one. Thereupon a receiver was appointed and the case was sent to a master; and it was upon the coming in of the master's report that the question, and the only question now before the law court, was first raised. It is now too late to object to the dissolution of the corporation. The only question is, what shall be done with the

small amount of assets now in the possession of the receiver. They amount to only one thousand four hundred and three dollars and twenty-three cents, and a safe.

It is the opinion of the court, and it is accordingly ordered and decreed that the receiver pay the costs of this suit, including reasonable counsel fees, and that he pay the balance, if any shall remain, to the State treasurer for the use of the State.

PETERS, C. J., VIRGIN, LIBBEY, EMERY, and HASKELL, JJ., concurred.

BOSTON GLASS MANUFACTORY v. MARY LANGDON.

(24 Pick. 49. 1834.)

ASSUMPSIT on a promissory note given by the defendant to the plaintiffs. The defendant pleads in abatement, that at the time of the purchase of the writ there was not, and now is not, any such corporation established by law, called the Boston Glass Manufactory, as in and by the writ is supposed. The plaintiffs reply that there was and is such a corporation; and tender an issue; which is joined.

At the trial, before Morton, J., the plaintiffs offered in evidence their act of incorporation, and showed their organization under it in 1811.

The records of the corporation were introduced by the plaintiffs, and were used and relied upon by both parties.

The defendant then introduced an indenture, dated the 27th of May, 1827, assigning all the property of the corporation to certain persons, in trust to pay, *pro rata*, such creditors as should become parties to the indenture. This instrument contained covenants, that the assignees might use the name of the corporation in the collection of the debts, and in the disposition of the property assigned; that the corporation would not hinder or obstruct them in the performance of these functions; and that it would make any further conveyances and assurances which might become necessary, and perform any other and further acts which might be required to enable the assignees fully to execute their trust. No provision was made for a release to the corporation by the creditors, nor for paying over to the corporation the surplus, if any, of the property assigned. The defendant also referred to all the records subsequent to 1817, and contended that the assignment of the property of the corporation, and the omission to hold annual meetings, to choose directors, and to transact business, as appears by the records and books of the corporation, supported the issue on her part and entitled her to a verdict.

But the jury were instructed, that the evidence was competent to

prove the establishment and continuance of the corporation down to the present time.

The plaintiffs then claimed to have the damages assessed by the jury, if they found a verdict in their favor, and offered in evidence the note declared on. This was objected to by the defendant, because the note had been assigned. But the objection was overruled.

The defendant then offered to prove that the note was without consideration. This evidence was objected to and was excluded.

The jury found a verdict for the plaintiffs for the whole amount of the note and interest.

The defendant excepted to the decisions and instructions of the judge; and for the reasons above appearing, moved for a new trial.

Austin, for the defendant. The corporation was shown to have been discontinued before the commencement of this action. It was insolvent, and all its property, including the note now in suit, was conveyed absolutely to trustees for the benefit of such creditors as became parties to the indenture, without any provision that a surplus should revert to the corporation, or that the creditors should give the corporation a release. Neither were any officers chosen, nor any meetings held by the corporation, after the date of the assignment; and the officers previously elected had ceased to be competent to act as such, for all of them had become insolvent and had parted with their shares in the corporate property. The bankruptcy of a corporation, alienation of all its property, and cessation to do business, amount to a dissolution. *Brinckerhoff v. Brown* (7 Johns. Ch. R. 217), *Slee v. Bloom* (19 Johns. R. 456); 2 Kent's Com. (1st ed.) 250; *Penniman v. Briggs* (1 Hopkins, 300; s. c. 8 Cowen, 387).

The jury, having found against the defendant on the plea in abatement, should have proceeded to assess the damages on proper testimony upon that question, and no greater damages should have been assessed than if the defendant had pleaded the general issue. If the defendant has two defences, one in abatement and one in bar, he ought to be allowed to avail himself of the latter in case the former fails him; otherwise injustice must be done.

MORTON, J., delivered the opinion of the court: —

The non-existence or death of the plaintiff may properly be pleaded in abatement. 1 Chitty's Pl. 482; Story's Pl. 24. But whether, as it entirely and perpetually destroys the plaintiff's right to recover, it may not also be pleaded in bar, it is not necessary to determine. *Proprietors of Monumoi v. Rogers* (1 Mass. R. 159); *First Parish in Sutton v. Cole* (3 Pick. 245). Whether the plea conclude in abatement or bar, the issue being found against the defendant, the judgment must be peremptory. The established rule is, that in dilatory pleas, when the issue is found against the defendant on matters of fact, the judgment must be in chief. Gould's Pl. 300; Howe's Pract. 215.

The principal question for our consideration is, whether judgment shall be rendered on the verdict. The defendants' counsel contends that the evidence introduced will not support the verdict, but that the verdict is against the evidence and the law and should be set aside.

The point which has been determined by the jury, though necessary to be submitted to them with proper instructions, is quite as much a matter of law as of fact; and we the more readily enter into the examination of it.

The legal establishment and due organization of the corporation were admitted; but it was contended that the facts disclosed showed a dissolution of it.

The elementary treatises on corporations describe four methods in which they may be dissolved. It is said that private corporations may lose their legal existence by the act of the Legislature; by the death of all the members; by a forfeiture of their franchises; and by a surrender of their charters. 2 Kyd on Corp. 447; 1 Bl. Comm. 485; 2 Kent's Comm. (1st ed.) 245; Angell & Ames on Corp. 501; *Oakes v. Hill* (14 Pick. 442). No other mode of dissolution is anywhere mentioned or alluded to.

1. In England, where the Parliament is said to be omnipotent, and where in fact there is no constitutional restraint upon their action, but their own discretion and sense of right, corporations are supposed to hold their franchises at the will of the Legislature. But if they possess the power to annul charters, it certainly has been rarely exercised by them. In this country, where the legislative power is carefully defined by explicit fundamental laws, by which it must be governed and beyond which it cannot go, it has become a question of some difficulty to determine the precise extent of their authority in relation to the revocation of charters granted by them. But as it is not pretended that there has been any legislative repeal of the plaintiffs' charter, it will not be useful further to discuss this branch of the subject.

2. As all the original stockholders are not deceased, the corporation cannot be dissolved for the want of members to sustain and exercise the corporate powers. Besides, this mode of dissolution cannot apply to pecuniary or business corporations. The shares, being property, pass by assignment, bequest, or descent, and must ever remain the property of some persons, who of necessity must be members of the corporation, as long as it may exist.

3. Although a corporation may forfeit its charter by an abuse or misuser of its powers and franchises, yet this can only take effect upon a judgment of a competent tribunal. 2 Kent's Comm. (1st ed.) 249; *Corporation of Colchester v. Seaber* (3 Burr. 1866); *Smith's Case* (4 Mod. 53). Whatever neglect of duty or abuse of power the corporation may have been guilty of, it is perfectly clear that they have not lost their charter by forfeiture. Until a judicial decree to

this effect be passed, they will continue their corporate existence. *The King v. Amery* (2 T. R. 515).

4. Charters are in many respects compacts between the government and the corporators. And as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal solemn act of the corporation; and it will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve, that there was to form the compact. It is the acceptance which gives efficacy to the surrender. The dissolution of a corporation, it is said, extinguishes all its debts. The power of dissolving itself by its own act, would be a dangerous power and one which cannot be supposed to exist.

But there is nothing in this case which shows an intention of the corporators to surrender or forfeit their charter, nor anything which can be construed into a surrender or forfeiture.

The possession of property is not essential to the existence of a corporation. 2 Kent's Comm. (1st ed.) 249. Its insolvency, cannot, therefore, extinguish its legal existence. Nor can the assignment of all its property to pay its debts, or for any other purpose, have that effect. The instrument of assignment was not so intended, and cannot be so construed. All its provisions look to the continuance of the corporation. It contains covenants that the assignees may use the corporate name for the collection of the debts and the disposition of the property assigned; that the corporation will not hinder or obstruct them in the performance of these functions; that it will make any further conveyances and assurances which may become necessary, and will do and perform any other and further acts which may be required to enable the assignees fully to execute their trust. The instrument which covenants for future acts cannot be construed to take away all power of action.

The omission to choose directors clearly does not show a dissolution of the corporation. Although the proper officers may be necessary to enable the body to act, yet they are not essential to its vitality. Even the want of officers and the want of power to elect them, would not be fatal to its existence. It has a potentiality which might by proper authority be called into action, without affecting the identity of the corporate body. *Colchester v. Seaber* (3 Burr. 1870).

But here in fact was no lack of officers. Although no directors had been chosen for several years, yet, by the by-laws of the corporation, the directors, though chosen for one year, were to continue in office till others were chosen in their stead.

The damages were properly assessed by the jury. The defendant having elected to try her case upon a plea in abatement, must submit to the legal consequences of that form of trial. Perhaps the

court might have assessed the damages as in case of default. But most obviously the better course was to submit the subject to a jury. In doing this the defendant could not be allowed to go into the whole defence as upon the general issue. The rule adopted at the trial was the correct one.

Judgment according to verdict.

HEARD v. TALBOT.

(7 Gray, 113. 1856.)

COMPLAINT under Revised Sts. c. 116, for flowing land. The parties, for the purpose of submitting to the court the right of the respondents to maintain this dam, as successors of the Proprietors of the Middlesex Canal, agreed upon the following statement of facts:—

“The complainant has the fee, in certain meadow lands in Wayland, described in his complaint, which lands are alleged to be flowed by the water of the Concord River, raised by the respondents’ dam in the operation of their mills.

“The respondents claim a right to now maintain their dam without payment of damages (even if the dam shall cause said lands to be flowed), by reason of the following acts and proceedings done and had by themselves and those under whom they claim.

“In 1708 the town of Billerica granted to one Richardson, a certain tract of land, and a right to dam Concord River at the falls in that town, for the purposes of a grist mill, so long as he or his heirs should furnish a mill there to grind the grain of the inhabitants of said town. In pursuance of said grant, a grist mill, within a year or two of the grant, was erected there, with a dam of a certain height, which mill and dam and other mills were kept up and in operation till and since the incorporation of the proprietors of the Middlesex Canal, as hereinafter set forth. No forfeiture is claimed by the town of Billerica or by the complainant for any want of a grist mill for the inhabitants.

“Certain persons were incorporated as ‘the Proprietors of the Middlesex Canal,’ by St. 1793, c. 21, for the purpose of cutting a canal to unite the water of the Merrimack River with the water of Medford River, with certain rights and privileges given them by their charter.

“The proprietors in 1798 purchased said mill privileges on the Concord River, and erected a dam, as the complainant alleges, to a greater height than the former dam, for the purpose of raising a head of water to supply their canal, using the surplus to operate their mills, the grist mill having the first right.

"In 1804 they completed their canal from Merrimack River to Charles River, and opened it for public navigation, taking toll therefor, and using the head of water so raised in Concord River to feed their canal, and the surplus also to run their said mills.

"In 1798, the proprietors procured an additional act to be passed (St. 1798, c. 16), by which they were empowered to purchase and hold any mill seats on the waters connected with their canal, and to erect mills thereon.

"Said proprietors rebuilt the grist mill and mills for manufacturing lumber, and leased and sold water-power at said Billerica, from time to time, so long as they were in active operation as a canal company, to divers persons, to be drawn from the head of water raised by said dam, and always to be used in subordination to the use of the water for feeding the canal, except the grist mill, which always had the first right to the use of the water.

"In 1826, finding their dam insufficient to raise the water for their purposes, said proprietors built a new and more permanent dam in connection with the old one, which is the structure here complained of.

"The proprietors carried on their canal, using in the dry seasons of the year all of the water of the river, for their various purposes, and for the mills of those claiming under them, the canal using the largest part thereof, and retaining the first right thereto, till the year 1851, when their canal was wholly disused by them and filled up in parts of it, and has become now wholly unfit for use, and is no longer filled with water, and is wholly unused by said proprietors.

"At the time of the abandonment of the use of their canal, and as a part of the winding up of their affairs, the proprietors sold all their land and the residue of the water-power by them unsold, raised by their dam aforesaid, to the respondents by deed of quitclaim, 'subject expressly to the reservation of all easements and services necessary for or incident to the preservation and use of said canal for the purpose of navigation, and of all the rights of the public therein, until the same shall be lawfully discontinued;' and the respondents have since that sale maintained and kept up the water by said dam for manufacturing purposes, and claim to use the same in such manner and to such extent as may suit their convenience for such manufacturing purposes, subject to said reserved right of said canal.

"It is also agreed (if it be competent evidence) that after the abandonment of their canal said proprietors applied to the Legislature for leave to wind up their affairs, and to sell their land and water-power, and surrender their charter, which application was denied; and that afterwards they applied by petition to the Supreme Court for leave to wind up their affairs and surrender their charter, which petition is still pending; which applications were made after the deed to the respondents.

"It is also agreed (if it be competent evidence) that the canal corporation, or those claiming under them, have never in fact paid

any damages for flowing the complainant's land, or obtained any grant or license therefor, except such as may be presumed by law from the lapse of time from the facts above stated.

"It is also agreed (if it be competent evidence) that the complainant's ancestor brought his complaint against the proprietors of the canal, as reported in the 5th of Metcalf's Reports, page 81, which may be referred to.

"It is also agreed that said canal corporation have never been dissolved, or said canal discontinued, except as aforesaid.

"If the said complaint can be sustained upon the aforesaid facts, and upon the proof by the complainant that the dam built in 1798 or in 1826 was higher than the dam maintained up to 1798, and that his land is flowed thereby, then the cause is to stand for trial; otherwise, the complainant is to become nonsuit."

BIGELOW, J.:—

There can be no doubt, that the proprietors of the Middlesex Canal, under their original act of incorporation, St. 1793, c. 21, and under the additional act of 1798, c. 16, by which they were empowered to purchase and hold mill seats on the waters connected with their canal, acquired, as part of their franchise, the right to flow the land of the complainant; and that this right was in its nature a permanent easement or servitude, for which the complainant or those under whom he claims title had an ample remedy in damages provided in the third section of the original charter of the corporation. That remedy was an exclusive one, and the time within which parties could legally avail themselves of it has long since passed away. These points have already been adjudicated. *Stevens v. Middlesex Canal* (12 Mass. 466); *Sudbury Meadows v. Middlesex Canal* (23 Pick. 36); *Heard v. Middlesex Canal* (5 Met. 81).

It seems to us very clear that there is nothing in the facts of the present case to take it out of the principles settled by those decisions, and that there is no ground on which the claim of the complainant to damages under the mill act can be sustained against these respondents. They hold their title to the mills and water-power raised by the dam which causes the land of the complainant to be flowed, under a grant from the Proprietors of the Middlesex Canal. By the deed under which they claim, the right is expressly reserved to the grantors to appropriate the water raised by the dam at all times to the purpose of supplying their canal. It is therefore in the right of the canal corporation, and subject to this reservation, that the respondents claim to use and enjoy the mill privileges created by the dam which is the subject of this complaint. Unless, therefore, the corporation have surrendered or lost the right to keep up and maintain this dam, it having been already settled in 5 Met. 81, that the complainant has no claim for damages on account thereof against the corporation, it would seem to follow that he has none against these respondents, who claim under the corporation.

The sole ground on which he now rests his case is, that the canal corporation have since the year 1851 wholly disused their canal, filled up portions of it, and suffered it to remain in such condition as to be entirely unfit for use. The argument is, that the right of erecting and maintaining a dam was granted to the corporation mainly for the purpose of enabling them to raise water for the supply of their canal, and the power to hold mills was wholly incidental to and dependent on the appropriation and use of the water raised by the dam for the great object for which the corporation was established, and their franchise granted; that the corporation, having abandoned the use of the canal, and ceased to supply it with water, can no longer claim the right, under their charter, to maintain the dam.

Admitting, for the sake of giving full force to this argument, the correctness of the premises on which it rests, we do not think the conclusion drawn from them legitimately follows. An essential link in the chain of reasoning is wanting. The argument assumes that the neglect or omission to use a right granted to a corporation, as part of their franchise, for the specific purpose for which it was given, necessarily works a forfeiture of the right itself. But this is not so, unless the right is expressly made conditional on the use, which is not done in the act incorporating the proprietors of the canal. The right is given absolutely, and without express condition or limitation. The corporation are still in existence. All the rights and powers conferred on them by law, and comprehended within the broad terms of their franchise, have never yet been legally forfeited or extinguished. Nor can they be, except by a surrender of the charter and its acceptance by the government, or by a forfeiture declared by the judgment of a competent tribunal, or by proceedings under St. 1852, c. 55.

In the absence of express conditions in an act of incorporation, by which corporate rights and powers are made to depend on their due exercise, a non-user or misuser of them does not operate as a surrender or forfeiture of the charter. Although the disuse of the canal and its abandonment by the corporation may be a gross disregard of the duty imposed on them by law, and an essential violation of the terms and conditions implied from the contract entered into with the government by the acceptance of the charter, and upon due proceedings had, might be a sufficient ground upon which to decree a forfeiture of all their corporate rights and privileges, they do not constitute any valid ground upon which the exercise by the corporation of any of the powers conferred by their charter can be defeated or denied by third persons in collateral proceedings. This results from the very nature of an act of incorporation. It is not a contract between the corporate body, on the one hand, and individuals whose rights and interests may be affected by the exercise of its powers, on the other. It is a compact between the corporation and the gov-

ernment from which they derive their powers. Individuals therefore cannot take it upon themselves, in the assertion of private rights, to insist on breaches of the contract by the corporation, as a ground for resisting or denying the exercise of a corporate power. That can be done only by the government with which the contract was made, and in proceedings duly instituted against the corporation. It would not only be a great anomaly to allow persons, not parties to a contract, to insist on its breach and enforce a penalty for its violation; but it would be against public policy, and lead to confusion of rights, if corporate powers and privileges could be disputed and defeated by every person who might be aggrieved by their exercise. Therefore it has been often held, that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corporations collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the government. *Angell & Ames on Corp.* § 777, and cases cited; *Boston Glass Manufactory v. Langdon* (24 Pick. 49); *Quincy Canal v. Newcomb* (7 Met. 276).

It follows from these principles, that the franchise of the Proprietors of the Middlesex Canal, which includes the right of keeping up and maintaining the dam which flows the land of the complainant, being still in existence, it is not competent for him in this proceeding to show a non-user or abandonment of the canal, as a ground for denying the right of the corporation to continue the dam; and as the respondents hold their title under the corporation, and justify the flowing of the complainant's land under the corporate franchise, there is no ground for sustaining the present complaint under the mill act against the respondents. It is a sufficient answer to this suit, that the corporation have the legal right to maintain the dam as against the complainant, without payment of damages.

This view of the case renders it unnecessary to determine the question discussed at the bar, whether the right to purchase and hold mills, which was conferred on the corporation by the Act of 1798, was the grant of an additional and distinct franchise or right, which may be used and enjoyed by the corporation or their grantees separately from and independently of the building and maintaining of a canal; or whether it was merely secondary and subordinate to the making of a canal and the raising of water for its supply, and was to cease and become extinguished when the right of keeping and using the canal should be surrendered or forfeited. Nor have we occasion to decide whether the forfeiture or extinguishment of the charter of the corporation would operate to defeat the title of the grantees of the corporation to the mills and water-power which had been acquired by the corporation lawfully, and conveyed to the respondents by deeds valid at the time they were made, by which the title became vested before such extinguishment or forfeiture took place. These are important and interesting questions; but it

will be quite time enough to settle them, when the exigency of a case shall require, in order to adjudicate upon the rights of parties, that they should be judicially determined.

Complainant nonsuit.

HARDON v. NEWTON.

(14 Blatchford, 376. 1878.)

IN EQUITY.

SHIPMAN, J.:—

THIS is a bill in equity, which alleges that the plaintiff is a citizen of the State of New York, and is the owner of sixty-five shares of the capital stock of the American Suspender Company, a joint-stock corporation organized under the statutes of the State of Connecticut, and established in Waterbury, in said State, of which corporation Isaac E. Newton is the president, and the other defendants are the directors. All the individual defendants are citizens of Connecticut. The defendant corporation manufactures elastic suspenders and webs. The bill further alleges, in substance, as follows: The defendants Newton, Merriman, and Pritchard, own the majority of the stock of said corporation. Newton has been its president for the past twelve years, and has practically controlled all its affairs, except the immediate supervision of the sales at the New York agency. The other directors, except said Merriman, have had no real part in the direction of the company, but have concurred in and sanctioned the acts which are complained of. Newton is incompetent for the position of president and manager of the company, and has managed its business in such manner as to cause losses, and has continued in important positions (1) one Dayton, who was known to Newton to be dishonest, and to be dishonestly using and disposing of the property of the company, and (2) one Judson, who was known to have been a dishonest man. Newton secured the election of said Merriman to be secretary and treasurer, although Newton had reason to believe and had said that he believed, that Merriman was untrustworthy, and was using the company's funds for his own benefit. Newton has neglected to make certain lines and grades of goods which would have been, and which he knew would have been, profitable to the company. He has not allowed the books of the company to be audited, with the fraudulent design of concealing the true condition of its affairs from the stockholders. No dividend has been paid since the year 1866, when it was paid with borrowed money. Sundry specified statements of the pecuniary condition of the company which were presented to the stockholders were untrue, and were known to be untrue by those of the defendants who were directors

at the time when the respective statements were made, and in their statements the assets were largely overvalued. By means of their wrongful acts the corporation has been losing money, its debts have increased, and it is in danger of insolvency. The directors sanction all the wrongful acts, and a request to them to take proceedings for the relief of the stockholders would be useless. The bill prays for a discovery, and for the dissolution of the corporation, and the appointment of a receiver to distribute the assets among the creditors and stockholders, and for such further relief as the case may require.

The defendants have pleaded to the relief which is prayed for. The plea avers, that, by the statutes of the State of Connecticut, the courts of equity of the State are empowered to dissolve a corporation, and to wind up its affairs, (1) on the application of any shareholder of any corporation, if said court shall find that said corporation has voted to wind up its affairs, or has abandoned the business for which it was organized, and has thereafter neglected, within a reasonable time, or in a proper manner, to wind up its affairs and distribute its assets among its stockholders; (2) upon the petition of one-third of the stockholders of any joint-stock company; and that, under no other circumstances is a court of equity of the State empowered by its statutes to dissolve a corporation. The plea further avers, that said Suspender Company has never voted to wind up its affairs, or to abandon its business, and that the plaintiff is not the owner of one-third of the capital stock of the corporation, and is not one-third of its stockholders.

The plea having been set down for argument and having been argued, the question of its sufficiency is now before the court. The special relief which is prayed for is the dissolution of the defendant corporation, and the appointment of a receiver to divide its assets among creditors and stockholders, which division would be a practical dissolution. A court of chancery by virtue of its general equity powers, in the absence of statutory provisions, is not authorized to dissolve a corporation, or to distribute the assets of a corporation, which is pursuing its ordinary business, among its shareholders, so as to effect a practical and actual dissolution. "A court of equity may hold trustees of a corporation accountable for breach of trust, but cannot divest it of its corporate character and capacity," unless under the circumstances and in the cases in which the court is specially empowered by statute. Angell and Ames on Corporations, Sect. 777; *Verplanck v. Mercantile Ins. Co.* (1 Edw. Ch. R. 84); *Atty.-Gen. v. Utica Ins. Co.* (2 Johns. Ch. R. 371); *Slee v. Bloom* (5 Johns. Ch. R. 366, 380); *Gaylord v. Fort Wayne, &c. R. R. Co.* (6 Biss. 286); *Atty.-Gen. v. Reynolds* (1 Eq. Cas. Abr. 131). The statutes of Connecticut have authorized the courts of equity of this State to dissolve corporations and wind up their affairs, only in the two cases which have been mentioned. The circumstances which

give a court of equity in this State power to dissolve a corporation have not arisen in the case of the defendant company.

But, a court of equity of general jurisdiction has jurisdiction, at the instance of stockholders, to prevent a corporation and its officers from a wilful misapplication of the funds of the corporation, to the injury of the shares or the dividends of the stockholders, and from waste and misconduct which amounts to a breach of trust on the part of the managers, and from such acts as tend to the destruction of the franchises of the corporation, and to compel the officers to account for such waste or misconduct amounting to a breach of trust: *Dodge v. Woolsey* (18 How. 331); *Bacon v. Robertson* (18 How. 480); *Robinson v. Smith* (3 Paige, 222); *Heath v. Erie Railway Co.* (8 Blatchf. C. C. R. 347); *Pond v. Vermont Valley R. R. Co.* (12 Blatchf. C. C. R. 280); and, if it affirmatively appears that the directors have refused to prosecute in the name of the corporation, or if the controlling directors of the corporation are themselves the wrong-doers, and must be made defendants, the suit may be instituted by a stockholder. *Robinson v. Smith*; *Pond v. Vermont Valley R. R. Co.*; *Heath v. Erie Railway Co.* (cited *supra*). In the last-named case this branch of the subject was exhaustively examined.

It is insisted by the plaintiff that the plea should not be allowed, inasmuch as appropriate relief may be granted under the general prayer if the allegations of the bill are sustained. "A plea to a bill in equity may be good in part and not so in the whole; and the court will allow it as to so much of the bill as is properly applicable, unless it contains the vice of duplicity." *Kirkpatrick v. White* (4 Wash. C. C. R. 595). If the plea is allowed, the bill may be amended in respect to the prayers for relief, under equity rule 35. And when the specific relief which is sought is not within the power of the court to grant, and the defect has been pointed out by plea, it is just that the plaintiff should so amend his bill as to apprise the defendants of the hitherto undisclosed relief which he seeks to obtain. The defendants have successfully shown that the specific relief cannot be obtained, and the general prayer only remains. They are entitled to know the result which the plaintiff wishes now to accomplish. Langdell's Summary of Equity Pleading, Sect. 61. The amended prayers should be consistent with the case which is made by the bill.

The plea is allowed with costs, with liberty to the plaintiff, upon motion, to amend his bill in respect to the prayers for relief.

CHAPTER XIII.

THE CORPORATION AND THE STATE.

LEGISLATIVE CONTROL UNDER THE CONSTITUTION.

TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD.

(4 *Wheaton*, 517. 1819.)

THE opinion of the court was delivered by MARSHALL, CH. J. : —

This is an action of trover, brought by the Trustees of Dartmouth College against William H. Woodward in the State court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled. A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the Legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid and binding on the trustees, without their assent and not repugnant to the Constitution of the United States; otherwise, it finds for the plaintiffs. The Superior Court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, Do the acts to which the verdict refers violate the Constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a State is to be revised, — an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity with which it was formed. On more than one occasion, this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that in no doubtful case would it pronounce a legislative act to be contrary to the Constitution. But the American people have said, in the Constitution of the

United States, that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument, they have also said, "that the judicial power shall extend to all cases in law and equity arising under the Constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendants claim under three acts of the Legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled, "An Act to amend the charter, and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the Senate, the speaker of the House of Representatives, of New Hampshire, and the governor and lieutenant-governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The Acts of the 18th and 26th of December are supplemental to that of the 27th June, and are principally intended to carry that act into effect. The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated, that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction every ingredient of a complete and legitimate contract is to be found. The points for consideration are, 1. Is this contract protected by the Constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?

1. On the first point, it has been argued, that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a State, for State purposes, and to many of those laws concerning civil institutions which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which to preserve good government the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the Constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That, as the framers of the Constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power, of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the Legislature in future from violating the right to property. That, anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State Legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that, since the clause in the Constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the Legislature to legislate on the subject of divorces. Those acts enable some tribunals, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When

any State Legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it, without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the Constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if any of the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds, in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements, as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever, may not assert all the rights which they possessed, while in being; whether, if they be without personal representatives, who may feel injured by a violation of the compact, the trustees be not so completely their representatives, in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter. It becomes then the duty of the Court most seriously, to examine this charter, and to ascertain its true character.

From the instrument itself, it appears, that about the year 1754 the Rev. Eleazer Wheelock established, at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England, for carrying on and extending his undertaking. In this pious work, he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others, trustees of the money, which had been, and should be, contributed; which appointment Dr. Wheelock confirmed by a deed of trust,

authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut River, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English; and the proprietors in the neighborhood having made large offers of land, on condition that the college should there be placed. Dr. Wheelock then applied to the Crown for an act of incorporation; and represented the expediency of appointing those whom he had, by his last will, named as trustees in America, to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," etc., "and also of English youth, and any others," the charter was granted, and the trustees of Dartmouth College were, by that name, created a body corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college, such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power, by his last will, to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office, until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body, by death, resignation, removal, or disability; and also to make orders, ordinances, and laws for the government of the college, the same not being repugnant to the laws of Great Britain or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees. This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college was conveyed to, and vested in, the corporate body.

From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted entirely of private donations. It is, perhaps, not very important, who were the donors. The probability is, that the Earl of Dartmouth, and the other trustees in England, were, in fact, the largest contributors. Yet the legal conclusion from the facts recited in the charter would probably be, that Dr. Wheelock was the founder of the college. The origin of the institution was, undoubtedly, the Indian charity school, established by Dr. Wheelock at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees, who received the money, were

appointed by, and act under, his authority. It is not too much to say, that the funds were obtained by him, in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him, in his last will, as the trustees of his charity-school, compose a part of the corporation, and he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying that Dr. Wheelock was not, in law, to be considered as the founder (1 Bl. Com. 481) of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds, the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students. It is then an eleemosynary (1 Bl. Com. 471), and so far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority? That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution, founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the Legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Dr. Wheelock, as the keeper of his charity-school, instructing the Indians in the art of reading, and in our holy religion; sustaining them at his own expense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the Legislature have supposed, that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England, and in America, enabled him to extend his care to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant-tutors with the funds contributed by others, or had the trustees in England established a school, with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been

private tutors; and the fact that they were employed in the education of youth could not have converted them into public officers, concerned in the administration of public duties, or have given the Legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust, uncontrolled by legislative authority.

Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn, for its foundation is purely private and eleemosynary; not from the application of those funds, for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument, than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law, for the purpose of being employed by the same individuals, for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property, in a

particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public-spirited individuals, desirous of making permanent appropriations, for charitable or other useful purposes, find it impossible to effect their design securely and certainly, without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being, a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred, which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the Legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted, that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering

the premises and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and also that the best means of education be established in our province of New Hampshire, for the benefit of said province, do of our special grace," &c. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point, we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate, that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein;" that is, from establishing in the province, Dartmouth College, as constituted by the charter. But, if these words, considered alone, could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these, New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors on condition that the institution should be there established. The real advantages from the location of the college, are, perhaps, not less considerable to those on the west, than to those on the east side of Connecticut River. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth, and any others." So that the objects of the contributors, and the incorporating act, were the same; the promotion of Christianity, and of education generally, not the interests of New Hampshire particularly.

From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity-school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained, than on all that have been discussed. The founders of the college, at least, those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract, as the Constitution intended to withdraw from the power of State legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the Constitution is solicitous, and to which its protection is extended.

The Court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him, and them, to perpetuate their beneficent intention. It was granted. An artificial, immortal being, was created by the Crown, capable of receiving, and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but for something, in their opinion, of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives; they are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So, with respect to the students who are to derive learning from this source; the corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are in the aggregate to be exercised, asserted, and protected, by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their Parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had Parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet, then, as now, the donors would have no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said that the trustees, in whom the rights of all were combined, possess no private, individual, beneficial interest in the property confided to their protection. Yet the contract would, at that time, have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the Constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the Constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent occurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case, being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd or mis-

chievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the Constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the Constitution not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the Constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us, to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, charity, and education are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States, that contracts for their benefit must be excluded from the protection of words which in their natural import include them? Or do such contracts so necessarily require new modelling by the authority of the Legislature, that the ordinary rules of construction must be disregarded, in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited proves that they are not. The framers of the Constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science, by reserving to the government of the Union the power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." They have, so far, withdrawn science, and the useful arts, from the action of the State governments. Why then should they be supposed so regardless of contracts made for the advance-

ment of literature, as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the Constitution; neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent, as to require a forced construction of that instrument, in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations, which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind, to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the Legislature. All such gifts are made in the pleasing, perhaps, delusive hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our Constitution were strangers to it, and that feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies whose fluctuating policy and repeated interferences produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful, to justify the construction which makes it.

The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government; and the presumption, that if allowed to continue themselves, they now are, and must remain for ever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the Legislature. It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must necessarily, partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students.

Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter, by the Crown; but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented, "that for many weighty reasons, it would be expedient that the gentlemen whom he had already nominated, in his last will, to be trustees in America, should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the Crown, with the approbation of Dr. Wheelock. Among these, is the doctor himself. If any others were appointed, at the instance of the Crown, they are the governor, three members of the Council, and the speaker of the House of Representatives of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the Crown. If, in the revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation, which suspicion might excite, would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion, that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely cannot be assumed that his trustees were selected without judgment. With as little probability can it be assumed, that while the light of science, and of liberal principles, pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that while the human race is rapidly advancing, they are stationary. Reasoning *à priori*, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the Constitution, which would exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation, is, that this

is a contract, the obligation of which cannot be impaired, without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the Legislature of New Hampshire to which the special verdict refers.

From the review of this charter which has been taken, it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the Crown, it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the Crown was bound, and could have made no violent alteration in its essential terms, without impairing its obligation.

By the Revolution, the duties, as well as the powers, of government devolved on the people of New Hampshire. It is admitted, that among the latter was comprehended the transcendent power of Parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts and rights respecting property remained unchanged by the Revolution. The obligations, then, which were created by the charter to Dartmouth College were the same in the new, that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present Constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the Legislature, to be found in the constitution of the State. But the Constitution of the United States has imposed this additional limitation, that the legislature of a State shall pass no act "impairing the obligation of contracts."

It has been already stated, that the act "to amend the charter and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one; gives the appointment of the additional members to the executive of the State; and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the ex-

ecutive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the State. The will of the State is substituted for the will of the donors in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave, to the objects for which those funds were given; they contracted also to secure that application by the constitution of the corporation. They contracted for a system which should, so far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is re-organized; and re-organized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of the government. This may be for the advantage of this college in particular and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given.

In the view which has been taken of this interesting case the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves, as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors, with salaries. The first president was one of the original trustees; and the charter provides, that in case of vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president, until the trustees shall make choice of and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted, that those contracts only are protected by the Constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest, yet it is by no means clear that the trustees of Dartmouth College have no beneficial interest in themselves. But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and

completely representing the donors for the purpose of executing the trust, has rights which are protected by the Constitution.

It results from this opinion, that the acts of the Legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the Constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the State court must, therefore, be reversed.¹

CHARLES RIVER BRIDGE v. WARREN BRIDGE.

(11 *Peters*, (U. S.) 420. 1837.)

TANEY, C. J., delivered the opinion of the court:—

The questions involved in this case are of the gravest character, and the court have given to them the most anxious and deliberate consideration. The value of the right claimed by the plaintiffs is large in amount; and many persons may, no doubt, be seriously affected in their pecuniary interests by any decision which the court may pronounce; and the questions which have been raised as to the power of the several States, in relation to the corporations they have chartered, are pregnant with important consequences, not only to the individuals who are concerned in the corporate franchises, but to the communities in which they exist. The court are fully sensible that it is their duty, in exercising the high powers conferred on them by the Constitution of the United States, to deal with these great and extensive interests with the utmost caution; guarding, so far as they have the power to do so, the rights of property, and at the same time carefully abstaining from any encroachment on the rights reserved to the States.

It appears, from the record, that in the year 1650, the Legislature of Massachusetts granted to the president of Harvard College "the liberty and power" to dispose of the ferry from Charlestown to Boston, by lease or otherwise, in the behalf, and for the behoof, of the college; and that under that grant, the college continued to hold and keep the ferry, by its lessees or agents, and to receive the profits of it, until 1785. In the last-mentioned year, a petition was presented to the Legislature, by Thomas Russell and others, stating the inconvenience of the transportation by ferries, over Charles River, and the public advantages that would result from a bridge; and praying to be incorporated, for the purpose of erecting a bridge in the place where the ferry between Boston and Charlestown was then kept. Pursuant to this petition, the Legislature, on the 9th of March, 1785, passed an act incorporating a company, by the name of "The

¹ The concurring opinions of STORY and WASHINGTON, JJ., are omitted.

Proprietors of the Charles River Bridge," for the purposes mentioned in the petition. Under this charter, the company were empowered to erect a bridge, in "the place where the ferry was then kept;" certain tolls were granted, and the charter was limited to forty years from the first opening of the bridge for passengers; and from the time the toll commenced, until the expiration of this term, the company were to pay £200 annually, to Harvard College; and at the expiration of forty years, the bridge was to be the property of the Commonwealth; "saving (as the law expresses it) to the said college or university a reasonable annual compensation, for the annual income of the ferry, which they might have received had not the said bridge been erected."

The bridge was accordingly built, and was opened for passengers on the 17th of June, 1786. In 1792, the charter was extended to seventy years from the opening of the bridge; and at the expiration of that time, it was to belong to the Commonwealth. The corporation have regularly paid to the college the annual sum of £200, and have performed all of the duties imposed on them by the terms of their charter.

In 1828, the Legislature of Massachusetts incorporated a company by the name of "The Proprietors of the Warren Bridge," for the purpose of erecting another bridge over Charles River. This bridge is only sixteen rods, at its commencement on the Charlestown side, from the commencement of the bridge of the plaintiffs; and they are about fifty rods apart, at their termination on the Boston side. The travellers who pass over either bridge, proceed from Charlestown square, which receives the travel of many great public roads leading from the country, and the passengers and travellers who go to and from Boston used to pass over the Charles River Bridge, from and through this square, before the erection of the Warren Bridge.

The Warren Bridge, by the terms of its charter, was to be surrendered to the State, as soon as the expenses of the proprietors in building and supporting it should be reimbursed; but this period was not, in any event, to exceed six years from the time the company commenced receiving toll.

When the original bill in this case was filed, the Warren Bridge had not been built; and the bill was filed, after the passage of the law, in order to obtain an injunction to prevent its erection, and for general relief. The bill, among other things, charged as a ground for relief, that the act for the erection of the Warren Bridge impaired the obligation of the contract between the Commonwealth and the proprietors of the Charles River Bridge; and was, therefore, repugnant to the Constitution of the United States. Afterwards, a supplemental bill was filed, stating that the bridge had then been so far completed, that it had been opened for travel, and that divers persons had passed over, and thus avoided the payment of the toll, which would otherwise

have been received by the plaintiffs. The answer to the supplemental bill admitted that the bridge has been so far completed, that foot passengers could pass; but denied that any persons but the workmen and the superintendents had passed over, with their consent. In this state of the pleadings, the cause came on for hearing in the supreme judicial court for the county of Suffolk, in the Commonwealth of Massachusetts, at November term, 1829; and the court decided, that the act incorporating the Warren Bridge did not impair the obligation of the contract with the proprietors of the Charles River Bridge, and dismissed the complainants' bill; and the case is brought here by writ of error from that decision. It is, however, proper to state, that it is understood that the State court was equally divided upon the question; and that the decree dismissing the bill, upon the ground above stated, was pronounced by a majority of the court, for the purpose of enabling the complainants to bring the question for decision before this court.

In the argument here, it was admitted, that since the filing of the supplemental bill a sufficient amount of toll had been reserved by the proprietors of the Warren Bridge to reimburse all their expenses, and that the bridge is now the property of the State, and has been made a free bridge; and that the value of the franchise granted to the proprietors of the Charles River Bridge has by this means been entirely destroyed. If the complainants deemed these facts material, they ought to have been brought before the State court, by a supplemental bill; and this court, in pronouncing its judgment, cannot regularly notice them. But in the view which the court take of this subject, these additional circumstances would not in any degree influence their decision. And as they are conceded to be true, and the case has been argued on that ground, and the controversy has been for a long time pending, and all parties desire a final end of it; and as it is of importance to them that the principles on which this court decide should not be misunderstood; the case will be treated, in the opinion now delivered, as if these admitted facts were regularly before us.

A good deal of evidence has been offered, to show the nature and extent of the ferry-right granted to the collegé, and also to show the rights claimed by the proprietors of the bridge, at different times, by virtue of their charter; and the opinions entertained by committees of the Legislature, and others, upon that subject. But as these circumstances do not affect the judgment of this court, it is unnecessary to recapitulate them.

The plaintiffs in error insist, mainly, upon two grounds:—
1st. That by virtue of the grant of 1650, Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charles-town and Boston; that this right was exclusive; and that the Legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college; and

that these rights, upon the erection of the bridge in the place of the ferry, under the charter of 1785, were transferred to, and became vested in "The Proprietors of the Charles River Bridge;" and that under and by virtue of this transfer of the ferry-right, the rights of the bridge company were as exclusive in that line of travel as the rights of the ferry. 2d. That independently of the ferry-right, the acts of the Legislature of Massachusetts, of 1785 and 1792, by their true construction, necessarily implied, that the Legislature would not authorize another bridge, and especially, a free one, by the side of this, and placed in the same line of travel, whereby the franchise granted to the "Proprietors of the Charles River Bridge," should be rendered of no value; and the plaintiffs in error contend, that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the State; and that the law authorizing the erection of the Warren Bridge in 1828 impairs the obligation of one or both of these contracts.

It is very clear, that in the form in which this case comes before us (being a writ of error to a State court), the plaintiffs, in claiming under either of these rights, must place themselves on the ground of contract, and cannot support themselves upon the principle that the law divests vested rights. It is well settled, by the decision of this court, that a State law may be retrospective in its character, and may divest vested rights, and yet not violate the Constitution of the United States, unless it also impairs the obligation of a contract. In *Satterlee v. Matthewson* (2 Pet. 413), this court, in speaking of the State law then before them, and interpreting the article in the Constitution of the United States which forbids the States to pass laws impairing the obligation of contracts, uses the following language; "It (the State law) is said to be retrospective; be it so. But retrospective laws which do not impair the obligation of contracts, or partake of the character of *Ex post facto* laws, are not condemned or forbidden by any part of that instrument" (the Constitution of the United States). And in another passage in the same case, the court say: "The objection, however, most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this act was to divest rights which were vested by law in *Satterlee*. There is, certainly, no part of the Constitution of the United States which applies to a State law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law, upon this ground, provided its effect be not to impair the obligation of a contract." The same principles were re-affirmed in this court, in the late case of *Watson and others v. Mercer*, decided in 1834 (8 Pet. 110): "As to the first point" say the court, "it is clear, that this court has no right to pronounce an act of the State Legislature void, as contrary to the Constitution of the United States, from the mere fact, that it divests antecedent vested rights of property. The Constitution of the

United States does not prohibit the States from passing retrospective laws, generally, but only *ex post facto* laws."

After these solemn decisions of this court, it is apparent that the plaintiffs in error cannot sustain themselves here, either upon the ferry-right, or the charter to the bridge, upon the ground that vested rights of property have been divested by the Legislature. And whether they claim under the ferry-right, or the charter to the bridge, they must show that the title which they claim was acquired by contract, and that the terms of that contract have been violated by the charter to the Warren Bridge. In other words, they must show, that the State had entered into a contract with them, or those under whom they claim, not to establish a free bridge at the place where the Warren Bridge is erected. Such, and such only, are the principles upon which the plaintiffs in error can claim relief in this case.

The nature and extent of the ferry-right granted to Harvard College, in 1650, must depend upon the laws of Massachusetts; and the character and extent of this right has been elaborately discussed at the bar. But in the view which the court take of the case before them, it is not necessary to express any opinion on these questions. For, assuming that the grant to Harvard College, and the charter to the bridge company, were both contracts, and that the ferry-right was as extensive and exclusive as the plaintiffs contend for, still they cannot enlarge privileges granted to the bridge, unless it can be shown, that the rights of Harvard College in this ferry have, by assignment, or in some other way, been transferred to the proprietors of the Charles River Bridge, and still remain in existence, vested in them, to the same extent with that in which they were held and enjoyed by the college, before the bridge was built.

It has been strongly pressed upon the court, by the plaintiffs in error, that these rights are still existing, and are now held by the proprietors of the bridge. If this franchise still exists, there must be somebody possessed of authority to use it, and to keep the ferry. Who could now lawfully set up a ferry, where the old one was kept? The bridge was built in the same place, and its abutments occupied the landings of the ferry. The transportation of passengers in boats, from landing to landing, was no longer possible, and the ferry was as effectually destroyed as if a convulsion of nature had made there a passage of dry land. The ferry, then, of necessity, ceased to exist, as soon as the bridge was erected; and when the ferry itself was destroyed, how can rights which were incident to it be supposed to survive? The exclusive privileges, if they had such, must follow the fate of the ferry, and can have no legal existence without it; and if the ferry-right had been assigned by the college, in due and legal form, to the proprietors of the bridge, they themselves extinguished that right, when they erected the bridge in its place. It is not supposed by any one that the bridge company have a right to keep a ferry. No such right is claimed for them, nor can be claimed

for them, under their charter to erect a bridge; and it is difficult to imagine, how ferry-rights can be held by a corporation, or an individual, who have no right to keep a ferry. It is clear that the incident must follow the fate of the principal, and the privilege connected with property cannot survive the destruction of the property; and if the ferry-right in Harvard College was exclusive, and had been assigned to the proprietors of the bridge, the privilege of exclusion could not remain in the hands of their assignees, if those assignees destroyed the ferry.

Upon what ground can the plaintiffs in error contend that the ferry-rights of the college have been transferred to the proprietors of the bridge? If they have been thus transferred, it must be by some mode of transfer known to the law; and the evidence relied on to prove it can be pointed out in the record. How was it transferred? It is not suggested, that there ever was, in point of fact, a deed of conveyance executed by the college to the bridge company. Is there any evidence in the record from which such a conveyance may, upon legal principle, be presumed? The testimony before the court, so far from laying the foundation for such a presumption, repels it, in the most positive terms. The petition to the Legislature, in 1785, on which the charter was granted, does not suggest an assignment, nor any agreement or consent on the part of the college; and the petitioners do not appear to have regarded the wishes of that institution as by any means necessary to ensure their success. They place their application entirely on considerations of public interest and public convenience, and the superior advantages of a communication across Charles River, by a bridge instead of a ferry. The Legislature, in granting the charter, show by the language of the law, that they acted on the principles assumed by the petitioners. The preamble recites that the bridge "will be of great public utility;" and that is the only reason they assign for passing the law which incorporates this company. The validity of the charter is not made to depend on the consent of the college, nor of any assignment or surrender on their part; and the Legislature deal with the subject, as if it were one exclusively within their own power, and as if the ferry-right were not to be transferred to the bridge company, but to be extinguished; and they appear to have acted on the principle, that the State, by virtue of its sovereign powers and eminent domain, had a right to take away the franchise of the ferry, because, in their judgment, the public interest and convenience would be better promoted by a bridge in the same place; and upon that principle, they proceed to make a pecuniary compensation to the college, for the franchise thus taken away; and as there is an express reservation of a continuing pecuniary compensation to the college, when the bridge shall become the property of the State, and no provision whatever for the restoration of the ferry-right, it is evident that no such right was intended to be reserved or continued. The ferry, with all its privi-

leges, was intended to be forever at an end, and a compensation in money was given in lieu of it. The college acquiesced in this arrangement, and there is proof, in the record, that it was all done with their consent. Can a deed of assignment to the bridge company, which would keep alive the ferry-rights in their hands, be presumed, under such circumstances? Do not the petition, the law of incorporation, and the consent of the college to the pecuniary provision made for it, in perpetuity, all repel the notion of an assignment of its rights to the bridge company, and prove that every party to this proceeding intended that its franchises, whatever they were, should be resumed by the State, and be no longer held by any individual or corporation? With such evidence before us, there can be no ground for presuming a conveyance to the plaintiffs. There was no reason for such a conveyance; there was every reason against it; and the arrangements proposed by the charter to the bridge could not have been carried into full effect, unless the rights of the ferry were entirely extinguished.

It is however said, that the payment of the £200 a year to the college, as provided for in the law, gives to the proprietors of the bridge an equitable claim to be treated as the assignees of their interest; and by substitution, upon chancery principles, to be clothed with all their rights. The answer to this argument is obvious. This annual sum was intended to be paid out of the proceeds of the tolls which the company were authorized to collect. The amount of the tolls, it must be presumed, was graduated with a view to this incumbrance, as well as to every other expenditure to which the company might be subjected, under the provisions of their charter. The tolls were to be collected from the public, and it was intended that the expense of the annuity to Harvard College should be borne by the public; and it is manifest that it was so borne, from the amount which it is admitted they received, until the Warren Bridge was erected. Their agreement, therefore, to pay that sum can give them no equitable right to be regarded as the assignees of the college, and certainly can furnish no foundation for presuming a conveyance; and as the proprietors of the bridge are neither the legal nor equitable assignees of the college, it is not easy to perceive how the ferry franchise can be invoked in aid of their claims, if it were even still a subsisting privilege, and had not been resumed by the State, for the purpose of building a bridge in its place.

Neither can the extent of the pre-existing ferry-right, whatever it may have been, have any influence upon the construction of the written charter for the bridge. It does not by any means follow, that because the legislative power of Massachusetts, in 1650, may have granted to a justly-favored seminary of learning, the exclusive right of ferry between Boston and Charlestown, they would, in 1785, give the same extensive privilege to another corporation, who were about to erect a bridge in the same place.

The fact that such a right was granted to the college, cannot, by any sound rule of construction, be used to extend the privileges of the bridge company beyond what the words of the charter naturally and legally import. Increased population, longer experience in legislation, the different character of the corporations which owned the ferry from that which owned the bridge, might well have induced a change in the policy of the State in this respect; and as the franchise of the ferry, and that of the bridge, are different in their nature, and were each established by separate grants, which have no words to connect the privileges of the one with the privileges of the other, there is no rule of legal interpretation which would authorize the court to associate these grants together, and to infer that any privilege was intended to be given to the bridge company, merely because it had been conferred on the ferry. The charter to the bridge is a written instrument which must speak for itself, and be interpreted by its own terms.

This brings us to the act of the Legislature of Massachusetts of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge;" and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs. Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the State, may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises, by the public, to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals. In the case of the *Proprietors of the Stourbridge Canal v. Wheeley and others* (2 B. & Ad. 793), the court say, "The canal having been made under an act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this,—that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act." And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined, for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal were expressly secured by the act of Parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the

canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had given it for articles which passed "through any one or more of the locks," and had said nothing as to toll for navigating one of the levels; the court held, that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant, if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still, the right to exact toll could not be implied, because such a privilege was not found in the charter.

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle, where corporations are concerned? Are we to apply to acts of incorporation a rule of construction differing from that of the English law, and, by implication, make the terms of a charter, in one of the States, more unfavorable to the public, than upon an act of Parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned, for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction, in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of community, than would be done in a like case in an English court of justice.

But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this court; and the rule of construction, above stated, fully established. In the case of the *United States v. Arredondo* (8 Pet. 738), the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the court; and the principle recognized, that in grants by the public nothing passes by implication. The rule is still more clearly and plainly stated in the case of *Jackson v. Lamphire* (3 Pet. 289). That was a grant of land by the State; and in speaking of this doctrine of implied covenants, in grants by the State, the court use the follow-

ing language, which is strikingly applicable to the case at bar: "The only contract made by the State is the grant to John Cornelius, his heirs and assigns, of the land in question. The patent contains no covenant to do, or not to do, any further act in relation to the land; and we do not feel ourselves at liberty, in this case, to create one by implication. The State has not, by this act, impaired the force of the grant; it does not profess or attempt to take the land from the assigns of Cornelius, and give it to one not claiming under him; neither does the award produce that effect; the grant remains in full force; the property conveyed is held by his grantee, and the State asserts no claim to it." The same rule of construction is also stated in the case of *Beatty v. Lessee of Knowler* (4 Pet. 168), decided in this court in 1830. In delivering their opinion in that case, the court say: "That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation."

But the case most analogous to this, and in which the question came more directly before the court, is the case of the *Providence Bank v. Billings* (4 Pet. 514), which was decided in 1830. In that case, it appeared that the Legislature of Rhode Island had chartered the bank, in the usual form of such acts of incorporation. The charter contained no stipulation on the part of the State, that it would not impose a tax on the bank, nor any reservation of the right to do so. It was silent on this point. Afterwards, a law was passed imposing a tax on all banks in the State; and the right to impose this tax was resisted by the Providence Bank, upon the ground, that if the State could impose a tax, it might tax so heavily as to render the franchise of no value, and destroy the institution; that the charter was a contract, and that a power which may in effect destroy the charter is inconsistent with it, and is impliedly renounced by granting it. But the court said, that the taxing power was of vital importance, and essential to the existence of government; and that the relinquishment of such a power is never to be assumed. And in delivering the opinion of the court, the late chief justice states the principle in the following clear and emphatic language. Speaking of the taxing power, he says, "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear." The case now before the court is, in principle, precisely the same. It is a charter from a State; the act of incorporation is silent in relation to the contested power. The argument in favor of the proprietors of the Charles River Bridge is the same almost in words with that used by the Providence Bank; that is, that the power claimed by the State, if it exists, may be so used as to destroy the value of the franchise

they have granted to the corporation. The argument must receive the same answer; and the fact that the power had been already exercised, so as to destroy the value of the franchise, cannot in any degree affect the principle. The existence of the power does not, and cannot, depend upon the circumstance of its having been exercised or not.

It may, perhaps, be said, that in the case of the Providence Bank, this court were speaking of the taxing power; which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges, that a State has surrendered, for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court above quoted, "that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear." The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power, nor is it so limited, in the opinion delivered. On the contrary, it was strictly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the State would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition, for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the proprietors of

the Charles River Bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and establishes certain rates of toll, which the company are authorized to take; this is the whole grant. There is no exclusive privilege given to them over the waters of Charles River, above or below their bridge; no right to erect another bridge themselves, nor to prevent other persons from erecting one; no engagement from the State, that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects, the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used from which an intention to grant any of these rights can be inferred; if the plaintiff is entitled to them, it must be implied, simply, from the nature of the grant; and cannot be inferred from the words by which the grant is made.

The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it, or from it, less convenient. None of the faculties or franchises granted to that corporation have been revoked by the Legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren Bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint; for it is not pretended, that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order, then, to entitle themselves to relief, it is necessary to show that the Legislature contracted not to do the act of which they complain; and that they impaired, or in other words, violated, that contract, by the erection of the Warren Bridge.

The inquiry, then is, Does the charter contain such a contract on the part of the State? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none; no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication; and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question: in charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, pur-

port to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this court to Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce, and the purposes of travel, shall not be construed to have been surrendered or diminished by the State; unless it shall appear by plain words, that it was intended to be done.

But the case before the court is even still stronger against any such implied contract as the plaintiffs in error contend for. The Charles River Bridge was completed in 1786; the time limited for the duration of the corporation, by their original charter, expired in 1826. When, therefore, the law passed authorizing the erection of the Warren Bridge, the proprietors of Charles River Bridge held their corporate existence under the law of 1792, which extended their charter for thirty years; and the rights, privileges, and franchises of the company must depend upon the construction of the last-mentioned law, taken in connection with the Act of 1785.

The Act of 1792, which extends the charter of this bridge, incorporates another company to build a bridge over Charles River; furnishing another communication with Boston, and distant only between one and two miles from the old bridge. The first six sections of this act incorporate the proprietors of the West Boston Bridge, and define the privileges, and describe the duties of that corporation. In the 7th section there is the following recital: "And whereas, the erection of Charles River Bridge was a work of hazard and public utility, and another bridge in the place of West Boston Bridge may diminish the emoluments of Charles River Bridge; therefore, for the encouragement of enterprise," they proceed to extend the charter of the Charles River Bridge, and to continue it for the term of seventy years from the day the bridge was completed; subject to the conditions prescribed in the original act, and to be entitled to the same tolls. It appears, then, that by the same act that extended this charter, the Legislature established another bridge, which they knew would lessen its profits; and this too, before the expiration of the first charter, and only seven years after it was granted; thereby showing that the State did not suppose that, by the terms it had used in the first law, it had deprived itself of the power of making such public improvements as might impair the profits of the Charles River Bridge; and from the language used in the clauses of the law by which the charter is extended, it would seem that the Legislature were especially careful to exclude any inference that the extension was made upon the ground of compromise with the bridge company, or as a compensation for rights im-

paired. On the contrary, words are cautiously employed to exclude that conclusion; and the extension is declared to be granted as a reward for the hazard they had run, and "for the encouragement of enterprise." The extension was given, because the company had undertaken and executed a work of doubtful success; and the improvements which the Legislature then contemplated might diminish the emoluments they had expected to receive from it.

It results from this statement, that the Legislature, in the very law extending the charter, asserts its rights to authorize improvements over Charles River which would take off a portion of the travel from this bridge and diminish its profits; and the bridge company accept the renewal thus given, and thus carefully connected with this assertion of the right on the part of the State. Can they, when holding their corporate existence under this law, and deriving their franchises altogether from it, add to the privileges expressed in their charter, an implied agreement, which is in direct conflict with a portion of the law from which they derive their corporate existence? Can the Legislature be presumed to have taken upon themselves an implied obligation, contrary to its own acts and declarations contained in the same law? It would be difficult to find a case justifying such an implication, even between individuals; still less will it be found, where sovereign rights are concerned, and where the interests of a whole community would be deeply affected by such an implication. It would, indeed, be a strong exertion of judicial power, acting upon its own views of what justice required and the parties ought to have done, to raise, by a sort of judicial coercion, an implied contract, and infer it from the nature of the very instrument in which the Legislature appear to have taken pains to use words which disavow and repudiate any intention, on the part of the State, to make such a contract.

Indeed, the practice and usage of almost every State in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession, on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and travelling. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporation supposed that their privileges were invaded, or any contract violated on the part of the State. Amid the multitude of cases which have occurred, and have been daily occurring, for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it, from an ordinary act of incorporation containing nothing more than the

usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves, that neither States, nor individuals, nor corporations ever imagined that such a contract could be implied from such charters. It shows that the men who voted for these laws never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party. We cannot deal thus with the rights reserved to the States; and by legal intendments and mere technical reasoning take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well-being and prosperity.

And what would be the fruits of this doctrine of implied contracts, on the part of the States, and of property in a line of travel, by a corporation, if it would now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it, in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach, without invading its rights in the privileged line? If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood, that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling; and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless indeed we resort to the old feudal grants, and to the

exclusive rights of ferries, by prescription, between towns; and are prepared to decide that when a turnpike road from one town to another had been made, no railroad or canal, between these two points, could afterwards be established. This court are not prepared to sanction principles which must lead to such results.

Many other questions of the deepest importance have been raised and elaborately discussed in the argument. It is not necessary, for the decision of this case, to express our opinion upon them; and the court deem it proper to avoid volunteering an opinion on any question involving the construction of the Constitution, where the case itself does not bring the question directly before them, and make it their duty to decide upon it. Some questions, also, of a purely technical character have been made and argued, as to the form of proceeding and the right to relief. But enough appears on the record to bring out the great question in contest; and it is the interest of all parties concerned that the real controversy should be settled, without further delay: and as the opinion of the court is pronounced on the main question in dispute here, and disposes of the whole case, it is altogether unnecessary to enter upon the examination of the forms of proceeding in which the parties have brought it before the court.

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, dismissing the plaintiffs' bill, must therefore be affirmed, with costs.¹

THORPE *v.* RAILROAD COMPANY.

(27 Vt. 140. 1855.)

ACTION on the case to recover damages for sheep of the plaintiff killed by one of the defendants' locomotives, upon their railroad track, where said sheep had escaped in consequence of there being no cattle-guard at a farm-crossing, across the defendant's railroad on the plaintiff's land in Charlotte. The only question reserved at the trial in the county court was, whether the defendants were bound by the provision in the general railroad act of 1849, requiring railroad companies to construct and maintain cattle-guards; there being no such obligation imposed upon the defendants by their charter, which was granted in 1843.

The county court decided and instructed the jury that the defendants were bound by said provision, to which the defendants excepted.

The opinion of the court was delivered by

REDFIELD, C. J.: —

¹ The opinions of McLEAN, and BALDWIN, JJ., concurring, and STORY and THOMPSON, JJ., dissenting, are omitted.

1. The present case involves the question of the right of the Legislature to require existing railways to respond in damages for all cattle killed or injured by their trains until they erect suitable cattle-guards at farm-crossings. No question could be made where such a requisition was contained in the charter of the corporation, or in the general laws of the State at the date of the charter. But where neither is the case, it is claimed that it is incompetent for the Legislature to impose such an obligation by statute, subsequent to the date of the charter.

It has never been questioned, so far as I know, that the American Legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American States. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State Legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular State in question. I am not aware that the constitution of this State contains any restriction upon the Legislature in regard to corporations, unless it be that where "any person's property is taken for the use of the public, the owner ought to receive an equivalent in money;" or that there is any such restriction in the United States Constitution, except that prohibiting the States from "passing any law impairing the obligation of contracts."

It is a conceded point, upon all hands, that the Parliament of Great Britain is competent to make any law binding upon corporations, however much it may increase their burdens or restrict their powers, whether general or organic, even to the repeal of their charters.

This extent of power is recognized in the case of *Dartmouth College v. Woodward* (4 Wheaton, 518), and the leading authorities are there referred to. Any requisite amount of authority, giving this unlimited power over corporations to the British Parliament, may readily be found. And if, as we have shown, the several State Legislatures have the same extent of legislative power, with the limitations named, the inviolability of these artificial bodies rests upon the same basis in the American States with that of natural persons, and there are, no doubt, many of the rights, powers, and functions of natural persons which do not come within legislative control. Such, for instance, as are purely and exclusively of private concern, and in which the body politic, as such, have no special interest.

2. It being assumed, then, that the Legislature may control the action, prescribe the functions and duties of corporations, and impose restraints upon them to the same extent as upon natural persons, that is, in all matters coming within the general range of

legislative authority, subject to the limitation of not impairing the obligation of contracts, provided the essential franchise is not taken without compensation, it becomes of primary importance to determine the extent to which the charter of a corporation may fairly be regarded as a contract within the meaning of the United States Constitution.

Upon this subject, the decisions of the United States Supreme Court must be regarded as of paramount authority. And the case of *Dartmouth College v. Woodward*, being so much upon the very point now under consideration, and the leading case, and authoritative exposition of the court of last resort upon that subject, must be considered as the common starting point, the point of divergence, so to speak, of all the contrariety of opinion in regard to it.

Mr. Chief Justice Marshall there says, "A corporation is an artificial being, — the mere creature of the law; it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." The decision throughout treats this as the fundamental idea, the pivot upon which the case turns. The charter of a corporation is thus regarded as a contract, inasmuch as it is an implied undertaking on the part of the State, that the corporation, as such, and for the purposes therein named or implied, shall enjoy the powers and franchises by its charter conferred. And any statute essentially modifying these corporate franchises is there regarded as a violation of the charter. But when we come to inquire what is meant by the franchises of a corporation, the principal difficulty arises. Certain things, it is agreed, are essential to the beneficial existence and successful operation of a corporation, such as individuality and perpetuity, when the grant is unlimited; the power to sue and be sued, to have a common seal and to contract; and in the case of a railroad, to have a common stock, to construct and maintain its road, and to operate the same for the common benefit of the corporators. Certain other things, as incident to the beneficial use of these franchises, are necessarily implied. But there is a wide field of debatable ground outside of all these. It is conceded that the powers expressly, or by necessary implication, conferred by the charter, and which are essential to the successful operation of the corporations, are inviolable.

But it has sometimes been supposed that corporations possess a kind of immunity and exemption from legislative control, extending to everything materially affecting their interest, and where there is no express reservation in their charters. It was upon this ground that a perpetual exemption from taxation was claimed in *Providence Bank v. Billings* (4 Peters, 514), their charter being general, and no power of taxation reserved to the State. The argument was, that the right to tax either their property or their stock was not only an abridgment of the beneficial use of the franchise, but, if it existed, was capable of being so exercised as virtually to destroy it. This

was certainly plausible, and the court do not deny the liability to so exercise the power of taxation as to absorb the entire profits of the institution. But still they deny the exemption claimed. Chief Justice Marshall there says: "The great object of an incorporation is, to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist."

This is sufficiently explicit, and upon examination will be found, I think, to have placed the matter upon its true basis. In reason, it would seem that no fault could be found with the rule here laid down by the great expounder of American constitutional law. As to the general liability to legislative control, it places natural persons and corporations precisely upon the same ground. And it is the true ground, and the only one upon which equal rights and just liabilities and duties can be fairly based.

To apply this rule to the present case, it must be conceded that all which goes to the constitution of the corporation and its beneficial operation is granted by the Legislature, and cannot be revoked, either directly or indirectly, without a violation of the grant, which is regarded as impairing the contract, and so prohibited by the United States Constitution. And if we suppose the Legislature to have made the same grant to a natural person which they did to defendants, which they may undoubtedly do, *Moor v. Veasie* (32 Maine 343; s. c. in error in the Sup. Ct. U.S., 4 Peters, 568), it would scarcely be supposed that they hereby parted with any general legislative control over such person, or the business secured to him. Such a supposition, when applied to a single natural person, sounds almost absurd. But it must, in fact, be the same thing when applied to a corporation, however extensive. In either case, the privilege of running the road, and taking tolls or fare and freight, is the essential franchise conferred. Any act essentially paralyzing this franchise, or destroying the profits therefrom arising, would no doubt be void. But beyond that, the entire power of the legislative control resides in the Legislature, unless such power is expressly limited in the grant to the corporation, as by exempting their property from taxation, in consideration of a share of the profits, or a bonus, or the public duties assumed. And it has been questioned how far one Legislature could, in this manner, abridge the general power of every sovereignty to impose taxes to defray the expense of public functions. *Brewster v. Hough* (10 New Hamp. 138); *Mechanics' and Traders' Bank v. Debolt* (1 Ohio, 591); *Toledo Bank v. Bond* (Ibid. 622). It seems to me there is some ground to question the right of the Legislature to extinguish, by one act, this essential right of sovereignty. I would not be surprised to find it brought into general doubt. But at present it seems to be pretty generally acquiesced in. *State of New Jersey v. Wilson* (7 Cranch, 164); reaffirmed

in *Gordon v. Appeal Tax Court* (3 Howard, 133). But all the decisions in the United States Supreme Court, allowing the Legislature to grant irrevocably any essential prerogative of sovereignty, require it to be upon consideration, and, in the case of corporations, contemporaneous with the creation of the franchise. *Richmond R. Co. v. The Louisa R. Co.* (13 Howard, 71). Similar decisions in regard to the right of the Legislature to grant perpetual exemption from taxation to corporations and property, the title to which is derived from the State, have been made by this court, *Herrick v. Randolph* (13 Vt. 525); and in some of the other States, *Landon v. Litchfield* (11 Conn. 251), and cases cited; *O'Donnell v. Bailey* (24 Miss. 386). But these cases do not affect to justify even this express exemption from taxation being held inviolable, except upon the ground that it formed a part of the value of the grant, for which the State received or stipulated for a consideration.

But in the present case the question arises upon the statute of 1850, requiring all railways in the State to make and maintain cattle-guards at farm-crossings, and until they do so, making them liable for damage done to cattle by their engines, by reason of defect of fences, or cattle-guards. The defendants' charter required them to fence their road, but no express provision is made in regard to cattle-guards. There is no pretence of any express exemption in the charter upon this subject, or that such an implied exemption can fairly be said to form a condition of the act of incorporation, unless everything is implied by grant which is not expressly inhibited; whereas the true rule of construction in regard to the powers of corporations is, that they are to take nothing by intendment, but what is necessary to the enjoyment of that which is expressly granted. In addition to the cases already cited, we may here refer to the language of the opinion of Grier, Justice, in *Richmond R. Co. v. Louisa R. Co.* (13 Howard, 71), citing from the former decisions of the court with approbation, "that public grants are to be construed strictly, that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing but what is clearly given by the act." This, being the definitive determination of the court of last resort, upon this subject, in so recent a case, should be regarded as final, if there be any such thing anywhere. And the language of Taney, Chief Justice, in *Charles River Bridge v. Warren Bridge* (11 Peters, 548), is still more specific, and in my judgment eminently just and conservative: "The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to privileged corporations." The conclusion of this learned judge and eminent jurist is, that no claim in any way abridging the most unlimited exercise of the legislative power over persons, natural or artificial, can be successfully asserted,

except upon the basis of an express grant, in terms, or by necessary implication.

But upon the principle contended for in *Providence Bank v. Billings* (*supra*), and sometimes attempted to be maintained in favor of other corporations, most of the railways in this State would be quite beyond the control of the Legislature, as well as to their own police, as that of the State generally. For in very few of their charters are these matters defined, or the control of them reserved to the Legislature. Many of the charters do not require the roads to be fenced. But in *Quimby v. The Vermont Cent. R. Co.* (23 Vt. 387), it was considered that the corporation were bound, as part of the compensation to landowners, either to build fences or pay for them. The same was also held in *Morse v. Boston and Maine R.* (2 Cush. 536). Any other construction will enable railroad corporations to take land without adequate compensation, which is in violation of the State constitution, and would make the charter void to that extent. So, too, in regard to farm-crossings, the charters of many roads are silent. And it has been held that the provision for restoring private ways does not apply to farm-crossings. But the railways, without exception, built farm-crossings, regarding them as an economical mode of reducing land damages, and they are now bound to maintain them, however the case might have been if none had been stipulated for, and the damages assessed accordingly. *Manning v. Eastern Counties Railway Co.* (12 M. & W. 237). So, too, many of the charters are silent as to cattle-guards at road-crossings, but the roads generally acquiesced in their necessity, both for the security of property and persons upon the railroad and of cattle in the highway. For it has been held that this provision is for the protection of all cattle in the highway. *Fawcett v. The York and North Midland R. Co.* (2 Law & Eq. 289); *Trow v. Vermont Cent. R. Co.* (24 Vt. 487). Thus making a distinction in regard to the extent of the liability of railways for damages arising through defects of fences and farm-crossings and cattle-guards, at those points, and those which arise from defects of fences and cattle-guards at road crossings, the former being only for the protection of cattle, rightfully in the adjoining fields, as was held in *Jackson v. R. & B. R. Co.* (25 Vt. 150), and the other for the protection of all cattle in the highway, unless perhaps, in some excepted cases, amounting to gross negligence in the owners. And there can be no doubt of the perfect right of the Legislature to make the same distinction in regard to the extent of the liability of railways in the Act of 1850, if such was their purpose, which thus becomes a matter of construction.

But the present case resolves itself into the narrow question of the right of the Legislature, by general statute, to require all railways, whether now in operation or hereafter to be chartered or built, to fence their roads upon both sides, and provide sufficient cattle-guards at all farm and road crossings, under penalty of paying all

damage caused by their neglect to comply with such requirements. It might be contended that cattle-guards are a necessary part of the fence at all crossings, but that has been questioned, and we think the matter should be decided upon the general ground. It was supposed that the question was settled by this court, in *Nelson v. F. & C. R. Co.* (26 Vt. 717). The general views of the court are there stated as clearly as it could now be done, but as the general question is of vast importance, both to the roads and the public, and has again been urged upon our consideration, we have examined it very much, in detail.

We think the power of the Legislature to control existing railways in this respect, may be found in the general control over the police of the country, which resides in the law-making power in all free states, and which is, by the fifth article of the bill of rights of this State, expressly declared to reside perpetually and inalienably in the Legislature; which is, perhaps, no more than the enunciation of a general principle applicable to all free states, and which cannot, therefore, be violated so as to deprive the Legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railroads, to be carried into effect by their by-laws and other regulations, it is, of course, always, in all such cases, subject to the superior control of the Legislature. That is a responsibility which Legislatures cannot divest themselves of, if they would.

This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, *Sic utere tuo ut alienum non laedas*, which being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. So far as railroads are concerned, this police power, which resides primarily and ultimately in the Legislature, is two-fold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes, and by their officers. We apprehend there can be no manner of doubt that the Legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several railroads in the State to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country, for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut Legislature to require trains upon all their railroads to

come to a stand before passing draws in bridges; or of the Massachusetts Legislature to require the same thing before passing another railroad. And by parity of reason may all railways be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.

There would be no end of illustrations upon this subject, which in the detail are more familiar to others than to us. It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be. *Hegeman v. Western R. Co.* (16 Barbour, 353).

2. There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, of the perfect right in the Legislature to do which, no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question. This objection is made generally upon two grounds: 1. That it subjects corporations to virtual destruction by the Legislature; and 2. That it is an attempt to control the obligation of one person to another, in matters of merely private concern.

The first point has already been somewhat labored. It is admitted that the essential franchise of a private corporation is recognized by the best authority as private property, and cannot be taken without compensation, even for public use. *Armington v. Barnet* (15 Vt. 745); *West River Bridge Co. v. Dix* (16 Vt. 446; s. c. in error in the United States Sup. Ct., 6 Howard, 507); 1 Shelford (Bennett's ed.) 441, and cases cited.

All the cases agree that the indispensable franchises of a corporation cannot be destroyed or essentially modified. This is the very point upon which the leading case of *Dartmouth College v. Woodward* was decided, and which every well-considered case in this country maintains. But when it is attempted upon this basis to deny the power of regulating the internal police of the railroads, and their mode of transacting their general business, so far as it tends

unreasonably to infringe the rights or interests of others, it is putting the whole subject of railway control quite above the legislation of the country. Many analogous subjects may be adduced to show the right of legislative control over matters chiefly of private concern. It was held, that a statute making the stockholders of existing banks liable for the debts of the bank was a valid law as to debts thereafter contracted, and binding to that extent upon all stockholders, subsequent to the passage of the law. *Stanley v. Stanley* (26 Maine, 191). But where a bank was chartered with power to receive money on deposit, and pay away the same, and to discount bills of exchange, and make loans, and a statute of the State subsequently made it unlawful for any bank in the State to transfer, by endorsement or otherwise, any bill or note, etc., it was held that the act was void, as a violation of the contract of the State with the bank in granting its charter. *Planters' Bank v. Sharp*, and *Baldwin v. Payne* (6 Howard, 301, 326, 327, 332); *Jameson v. Planters' and Merchants' Bank* (23 Alabama, 168). It is true that any statute destroying the business or profits of a bank, and equally of a railroad, is void. Hence a statute prohibiting banks from taking interest, or discounting bills or notes, would be void, as striking at the very foundation of the general objects and beneficial purposes of the charter. But a general statute reducing the rate of interest, or punishing usury, or prohibiting speculations in exchange or in depreciated paper, or the issuing of bills of a given denomination, or creating other banks in the same vicinity, have always been regarded as valid. And while it is conceded the Legislature could not prohibit existing railways from carrying freight or passengers, it is believed that beyond all question it may so regulate these matters as to impose new obligations and restrictions upon these roads materially affecting their profits, as by not allowing them to run in an unsafe condition; as was held as to turnpikes. *State v. Bosworth* (13 Vt. 402). But a law allowing certain classes of persons to go toll free is void. *Pingrey v. Washburn* (1 Aiken, 268). So, too, chartering a railroad along the same route of a turnpike is no violation of its rights, *White River Turnpike Co. v. Vermont Cent. R. Co.* (21 Vt. 590); *Turnpike Co. v. Railway Co.* (10 Gill & Johnson, 392); or chartering another railway along the same route of a former one, to whom no exclusive rights are granted in terms, *Matter of Hamilton Avenue* (14 Barbour, 405); or the establishment of a freeway by the side of a toll bridge. *Charles River Bridge v. Warren Bridge*, (*supra*).

The Legislature may, no doubt, prohibit railroads from carrying freight which is regarded as detrimental to the public health or morals, or the public safety generally; or they might probably be made liable as insurers of the lives and limbs of passengers, as they virtually are of freight. The late statute giving relatives the right to recover damages where a person is killed, has wrought a very im-

portant change in the liability of railways, ten times as much, probably, as the one now under consideration ever could do. And I never knew the right of the Legislature to impose the liability to be brought in question.

But the argument that these cattle-guards at farm-crossings are of so private a character as not to come within the general range of legislative cognizance, seems to me to rest altogether upon a misapprehension. It makes no difference how few or how many persons a statute will be likely to affect. If it professes to regulate a matter of public concern, and is in its terms general, applying equally to all persons or property coming within its provisions, it makes no difference, in regard to its character or validity, whether it will be likely to reach one case or ten thousand. A statute requiring powder-mills to be built remote from the villages or highways, or to be separated from the adjoining lands by any such muniment as may be requisite to afford security to others' property or business, would probably be a valid law if there were but one powder-mill in the State, or none at all, and notwithstanding the whole expense of the protection should be imposed upon the proprietor of the dangerous business. And even where the State Legislature have created a corporation for manufacturing powder at a given point, at the time, remote from inhabitants, if in process of time dwellings approach the locality, so as to render the further pursuit of the business at that point destructive to the interests of others, it may be required to be suspended or removed, or secured from doing harm, at the sole expense of such corporation. This very point is, in effect, decided in regard to Trinity churchyard, which is a royal grant for interment, securing fees to the proprietors, in the case of *Coates v. The City of New York* (7 Cowen, 604); and in regard to *The Presbyterian Churchyard*, in their case v. *The City of New York* (5 Cowen, 538).

So, too, a statute requiring division fences between adjoining land proprietors, to be built of a given height or quality, although differing from the former law, would bind natural persons, and equally corporations. But a statute requiring landowners to build all their fences of a given quality or height would no doubt be invalid, as an unwarrantable interference with matters of exclusively private concern. But the farm-crossings upon a railway are by no means of this character. They are division fences between adjoining occupants, to all intents. In addition to this, they are the safeguards which one person, in the exercise of a dangerous business, is required to maintain in order to prevent the liability to injure his neighbor. This is a control by legislative action coming within the obligation of the maxim, *Sic utere tuo*, and which has always been exercised in this manner in all free states in regard to those whose business is dangerous and destructive to other persons, property or business. Slaughter-houses, powder-mills, or houses for keeping powder, un-

healthy manufactories, the keeping of wild animals, and even domestic animals, dangerous to persons or property, have always been regarded as under the control of the Legislature. It seems incredible how any doubt should have arisen upon the point now before the court. And it would seem it could not, except from some undefined apprehension, which seems to have prevailed to a considerable extent, that a corporation did possess some more exclusive powers and privileges upon the subject of its business, than a natural person in the same business, with equal power to pursue and to accomplish it; which, I trust, has been sufficiently denied.

I do not now perceive any just ground to question the right of the Legislature to make railways liable for all cattle killed by their trains. It might be unjust or unreasonable, but none the less competent. *Girtman v. Central Railroad* (1 Kelley (Georgia), 173), is sometimes quoted as having held a different doctrine; but no such point is to be found in the case. The British Parliament for centuries, and most of the American Legislatures, have made the protection of the lives of domestic animals the subject of penal enactment. It would be wonderful if they could not do the same as to railways, or if they could not punish the killing, by requiring them to compensate the owner, or as in the present case, to do it until they used certain precautions in running their trains, to wit, maintained cattle-guards at roads and farm-crossings.

There are some few cases in the American courts bearing more directly upon the very point before us. In *Suydam v. Moore* (8 Barbour, 358), the very same point is decided against the railway; Willard, J., compares the requirement to the law of the road, the passing of canal boats, and keeping lights at a given elevation in steamboats, and says it comes clearly within the maxim *Sic utere tuo*; and in *Waldron v. The Rensselaer & Saratoga R. Co.* (Ibid. 390), the same point is decided, and the same judge says the requirements of the new act, which is identical with our statute of 1850, as applied to existing railways, "are not inconsistent with their charter, and are, in our judgment, such as the Legislature had the right to make." They were designed for the public safety, as well as the protection of property. In *Milliman v. The Oswego & Syracuse R.* (10 Barbour, 87), the ground is assumed that the new law was not intended to apply to existing roads. And no doubt is here intimated of the right of the Legislature to impose similar regulations upon existing railways. The N. Y. Revised Statutes subject all corporate charters to the control of the Legislature; but it has been there considered, that this reservation does not extend to matters of this kind, but that the right depends upon general legislative authority. The case of *The Galena and Chicago Union R. Co. v. Loomis* (13 Illinois, 548) decides the point that the Legislature may pass a law requiring all railways to ring the bell or blow the whistle of their engines immediately before passing highways at grade. The court

say, "The Legislature has the power, by general laws, from time to time as the public exigencies may require, to regulate corporations in their franchises, so as to provide for the public safety. The provision in question is a mere police regulation, enacted for the protection and safety of the public, and in no manner interferes with, or impairs the powers conferred on the defendants in their act of incorporation." All farm-crossings in England are required to be above or below grade, so as not to endanger passengers upon the road, and so of all road crossings there, unless protected by gates. I could entertain no doubt of the right of the Legislature to require the same here as to all railways, or even to subject their operations to the control of a board of commissioners, as has been done in some States. In *Benson v. New York City* (10 Barbour, 223), it was held, that a ferry, the grant to which was held, not under the authority of the State, but from the city of New York, and which was a private corporation, as to the stock, might be required by the Legislature to conform to such regulations, restrictions, and precautions as were deemed necessary for the public benefit and security. The opinion of Woodbury, Justice, in *East Hartford v. Hartford Bridge Co.* (10 Howard, 511), assumes similar grounds, although that case was somewhat different. The case of *Swan v. Williamson* (2 Michigan, 427), denies that railways are private corporations. But that proposition is scarcely maintainable so far as the pecuniary interest is concerned. If the stock is owned by private persons, the corporation is private so far as the right of legislative control is concerned, however public the functions devolved upon it may be. The language of Marshall, Chief Justice, in *Dartmouth College v. Woodward* (4 Wheaton, 518, 629), seems pertinent to the general question of what laws are prohibited on the ground of impairing the obligation of contracts; "That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted." And equally pertinent is the commentary of Parsons on Contracts, 2 vol. 511, upon the provision of the United States Constitution in relation to the obligation of contracts. "We may say that it is not intended to apply to public property, to the discharge of public duties, to the possession or exercise of public rights, nor to any changes or qualifications in any of these, which the Legislature of a State may at any time deem expedient."

We conclude then, that the authority of the Legislature to make the requirement of existing railways may be vindicated because it comes fairly within the police of the State; 2. Because it regards the division fence between adjoining proprietors; 3. Because it properly concerns the safe mode of exercising a dangerous occupation or business; and 4. Because it is but a reasonable provision for the protection of domestic animals, all of which interests fall legiti-

mately within the range of legislative control, both in regard to natural and artificial persons.

Judgment affirmed.

BENNETT, J, dissenting.

BEER COMPANY v. MASSACHUSETTS.

(97 U. S. 25. 1877.)

ERROR to the Superior Court of the Commonwealth of Massachusetts.

This was a proceeding in the Superior Court of Suffolk County, Massachusetts, for the forfeiture of certain malt liquors, belonging to the Boston Beer Company, and which had been seized as it was transporting them to its place of business in said county, with intent there to sell them in violation of an act of the Legislature of Massachusetts, passed June 19, 1869, c. 415, commonly known as the Prohibitory Liquor Law. The company claimed that, under its charter, granted in 1828, it had the right to manufacture and sell said liquors; and that said law impaired the obligation of the contract contained in that charter, and was void, so far as the liquors in question were concerned. The court refused to charge the jury to that effect, and a verdict was found against the claimant. The rulings of the Superior Court having been affirmed by the Supreme Judicial Court of the Commonwealth, the company brought the case here. The statutes of Massachusetts bearing on the case are referred to in the opinion of the court.

MR. JUSTICE BRADLEY delivered the opinion of the court:—

The question raised in this case is, whether the charter of the plaintiff, which was granted in 1828, contains any contract the obligation of which was impaired by the prohibitory liquor law of Massachusetts, passed in 1869, as applied to the liquor in question in this suit.

Some question is made by the defendant in error whether the point was properly raised in the State courts, so as to be the subject of decision by the highest court of the State. It is contended that, although it was raised by plea, in the municipal court, yet, that plea being demurred to, and the demurrer being sustained, the defence was abandoned, and the only issue on which the parties went to trial was the general denial of the truth of the complaint. But whatever may be the correct course of proceeding in the practice of courts of Massachusetts, — a matter which it is not our province to investigate, — it is apparent from the record that the very point now sought to be argued was made on the trial of the cause in the Superior Court, and was passed upon, and made decisive of the controversy; and was afterwards carried by bill of exceptions to the Supreme Judicial

Court, and was decided there adverse to the plaintiff in error on the very ground on which it seeks a reversal.

The Supreme Court, in its rescript, expressly decides as follows:—

“ Exceptions overruled for the reasons following :—

“ The act of 1869, c. 415, does not impair the obligations of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as on individuals.

“ The act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the Legislature.”

The judgment of the Superior Criminal Court was entered in conformity to this rescript, declaring the liquors forfeited to the Commonwealth, and that a warrant issue for the disposal of the same.

This is sufficient for our jurisdiction, and we are bound to consider the question which is thus raised.

As before stated, the charter of the plaintiff in error was granted in 1828, by an act of the Legislature passed on the 1st of February in that year, entitled “ An Act to incorporate the Boston Beer Company.” This act consisted of two sections. By the first, it was enacted that certain persons (named), their successors and assigns, “ be, and they hereby are, made a corporation, by the name of The Boston Beer Company, for the purpose of manufacturing malt liquors in all their varieties, in the city of Boston, and for that purpose shall have all the powers and privileges, and be subject to all the duties and requirements, contained in an act passed on the third day of March, A. D. 1809, entitled ‘ An Act defining the general powers and duties of manufacturing corporations,’ and the several acts in addition thereto.” The second section gave the company power to hold such real and personal property to certain amounts, as might be found necessary and convenient for carrying on the manufacture of malt liquors in the city of Boston.

The general manufacturing act of 1809, referred to in the charter, had this clause, as a proviso of the seventh section thereof: “ Provided always, that the Legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal any act or part thereof, establishing any corporation, as shall be deemed expedient.”

A substitute for this act was passed in 1829, which repealed the act of 1809, and all acts in addition thereto, with this qualification: “ But this repeal shall not affect the existing rights of any person, or the existing or future liabilities of any corporation, or any members of any corporation now established, until such corporation shall have adopted this act, and complied with the provisions herein contained.”

It thus appears that the charter of the company, by adopting the provisions of the act of 1809, became subject to a reserved power of the Legislature to make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal the act, or any part thereof, establishing the corporation. This reservation of the power was a part of the contract.

But it is contended by the company that the repeal of the Act of 1809 by the Act of 1829 was a revocation or surrender of this reserved power.

We cannot so regard it. The charter of the company adopted the provisions of the Act of 1809, as a portion of itself; and those provisions remained a part of the charter notwithstanding the subsequent repeal of the act. The Act of 1829 reserved a similar power to amend or repeal that act at the pleasure of the Legislature, and declared that all corporations established under it should cease and expire at the same time when the act should be repealed. It can hardly be supposed that the Legislature, when it reserved such plenary powers over the corporations to be organized under the new act, intended to relinquish all its powers over the corporations organized under or subject to the provisions of the former act. The qualification of the repeal of the Act of 1809, before referred to, seems to be intended not only to continue the existence of the corporations subject to it in the enjoyment of all their privileges, but subject to all their liabilities, of which the reserved legislative control was one.

If this view is correct, the Legislature of Massachusetts had reserved complete power to pass any law it saw fit, which might affect the powers of the plaintiff in error.

But there is another question in the case, which, as it seems to us, is equally decisive.

The plaintiff in error was incorporated "for the purpose of manufacturing malt liquors in all their varieties," it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.

We do not mean to say that property actually in existence and in which the right of the owner has become vested, may be taken for

the public good without due compensation. But we infer that the liquor in this case, as in the case of *Bartemeyer v. Iowa* (18 Wall. 129), was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behoved it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The Legislature had no power to confer any such rights.

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama* (94 U. S. 645).

Since we have already held, in the case of *Bartemeyer v. Iowa*, that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts.

Of course, we do not mean to lay down any rule at variance with what this Court has decided with regard to the paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign nations and among the several States, or otherwise. *Brown v. Maryland* (12 Wheat. 419); *License Cases* (5 How. 504); *Passenger Cases* (7 id. 283); *Henderson v. Mayor of New York* (92 U. S. 259); *Chy Lung v. Freeman* (id. 275); *Railroad Company v. Husen* (95 id. 465). That question does not arise in this case.

Judgment affirmed.

RAILWAY COMPANY *v.* LACKEY.

(78 Ill. 55. 1875.)

APPEAL from the Circuit Court of Marion county.

MR. JUSTICE BREESE delivered the opinion of the court:—

This is an appeal from the judgment of the Marion circuit court, rendered at the October term, 1870, upon the following agreed state of facts:—

“It was agreed in this case that, during the year 1869, three persons were run over and killed by trains on the railroad of appellant, in Marion County, and the appellee, being coroner of said county at the time, held an inquest in each case, the expenses of which, together with the costs of burial, amount, in the aggregate, to \$91.15; that if appellant was, in law, liable to appellee, upon the facts stated, for the above amount, then judgment should be rendered in favor of appellee therefor, and if not so liable, then judgment should be for appellant, with the right to either party to appeal.”

In 1855, the General Assembly of this State passed an act entitled, “An Act to provide for the burial of the dead occurring on railroads, and in or by vehicles carrying passengers,” in the second section of which act it is provided that “every railroad company running cars within this State shall be liable for all the expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision, or other accident occurring to such cars, or otherwise; and any coroner, city, town, or person who shall take charge of and decently inter any such body or corpse, or cause any inquest to be held over such corpse, shall have the cause of action against such company before any court having competent jurisdiction.” Sess. Laws 1855, p. 170; Scates’ Comp. 423.

It is insisted by appellant, that this statute is not within the constitutional competency of the General Assembly to enact, as it places the burden of these expenses upon the railroad companies, which, in other cases of like nature, is placed upon the estate of the deceased, or upon the county in which the accident may occur. This is the general law. R. S. 1845, ch. 99, title, “Sheriffs and Coroners,” sec. 23; R. S. 1874, sec. 21, title, “Coroners.”

It may, very pertinently, be asked, why this distinction? On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred?

An examination of the section will show that no default or negligence of any kind need be established against the railroad company,

but they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful, and of great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty, or the want of proper care and skill in running their trains. The penalty is not aimed at anything of this kind. We say penalty, for it is in the nature of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case, nor are they in the contemplation of the statute. A passenger on the train dies from sickness. He is a man of wealth. Why should his burial expenses be charged to the railroad company? There is neither reason nor justice in it, and if he be poor, having not the means for a decent burial, the general law makes ample provision for such cases. As argued by the counsel for appellant, the law attempts to place what is properly a public burden upon these corporations, which should be borne by all alike, and discharged out of public funds raised by equal and uniform taxation. This may be considered in the light of a special tax, for which there is no sanction in the Constitution. We have not been furnished with any brief, points, or argument for the appellee. The views presented by appellant satisfy us the law in question cannot be sustained as a constitutional enactment.

In 1874, the General Assembly repealed this statute, by chap. 131, title, "Statutes," R. S. 1022, but, at the same session, re-enacted it substantially, giving the power to sue, not to the coroner, as here, but to the county. *Ib.*, title, "Coroners," 283, sec. 22.

For the reasons given the judgment is reversed.

Judgment reversed.

GREENWOOD v. FREIGHT COMPANY.

(105 U. S. 13. 1881.)

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

MR. JUSTICE MILLER delivered the opinion of the court:—

The appellant, Greenwood, a citizen of the State of New York, brought his bill of complaint against the Union Freight Railroad Company, a corporation established by the laws of Massachusetts; against the Marginal Freight Railroad Company, likewise a Massachusetts corporation; against the city of Boston, its mayor and aldermen by name; and against the directors of the Marginal Freight Railroad Company,—all citizens of Massachusetts.

The Union Freight Railroad Company demurred to the bill, and

the demurrer was sustained and the bill dismissed. It is this decree which we are called on to review on appeal taken by complainant.

The case made by the bill is that the Marginal Freight Railroad Company, which we shall hereafter call the Marginal Company, was organized under an act of the Legislature of Massachusetts of the date of April 26, 1867, to build and operate a railroad through various streets in the city of Boston, "with all the privileges and subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they are applicable." The right of way of this company for part of its route lay over the line of a railway previously granted to the Commercial Freight Railroad Company, and the Marginal Company, by virtue of a provision in its charter, purchased and paid the Commercial Company for the joint use of its track, so far as it ran through the same streets. Afterwards, on May 6, 1872, the Legislature of Massachusetts incorporated, by an act of that date, the Union Freight Railroad Company, which, by virtue of its charter and the authority of the board of aldermen of Boston, was authorized to run its track through the same streets and over the same ground covered by the track of the Marginal Company, and to take possession of the track of that and any other street-railroad company, on payment of compensation. This latter act also repealed the charter of the Marginal Company.

Sections 4, 6, and 7 of this act constitute the foundation of complainant's grievance, because they are said to impair the obligation of the contract found in the charter of the Marginal Company, and, as they are short, they are here given verbatim:—

SECT. 4. Said corporation may, within its authorized limits and for the purposes of this act, enter upon and use any part of the tracks of any other street railroad, and may suitably strengthen and improve such tracks; and if the corporations cannot agree upon the manner and conditions of such entry and use, or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the thirty-eighth section of chapter three hundred and eighty-one of the acts of the year eighteen hundred and seventy-one.

SECT. 6. Said corporation shall, within four months from the passage of this act, take the tracks, or any part thereof, of the Marginal Freight Railway Company, subject to the laws relating to the taking of land by railroad companies, and the compensation to be made therefor.

SECT. 7. Chapter one hundred and seventy of the acts of the year eighteen hundred and sixty-seven, entitled an "Act to incorporate the Marginal Freight Railway Company," and so much of chapter four hundred and sixty-one of the acts of the year eighteen hundred and sixty-nine as relates to said Marginal Freight Railway Company, are hereby repealed.

The bill avers that the Union Freight Railroad Company has been organized, and is about to proceed in such a manner under this act that the Marginal Company will be utterly destroyed, and its several contracts, franchises, rights, easements, and properties will be im-

paired and destroyed, and the stock of complainant in said company will be destroyed and made valueless, and he will sustain irreparable damage and mischief.

Complainant then alleges that he had requested and urged the directors of the Marginal Company to take steps to assert the rights and franchises of the company against what he believes to be unconstitutional legislation, and that they had declined and refused to do so. He also sets out a vote or resolution of said directors, in which they respond to his demand by saying that the assertion of the rights of the corporation in the State courts is accompanied with so many embarrassments that they decline to attempt it. The prayer of the bill is for an injunction against all the defendants, to prevent these acts so injurious to the rights of the Marginal Freight Railroad Company.

The first ground of demurrer to this bill is that the complainant, whose interest is merely that of a stockholder in the Marginal Company, shows no right to sustain this bill, the object of which is to assert rights that are those of the corporation, which is itself under no disability to sue.

This whole subject was fully considered in the recent opinion of the court in *Hawes v. Oakland* (104 U. S. 450), in the decision of which we had the benefit of the able argument of counsel in this case, which was argued before that was decided. We refer to that opinion for the principles which must govern this branch of the present case. It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence, and of the annihilation of all corporate powers under the Act of 1872, that we think complainant as a stockholder comes within the rule laid down in that opinion, and which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter.

As none of the defendants are charged with a purpose to exercise any power or to perform any acts not authorized by the terms of the Act of May 6, 1872, the remaining question to be decided is, whether the features of that act to which complainant objects in his bill are beyond the power of the Legislature of Massachusetts, or are forbidden by anything in the Constitution of the United States.

These exercises of power in the statute complained of are divisible into two:—

1. The repeal of the charter of the Marginal Company.
2. The authority vested in the Union Company to take its track for the use of the latter company.

It is the argument of counsel, pressed upon us with much vigor, that the two taken together constitute a transfer of the property of the one corporation to the other, and with it all the corporate franchises, rights, and powers belonging to the elder corporation.

We are not insensible to the force of the argument as thus stated;

and we think it must be conceded that, according to the unvarying decisions of this court, the unconditional repeal of the charter of the Marginal Company is void under the Constitution of the United States, as impairing the obligation of the contract made by the acceptance of the charter between the corporators of that company and the State, unless it is made valid by that provision of the General Statutes of Massachusetts called the reservation clause, concerning acts of incorporation; or unless it falls within some enactment covered by that part of its own charter which makes it "subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they may be applicable."

The first of these reservations of legislative power over corporations is found in sect. 41 of chap. 68 of the General Statutes of Massachusetts, in the following language: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal, at the pleasure of the Legislature."

It would be difficult to supply language more comprehensive or expressive than this.

Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the Legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the Legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it. This expression, "the pleasure of the Legislature," is significant, and is not found in many of the similar statutes in other States.

This statute having been the settled law of Massachusetts and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal Company, we cannot doubt the authority of the Legislature of Massachusetts to repeal that charter. Nor is this seriously questioned by counsel for appellant; and it may, therefore, be assumed that if the repealing clause of the Act of May 6, 1872, stood alone, its validity must be conceded. *Crease v. Babcock* (23 Pick. (Mass.) 334); *Erie & N. E. Railroad Co. v. Casey* (26 Pa. St. 287); *Pennsylvania College Cases* (13 Wall. 190); 2 Kent, Com. 306.

It is argued, however, that the act is to be examined as a whole, and that as the earlier sections of the statute bestow upon the Union Company the right to seize the track and other property of the Mar-

ginal Company, this repealing clause is inserted merely to aid in the general purpose of transferring a valuable property and its appurtenant franchise from one corporation to another.

Whether this is sufficient to invalidate that branch or feature of the statute may depend somewhat upon the effect of the repealing clause upon the rights of the Marginal Company, as well as upon other matters; but we do not doubt the validity of the repealing clause of that act, whatever may have been the reasons which influenced the Legislature to enact it, for the exercise of this power is by express terms declared to be at the pleasure of the Legislature.

The forty-first section of chapter 68, as we have cited it, had a proviso, as it was originally enacted, "that no act of incorporation shall be repealed, unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same."

So that charters subject to the pleasure of the legislative will were only those of perpetual duration. This proviso was, however, either repealed by express enactment or intentionally left out in subsequent revisions of the statutes, for it is not found in that of 1860, known as the General Statutes of Massachusetts, nor in that of the present year, just published, called the Public Statutes of Massachusetts.

What is the effect of the repeal of the charter of a corporation like this? One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is, abrogated by the repeal of the law which granted these special rights.

Personal and real property acquired by the corporation during its lawful existence, rights of contracts, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the Legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation to their interest

in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.

And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and the creditors of such a corporation, after the act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power. As early as 1806, in the case of *Wales v. Stetson* (2 Mass. 143), the Supreme Court of that State made the declaration "that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the Legislature in the act of incorporation." In *Trustees of Dartmouth College v. Woodward* (4 Wheat. 518), decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the Federal Constitution against impairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher v. Peck* (6 Cranch, 87), and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the State could not impair.

It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the Legislatures creating such bodies had previously supposed they had the right to exercise no longer existed. It was, no doubt, with a view to suggest a method by which the State Legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that when the Legislature was enacting a charter for a corporation, a provision in the statute reserving to the Legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would

be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of *Wales v. Stetson* (2 Mass. 143).

It would seem that the States were not slow to avail themselves of this suggestion, for while we have not time to examine their legislation for the result, we have in one of the cases cited to us as to the effect of a repeal, *McLaren v. Pennington* (1 Paige (N. Y.), 102), in which the Legislature of New Jersey, when chartering a bank with a capital of \$400,000 in 1824, declared by its seventeenth section that it should be lawful for the Legislature at any time to alter, amend, and repeal the same. And Kent (2 Com. 307), speaking of what is proper in such a clause, cites as an example a charter by the New York Legislature of the date of Feb. 25, 1822. How long the Legislature of Massachusetts continued to rely on a special reservation of this power in each charter as it was granted, it is unnecessary to inquire, for in 1831 it enacted as a law of general application, that all charters of corporations thereafter granted should be subject to amendment, alteration, and repeal at the pleasure of the Legislature; and such has been the law ever since.

This history of the reservation clause in acts of incorporation supports our proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal.

This view is sustained by the decisions of this court, and of other courts on the same question. *Pennsylvania College Cases* (*supra*); *Tomlinson v. Jessup* (15 Wall. 454); *Railroad Company v. Maine* (96 U. S. 499); *Sinking Fund Cases* (99 id. 700); *Railroad Company v. Georgia* (98 id. 359); *McLaren v. Pennington* (*supra*); *Erie & N. E. Railroad v. Casey* (*supra*); *Miner's Bank v. United States* (1 Greene (Iowa), 553); 2 Kent, Com. 306, 307.

It results from this view of the subject that whatever right remained in the Marginal Company to its rolling-stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber the streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter.

It was, therefore, in the power of the Massachusetts Legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the Legislature was governed by sufficient reason in thus repealing the charter of one company, and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case. It

may well be supposed, if answer were required to the complainant's bill, that it was made to appear that the Marginal Company had shown its incapacity to fulfil the objects for which it was created, and that another corporation, embracing larger area, connecting with more freight depots and wharves, and with more capital, could better serve the public in the matter for which both franchises were given.

That in creating the later corporation, whose object was to fulfil a public use, it could authorize it to take such property of other corporations as might be necessary to that use, as well as that of individuals, can hardly admit of question. Sect. 4 of the act gives this power to the Union Company with reference to the tracks of all street railroads in the city, and provides that in the event of an inability to agree with the owners of these tracks as to compensation, that shall be determined in accordance with the provisions of general laws previously enacted on that subject. To this there can be no valid legal objection. The property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent domain, on making due compensation. *West River Bridge Co. v. Dix* (6 How. 507); *Central Bridge Corporation v. City of Lowell* (4 Gray (Mass.), 474); *Boston Water-power Co. v. Boston & Worcester Railroad Corporation* (23 Pick. (Mass.) 360); *Richmond, &c. Railroad Co. v. Louisa Railroad Co.* (13 How. 71).

But it is the sixth section of the act which is most bitterly assailed as an invasion of appellant's rights. It declares that the Union Freight Company, within four months from the passage of the act, shall take the tracks, or any part thereof, of the Marginal Freight Company, subject to the laws relating to taking land by railroad companies and the compensation therefor. If, as the language seems to imply, the new company is bound to take so much of the track of the old one as it shall need or elect to use, and pay for it within four months, it is a requirement favorable to this company in preference to others, and with special reference to the fact that its power to use the track for railroad purposes has ceased. If it is merely a permission to take the track on payment of compensation, it is still a favor to the Marginal Company to require this to be done within four months.

A suggestion is made that the Marginal Company acquired by purchase, for \$15,000, the right to the use of the track of the Commercial Freight Company, and that this property stands on different grounds from the remainder of its track.

We are unable to discover any difference in principle. If the new company takes this track, or takes the Marginal Company's right to use it, we suppose the latter will be entitled to compensation for its interest in it, as for other property taken for a public use.

In fact, in regard to the whole question discussed as to the mode

of making compensation, and its sufficiency to indemnify the Marginal Company for what is taken, it seems to us to be premature; for whenever the attempt to adjust the compensation is made, the question of its sufficiency and its compliance with the law on that subject may arise, and it can then be decided.

Nor are we satisfied of the soundness of the argument of counsel that the clause in the Marginal Company's charter, which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways, withdraws it from the operation of the forty-first section of chapter 68 of the General Laws of the State. The latter clause declares all acts of incorporation subject to its provisions. This subsection is not impaired by the fact that a particular corporation is made by its charter subject to other laws also of a general character.

We are of opinion that the question of the repeal of the charter of the Marginal Company is to be decided by the construction of the general statute, whose effect and history we have discussed.

These considerations require the affirmance of the decree of the Circuit Court sustaining the demurrer to appellant's bill.

Decree affirmed.

COMMONWEALTH v. EASTERN RAILROAD COMPANY.

KEANE v. SAME.

(103 Mass. 254. 1869.)

THE first case was an action of tort on the St. of 1868, c. 89, which was passed March 27 of that year, and is printed in the margin,¹ against a railroad company incorporated by the St. of 1836, c. 232, to recover \$400 for the delay of the defendants for two months to establish a station at Knight's Crossing in Newbury. Writ dated September 16, 1868. The answer alleged that the St. of 1868, c. 89,

¹ "SECTION 1. The Eastern Railroad Company is hereby required to establish and maintain, on the line of its railroad at Knight's Crossing, so called, in the town of Newbury, a flag station; and to erect at said place a station-house reasonably commodious for the use of passengers and the accommodation of freight, at which at least two trains each way shall stop each day, upon the proper signals being made; and said company is hereby authorized to take such land as shall be necessary for the erection of such station-house, and for approaches thereto, under the provisions of the sixty-third chapter of the General Statutes.

"SECTION 2. Said station-house shall be ready for the accommodation of passengers and freight by the first day of July next, and said Eastern Railroad Company shall forfeit and pay the sum of two hundred dollars for each month's delay in the establishment of said station after said first day of July, to be recovered to the use of the Commonwealth.

"SECTION 3. This act shall take effect upon its passage."

was unconstitutional. The case was submitted to the judgment of the Superior Court, and on appeal, of this court, upon the pleadings and these facts agreed:—

“It is agreed that, since the passage of the St. of 1868, c. 89, the defendants did not, prior to the date of this writ, take any steps by way of compliance with the provisions of said act; that they did not erect any station-house at the place named in said act, and have never caused any trains to stop at said place; and that they have never advertised or in any way recognized Knight’s Crossing as a station or place for the stopping of trains whether signalled or otherwise. It is further agreed that the plaintiffs have no evidence that any person ever offered himself as a passenger at said station, or that any freight was ever offered there for carriage; but it is agreed also that the defendants have never made any provisions for receiving passengers or freight there.”

CHAPMAN, C. J.:—

By the St. of 1868, c. 89, the defendants are required to establish a flag station on their railroad at Knight’s Crossing in Newbury, and erect there a station-house at which at least two trains each way and each day shall stop. The statute has not been complied with, and the defendants contend that it is unconstitutional. The defendants were chartered April 14, 1836, subject to the provision in the Revised Statutes that every act of incorporation passed since March 11, 1831, shall at all times be subject to amendment, alteration, or repeal at the pleasure of the Legislature (Rev. Sts. c. 44, § 23; re-enacted by Gen. Sts. c. 68, § 41), and to the provisions of the 39th chapter of the Revised Statutes.

The defendants say that the Act of 1868 violates the contract made with them by the Commonwealth; and requires them to expend their property for an assumed public use without compensation, contrary to the Constitutions of the United States and of this State.

That such a charter is a contract is not denied. It was so held in *Dartmouth College v. Woodward* (4 Wheat. 518); and charters are habitually spoken of as contracts. In *Blakemore v. Glamorganshire Canal Navigation* (1 Myl. & K. 154), Lord Eldon said he regarded them all in the light of contracts made by the Legislature on behalf of every person interested in anything to be done under them. In respect to charters for railroads, both the Legislature and the corporation act as trustees of the public interest to some extent; for the corporation is intrusted with the exercise of the right of eminent domain, which is in its nature a public right, and is not to be sacrificed to uses that are exclusively private. The private interests of the stockholders are likely to have a controlling influence with the officers of the company, and it is important that the Legislature should possess the power to prevent abuses to which this influence may lead. To some extent they would possess such a power without any clause in the charter reserving it. But to define their rights more

clearly, the clause has been introduced reserving to them the power to alter, amend, and repeal. This clause constitutes a part of the express contract between the Legislature and the corporation. The question arising in the present case is, whether the Act of 1868 above referred to is within the fair interpretation of this clause. In several cases this clause has been the subject of discussion. In *Roxbury v. Boston & Providence Railroad Co.* (6 Cush. 424, 432), it was said by the court that the clause authorized the Legislature to make reasonable alterations and amendments, and it was held that the St. of 1842, c. 22, which authorized county commissioners, upon the application of the selectmen, &c., to alter or lower roads so as to prevent crossings at the same grade with a railroad, and to require the corporation to pay the expense with costs, was a valid act. It is true that it was a general act; but it required corporations to expend money for the benefit of the public and without any apparent equivalent to themselves, except to diminish the danger of collisions with travellers on the highway. In *Fitchburg Railroad Co. v. Grand Junction Railroad & Depot Co.* (4 Allen, 198, 205), the clause was applied to special statutes of 1856, c. 296, and 1857, c. 128, which required the Fitchburg, the Grand Junction, and the Boston and Lowell Railroad corporations to make expensive changes at their crossings, and to erect a bridge of specified dimensions and materials, and construct a connecting track, and which directed how the work should be superintended, and how the expense should be apportioned. The court held that under this clause the changes were rightly ordered, and that the Legislature might prescribe by whom, in what manner, and under whose supervision the work should be accomplished, and in what proportions according to their respective interests it should be paid for by the parties affected by it. As these are special acts directing expensive changes at a particular locality, the present case seems to be covered by that.

But independently of the authority of those cases, it seems to us that the clause was intended to provide for such a case as the present. If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations or do any way business for that reason, though the road passed for a long distance through a populous part of the State, this would be a case manifestly requiring and authorizing legislative interference under the clause in question. And on the same ground, if they refuse to provide reasonable accommodation for the people of any smaller locality, the Legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any

particular case is for the Legislature to determine; and their determination on this point must be conclusive.

The objection that it takes the property of the company and appropriates it to the benefit of others is not valid. The depot which they are required to build is to be their own, like all the other depots, and their compensation for all their outlays is in their freights and fares. If the act required them to build a structure for the private benefit of others exclusively, and having no connection with the business of their road, the case might be within the principle stated in *Commonwealth v. Essex Co.* (13 Gray, 239, 253), as it would take away their property or rights which had become vested under a legitimate exercise of the power granted them. It was there held that an act requiring a water-power company to erect a fish-way in their dam was void. But the act upon which this action is brought is not subject to such an objection. It is a modification of the charter, within the fair interpretation of the power reserved to the Legislature in the charter, and merely requires them to provide what the Legislature regards as a reasonable accommodation to the public in a particular locality where they are using property which they have taken for that purpose.

Judgment for the Commonwealth.

The Second Case, which was argued at the same time, was a petition, filed January 16, 1869, by George W. Keene and more than twenty-five other legal voters of the city of Lynn, under the St. of 1868, c. 348 (which was passed June 11 of that year, and is printed in the margin),¹ alleging that the Eastern Railroad Company, though often requested to erect a new station-house in Lynn in compliance with § 1 of that statute, and to do the other acts thereby authorized or required, had wholly neglected and refused so to do, and praying therefore "that three commissioners may be appointed at the expense of said corporation, with instructions to hear the parties,

¹ "SECTION 1. The Eastern Railroad Company is hereby required to erect a new station-house, and to maintain the same on said railroad at the central station on Central Square in Lynn, reasonably commodious for the use of passengers, together with sufficient platforms, and containing a ticket-office and separate apartments for men and women; and said company is hereby authorized to take such land as may be necessary for the erection of said station-house, with proper approaches thereto, under the provisions of the statutes authorizing railroad corporations to take land for the construction of railroads.

"SECTION 2. In case of neglect or failure of said corporation to erect such station-house, as aforesaid, within six months from the passage of this act, the Supreme Judicial Court may, on the application of any twenty-five legal voters in the City of Lynn, and notice to said corporation, appoint three commissioners at the expense of said corporation, who shall decide all questions relating thereto that may arise between the parties; and the said court or any judge thereof shall have full power and authority to make any decisions or pass any orders in the premises that may be suitable, to compel a specific performance of the requirements of this act.

"SECTION 3. This act shall take effect upon its passage."

and to decide all questions relating to the erection of said station-house that may arise between the parties; and that such orders may be passed as may be suitable to compel a specific performance by said corporation of the requirements of said act; and for such other relief in the premises as may be just and proper."

Notice was given to the railroad corporation, and it appeared and made answer, admitting that it had not erected a new station-house in Lynn as directed to do by the statute, but denying that the statute was constitutional, and that the court had any jurisdiction or authority in the premises.

By agreement of the parties, the case was reserved by Gray, J., for the determination of the full court, upon the petition and answer "with like effect as if the same were a bill and answer in equity."

BY THE COURT:—The statute is constitutional and valid, for the reasons stated in the opinion in *Commonwealth v. Eastern Railroad Company*.

Prayer of petition granted; commissioners to be appointed.

COMMONWEALTH v. ESSEX COMPANY.

(13 Gray, 239. 1859.)

INDICTMENT against the Essex Company on the St. of 1856, c. 289, for neglecting to make and maintain around their dam across the Merrimac River at Lawrence a suitable and sufficient fishway for the usual and unobstructed passage of fish. Trial in the court of common pleas in Middlesex, before Aiken, J., who signed this bill of exceptions:—

"To sustain the indictment, the Commonwealth offered proof that the defendants have not constructed in or around their dam at said Lawrence fishways which admit of the usual and unobstructed passage of fish, as alleged in the indictment. To the admission of this evidence the defendants objected, as incompetent and immaterial. But it was admitted, subject to objection.

"The defendants then offered to prove the following facts. That the said Essex Company, on the 16th of August, 1847, made application to the county commissioners for the county of Essex, requesting them, after due notice and a hearing of all parties interested, to prescribe the mode in which they should construct fishways in their said dam at Lawrence, according to the seventh section of their act of incorporation, St. 1845, c. 163; that thereupon the said county commissioners appointed the 20th of September, 1847, and the town of Lawrence, as the time and place for said hearing, and ordered said company to give notice thereof to all persons and corporations interested therein, by publishing an attested copy of said petition and

order thereon in every newspaper published in the towns in Middlesex and Essex Counties bordering on the Merrimac River, three weeks successively, the last publication to be seven days at least before said September 24th, and also by serving an attested copy of the same on the town-clerk of every town in said counties bordering on the Merrimac River, and also by posting up an attested copy thereof in two public places in each of said towns fourteen days at least before said September 24th; that said order was complied with; that on said September 24th, 1847, the said commissioners had a public hearing of all parties interested; that said hearing was largely attended; that the respective parties were represented by counsel, and that about twenty witnesses were examined; that, after consideration, the said commissioners subsequently, namely, on the 12th of October, 1847, did prescribe the mode in which the said company should construct fishways in their dam, and the same was duly made matter of record; that immediately thereupon the said company did construct fishways in their dam according to the prescription of said commissioners and to their satisfaction as having been built according to their prescription, and have maintained the same during the period mentioned in the indictment, and that no complaint has ever been made to the commissioners of Essex County that said fishways do not conform to said prescription.

“That immediately upon the passage of the Act of 1848, c. 295, the Essex Company accepted the same as therein prescribed, increasing their capital stock by the additional sum of \$500,000, as therein provided; that, at the passage of said act, the character of said fishways, as not affording a usual and unobstructed passage to fish, was well known, and was brought to the notice of the Legislature; that, immediately after the passage of said act, the Essex Company paid, under said act, the sum of about \$26,000 to the owners of fish rights above said dam, as damages for hindering or impeding the passage of fish by their said dam with the fishways aforesaid.

“That the Essex Company own, by purchase, the land at and around each end of their dam; that a fishway, securing the usual and unobstructed passage of fish in or around said dam, will cost, as variously estimated from \$10,000 to \$40,000, and that the number of stockholders in said company in the years 1847 and 1848 was about two hundred and fifty, and in 1856 was about three hundred and fifty. “The Commonwealth objected to the admission of this evidence, on the ground that it was incompetent, and, if admitted, would furnish no legal defence to said indictment. The court ruled that said evidence was incompetent, and that said facts, if proved, would constitute no legal defence to the indictment, and excluded the evidence.

“The defendants offering no further evidence, the court instructed the jury that upon the evidence the Commonwealth was entitled to a verdict, and under this the jury accordingly returned a verdict of

guilty. To the admission of the evidence aforesaid introduced by the Commonwealth, and to the rejection of said evidence offered by the defendants, and to the rulings and instructions aforesaid, the defendants excepted."

SHAW, C. J.:—

The Essex Company, the defendants in this case, were indicted in the court of common pleas for a violation of the St. of 1856, c. 289, requiring that company, before the 1st of February, 1857, to make, and forever thereafter maintain, in or around their dam in Lawrence, a suitable and sufficient fishway for the usual and unobstructed passage of fish, under a penalty of not less than \$100 nor more than \$500 a day for the time they should neglect to make and maintain such fishway after said 1st of February. This act was passed on the 6th of June, 1856.

The company, having failed to provide any new fishway after the passage of this act, were indicted for such neglect, and upon trial several grounds of defence were taken, which are set forth in the bill of exceptions. As the several questions substantially resolve themselves into one general consideration of the rights of this company, instead of considering the admissions and rejections of the evidence, and the particular rulings of the court thereon, in detail, it may be more convenient to state the real ground of controversy.

The Essex Company were created a corporation by St. 1845, c. 163, for the purpose of constructing a dam across the Merrimac River, and constructing one or more locks and canals in connection with said dam; for the purpose of creating a water-power to use, or sell, or lease to other persons or corporations to use, for manufacturing and mechanical purposes; and for constructing a main canal, for navigation or transports. By § 5, the said corporation was required to make and maintain, in the dam so built by them across said river, suitable and reasonable fishways, to be kept open at such seasons as are necessary and usual for the passage of fish. By § 7, they were required to build such fishways in the mode prescribed by the county commissioners, after due notice and a public hearing of all parties interested, with power to the commissioners to examine and determine whether the fishways have been built according to such mode prescribed, and, if so, to accept the same.

By an additional act passed in May, 1848, the company were authorized to increase their capital stock, but upon an express condition. St. 1848, c. 295. This condition was, "that said company shall be liable for all damages which shall be occasioned to the owners of fish rights existing above the said company's dam, by the stopping or impeding the passage of fish up and down the Merrimac River by the said dam." An adequate and constitutional mode of assessing these damages was provided by the act, which of course would not be resorted to when such damage should be agreed upon by the owners of such fish rights and the company, and paid. This

act contained a further proviso, that nothing contained in the 7th section of the act of incorporation — the section requiring the company to make and maintain fishways — should be deemed to be a bar to such claim for damages. A second section of this act of 1848 provided that the act should take effect whenever the stockholders, at a legal meeting, should accept the provisions of the preceding section, and file an authenticated copy of their vote of acceptance in the office of the secretary of the Commonwealth. It is conceded that such a vote, accepting this act, was duly passed, and an authenticated copy of it filed with the secretary of the Commonwealth soon after the passage of the act. The construction of this statute and the acts done under it by the defendant company will be considered hereafter.

By the above statutes the obligation of the company in preserving the fishway on the Merrimac River, as a consideration and condition of the franchise granted them, was fixed and determined, until the passage of the act eight years after, St. 1856, c. 289, by which the company were required to make and forever thereafter maintain in or around their dam in Lawrence, a suitable and sufficient fishway for the usual and unobstructed passage of fish, during the months of April, May, June, September, and October, in every year.

This is the statute upon which this indictment is found, and the question is, whether the company are liable for the heavy penalties therein declared, for neglect of the duty thus prescribed.

In order to ascertain what was done by the company under their act of incorporation, and the additional act above cited, we recur to the bill of exceptions. At the trial the defendants offered to prove, that after the grant of their charter, and whilst their dam was in process of erection, they applied to the county commissioners, who, after ample public notice, and a full hearing of all parties interested, on the 12th of October, 1847, prescribed the mode in which said company should construct fishways in their dam, and the same was duly made matter of record; and that thereupon the company did construct fishways in their dam, according to the prescription of said commissioners, and to their satisfaction as having been built according to their prescription, and that they have maintained the same during the time mentioned in the indictment.

The defendants also offered to prove that immediately after the passage of the Act of 1848, c. 295, they in due form, by a vote recorded, authenticated, and transmitted to the secretary of the Commonwealth, accepted the said act, authorizing them to enlarge their capital stock and binding them to pay damages to all proprietors of fish rights above said dam; that at the time of passing said last-mentioned act, the character of said fishways, so constructed, as not affording a usual and unobstructed passage to fish, was well known, and was brought to the notice of the Legislature; that immediately after the passage of said last act, the defendants paid, under said act, the sum of about \$26,000 to various owners of fish rights above

said dam as damage for hindering or impeding the passage of fish by their said dam, with the fishways aforesaid; that a fishway in or around said dam, securing the usual and unobstructed passage of fish, would cost, as variously estimated, from \$10,000 to \$40,000; and that the number of stockholders in said company in 1848 was about two hundred and fifty, and in 1856, about three hundred and fifty.

This evidence was objected to by the counsel for the prosecution, on the ground that it was incompetent, and, if admitted, would furnish no legal defence; it was so ruled by the court, and the evidence was excluded. The defendants offering no other evidence, the court instructed the jury that upon the evidence the Commonwealth were entitled to a verdict, and accordingly the jury returned a verdict of guilty.

In considering these exceptions, we are to regard the facts, of which proof was thus tendered and rejected, as having the same bearing which they would have had if actually proved.

1. The first question arising upon the construction of these statutes, which must obviously be considered and construed together, is, what duty did the statute of 1856 require the defendant company to do?

The expression is, to "make and forever maintain in or around their dam a suitable and sufficient fishway for the usual and unobstructed passage of fish." Construed according to the subject-matter, we cannot fail to understand that this provision refers to the migratory fish, which pass, every spring, from the ocean up fresh-water rivers to their head-waters, to cast their spawn. No one conversant with the legislation of Massachusetts, and who has witnessed the constant anxiety of the government for the salmon, shad, and alewives, and in regulating the fisheries of them, can doubt the purpose of this requirement. At this time, the fishways prescribed by the original act, and built as directed, had been in operation; and it appears, by the evidence offered, that after the few first years they had proved insufficient for the purpose. Perhaps it is not too much to presume, from the known natural instinct of these classes of fish to pursue the direct line of the natural current, against all obstacles, that no fishway around the dam would be sufficient. But without any such speculation, the evidence showed that the fishway which they had made and maintained had proved insufficient. Under these circumstances, the law requiring them to make and maintain a sufficient fishway to secure the unobstructed passage of fish was in effect requiring them to make a new structure, at whatever cost, which at their peril should be sufficient. It appears by the evidence, that the first cost of such a structure would amount to a sum, variously estimated from \$10,000 to \$40,000.

2. The next question is, whether, taken in connection with the other statutes above cited, it was competent for the Legislature to impose the obligation, and require the performance of the duties pre-

scribed in said statute, under the penalty therein expressed, and whether this indictment can be maintained for the non-performance of it.

It seems to be well settled that the obstruction of the passage of the annual migratory fish through the rivers and streams of the Commonwealth is not an indictable offence at common law. But the right to have these fish pass up rivers and streams to the head-waters thereof is a public right, and subject to regulation by the Legislature; though the right to take fish in waters not navigable belongs to the riparian owners of the soil along the shores and banks of such rivers and streams. *Commonwealth v. Chapin* (5 Pick. 199). The liability, therefore, of the defendants to this indictment depends upon the statute.

It is plainly within the province of the Legislature to determine and regulate the use of all common and public rights and easements. The rights of navigation on tide waters, and of the use of streams not navigable for boats and rafts, are public, and such rights are subject to regulation. It sometimes happens that the full enjoyment of two public rights would, to some extent, interfere with each other, as where a highway, turnpike, or railroad crosses a navigable or boatable stream. It is then for the Legislature to determine which shall yield, and to what extent, and whether wholly, or in part only, to the other; and such question will ordinarily be determined by the Legislature, according to their conviction of the greater preponderance of public necessity and convenience. The most common case is that where each is required to yield in part, as in the case of a bridge over a navigable river, furnished with a draw, to be raised for the passage of vessels, at the expense of the bridge-owners, or by the navigators desiring to pass it, as the Legislature may direct.

The bridge causes some impediment to the navigation; the raising of the draw causes some impediment to the land passengers. Sometimes a bridge is authorized without a draw, when the navigation is small, as in the case of the bridge over Charles River between Brighton and Cambridge, and the railroad bridge over Miller's River between Somerville and Cambridge. Sometimes the Legislature have required the bridge-owners to pay a sum to every passing vessel, equal to the damage caused by the impediment. These different provisions serve to illustrate the general principle, that all these public rights are subject to regulation; such regulations will be governed by considerations of their relative value and importance.

The manner in which the public right to free passage of fish up the several rivers and streams has been established and regulated, by the early colonial and provincial laws, as well as by the laws of the Commonwealth, is well established. *Commonwealth v. Chapin* (5 Pick. 199); *Vinton v. Welsh* (9 Pick. 87). In this last case, after citing the case of *Stoughton v. Baker* (4 Mass. 572), and various other cases, Parker, C. J., sums up the result thus: "In the first

case cited, it was decided, that the colonial, provincial and constitutional Legislatures having exercised the right for the public good, of regulating the fisheries in the several towns, the owners of several fisheries and of dams across rivers, held their property subject to such regulations as the Legislature should, from time to time, for the preservation of the fish, prescribe. And that doctrine has been received and acted upon as law, from the time of that decision to the present." (9 Pick. 92).

By the decision in *Stoughton v. Baker*, all persons, who may build a dam for mill purposes, on a stream annually frequented by fish, do it under an implied obligation to keep open sufficient sluices and fishways for the passage of fish, at the proper season; and further, if a grant is made by the Legislature to erect a dam across a river, it is to be construed to be under the same implied condition to keep open fishways, unless such implication is excluded by an express provision exempting them.

The same principle is recognized in *Vinton v. Welsh*, in deciding that an act incorporating the defendant and others to erect reservoir dams, without any provision for fishways, was not a repeal of former laws requiring them, because there was no clause of express repeal, or expressly exempting them from keeping such fishways.

From this view of the law of Massachusetts, we come to the conclusion that from the earliest times the right of the public to the passage of fish in rivers, and the private rights of riparian proprietors incident to and dependent on the public right, have been subject to the regulation of the Legislature; and the mode adopted by the Legislature, whether by public or private acts, to secure and preserve such rights, has been by requiring, in the erection of dams such sluices and fishways as would enable these migratory fish according to their known habits and instincts to pass from the lower to the higher level of the water, occasioned by such dam, so that, although their passage might be somewhat impeded, it would not be essentially obstructed thereby. This was the only remedy, because no private action would lie for the riparian proprietor, and no indictment at common law for the public injury.

3. We are now to consider what are the true construction and operation of the act of incorporation, by which the defendants were constituted and chartered.

All provisions of statute, made for regulating the fisheries, are intended for the public benefit, and all persons, at their peril, must take notice of them; they are therefore public statutes, and the courts of law will, *ex officio*, take notice of them. *Burnham v. Webster* (5 Mass. 266); *Commonwealth v. M'Curdy* (5 Mass. 324).

The objects proposed to be accomplished by the defendants were so far public in their nature, and designed to promote the public benefit, that it was quite competent for the Legislature to exercise the power of eminent domain, by authorizing them to take private

property when necessary, providing modes by which a full compensation therefor should be made. These objects were to establish a great water power for manufacturing and mechanical purposes, and for improving the navigation of the river by locks and canals. *Boston & Roxbury Mill Dam v. Newman* (12 Pick. 467); *Hazen v. Essex Co.* (12 Cush. 477, 478). The usual provision was made for the assessment and payment of damages, which is made where private property is authorized to be taken for public use.

The usual provision was also made for the preservation of the rights of fishery, both public and private, which have been made in like cases, by requiring the company to make and maintain fishways in said dam, which should be made to the satisfaction of the county commissioners. We believe it has been usual, in such acts of legislation, to delegate an authority to a committee or commissioners, to see that certain provisions are specifically carried into effect; and we have never known the legality of such delegation of power questioned. In the leading case of *Stoughton v. Baker*, before cited, it was held that where a certain portion of the things authorized to be done by a committee of three was done by one, to that extent the power was not well executed.

It appears by the facts that the county commissioners did, in due form, prescribe the mode in which fishways should be made, and they were so made, and afterwards maintained, to the time of finding this indictment, in the mode thus prescribed. Under these circumstances, we are strongly inclined to the opinion that the company had performed the condition on which their charter was granted, and would be free from public prosecution. Whether, if the fishways actually provided had proved wholly unfit and inadequate to their purpose, and other measures could be provided within a reasonable cost, which could be shown to be probably effectual, the Legislature could, by further legislation, have required the company to construct such other fishways, we give no opinion, for reasons which will appear in our construction of the additional act.

4. In putting a construction upon the additional act (St. 1848, c. 295), it is important to note the date, and the circumstances under which it was passed. At that time the dam had been in operation some time, with the fishway prescribed, and proved to be unsuitable or insufficient to accomplish the proposed purpose of providing for the passage of the fish. It appears that the company required legislative aid to enable them to increase their capital stock. It seems that the Legislature seized the opportunity to make a better provision for the security of the fisheries, than that required in the act of incorporation had proved to be. This they did by a scheme to be proposed to the company by way of condition, and acceded to by them in legal form; a scheme entirely different from that proposed in the act of incorporation, and different from any which had been previously adopted in any similar case.

The Legislature had the power to regulate the public right, and diminish it or release it, as the best good of the public, on the whole, might in their judgment require. Whether that public good, expected from the fishery, consisted in affording an additional article of food to the people, or an employment for labor, or otherwise, the Legislature might well compare this with the public advantage, in affording increased profitable labor and means of subsistence, and various benefits, from building up a large manufacturing town, and decide as the balance of public benefit should preponderate. Of this they must judge. *Boston & Lowell Railroad v. Salem & Lowell Railroad* (2 Gray, 1).

But the Legislature stood in a more delicate relation towards the various riparian owners of fish-rights above the dam. The extinction of the public right to have the fish pass the dam would deprive these owners of their several fisheries, which were in effect private property. Towards them, therefore, the public stood, in some respects, as trustees, and their beneficial interests could not honorably be disregarded. The plan, therefore, proposed by this enactment, was to substitute, for the public right intended to be provided for by the fishways required, a provision for the payment of damages by the company to every riparian owner of fishing-rights along the river above said dam, giving them a remedy against the company where none existed before, for all damages occasioned by the stopping or impeding the passage of fish up and down the Merrimac River by the said dam. It declared that the provision in the 7th section of the former act, requiring the making and maintaining of such fishways as the county commissioners should prescribe, should not be deemed a bar to such private claim for damages; implying that, but for this clause, such provision for fishways would have been a bar to any private claim for damages. It provides an easy and constitutional mode for every such private owner to obtain his damages, to be used, if the same should not be adjusted and paid by agreement which each such private owner would have a right to make, in respect to his own several interest. It was the substitution of one onerous duty upon the company for another, more equitably and effectually to accomplish the same object.

To preclude all question as to the right of the Legislature thus to impose a new obligation upon the company; it was provided that the act should not take effect until it should be in terms accepted at a meeting of stockholders called for that purpose, and authentic evidence thereof filed in the office of the secretary of the Commonwealth for the information and benefit of all persons concerned, as well those individual riparian owners who might claim their rights under it, as those persons who might afterwards acquire or hold shares in the stock of said company. This appears to us to be the direct meaning and construction of this enactment. It was not a new provision, requiring the better performance of a pre-existing duty; it was substi-

tuting a new species of indemnity to parties, where none in any form existed before, either by an action of tort at common law, or by a claim for damages under any statute.

Under these circumstances, it appears to us, especially after it has been acceded to by the company, and after they have paid a large sum of money in pursuance of it, that this enactment has in it all the elements of a contract executed by one party and binding on the other.

5. The remaining question is whether the act of 1856 is justified by the provision in the Rev. Sts. c. 44, § 23, that acts of incorporation afterwards passed should be subject to amendment, alteration, or repeal? That provision is, that every act of incorporation shall at all times be subject to amendment, alteration, or repeal, at the pleasure of the Legislature; provided, that no such act shall be repealed, unless for violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same.

The power of repeal is limited and qualified, and was so considered in the case of *Crease v. Babcock* (23 Pick. 334).

Does this come within the power of the Legislature to amend or alter? It seems to us that this power must have some limit, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business; and they purchased such lot from a third party; could the Legislature prohibit the company from holding it? If so, in whom should it vest; or could the Legislature direct it to revert in the grantor, or escheat to the public; or how, otherwise?

Suppose a manufacturing company incorporated is authorized to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid; can the Legislature afterwards alter the act of incorporation so as to give to such meadow-owners future annual damages? Perhaps from these extreme cases — for extreme cases are allowable to test a legal principle — the rule to be extracted is this; that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.

It appears to us, in the present case, that after the government, acting in behalf of the public, and also of all those riparian owners whose fish-rights would be damnified by the defendant's dam, with the fishway as it was, entered into a solemn and formal contract with the defendant company to exempt them from the obligation of making and maintaining a suitable and sufficient fishway, if such were practicable, by indemnifying all parties damnified in their several fisheries, and the defendant company had executed their part of the contract by the payment of a large sum of money, it was not com-

petent for the Legislature, without any change of circumstances, under their authority to amend and alter the charter of the company, to pass a law requiring them to do the acts from which, by the terms of such contract, they had been exempted, and therefore that the said act was null and void, and this indictment founded upon it cannot be maintained.

Exceptions sustained.

DETROIT v. PLANK-ROAD COMPANY.

(43 Mich. 140. 1880.)

COOLEY, J. :—

A mandamus is applied for in this case to compel the respondent to remove beyond the city limits a toll-gate located on Grand River Street. The questions the application presents are questions of statutory construction and of constitutional law.

The respondent was incorporated April 3, 1848, for the purpose of building and maintaining a plank road from the city of Detroit to the village of Howell, with certain specified branches. The third section of the act of incorporation provided that the corporation "shall be subject to the provisions of an act entitled 'An act relative to plank roads,' approved March 13, 1848, except so far as otherwise provided in this act."

The fifth section was as follows: "This act shall be and remain in force for the term of sixty years from and after its passage; but the Legislature may at any time alter, amend or repeal this act by a vote of two thirds of each branch thereof; but such alteration, amendment or repeal shall not be made within thirty years of the passage of this act, unless it shall be made to appear to the Legislature that there has been a violation by the company of some of the provisions of this act: Provided, That after said thirty years, no alteration or reduction of the tolls of said company shall be made during its existence unless the yearly net profits of said company, over and above all expenses, shall exceed ten per cent on the capital stock invested, provided there be no violation of the charter of said company." (Laws 1848, p. 398.)

This act of incorporation was one of a considerable number passed by the same Legislature, all very short, and doing little beyond fixing the line of the proposed road, and the period of corporate existence, but referring for all other directions to the "Act relative to plank roads," subject to the provisions of which they were all made. That act prescribed a method of organization, enumerated the corporate powers and franchises, provided for an annual report to the Secretary of State, prescribed rates of toll, and limited the imposition of taxes. (Laws 1848, p. 59.)

Several sections of the general act of 1848 were amended in 1853, and several new sections were added. One of the new sections was as follows: "Any plank-road company, organized under the provisions of this act, shall be subject to the provisions of all amendments made or to be made thereto, whenever the assent of any such company, certified by the president and secretary thereof, to the provisions of such amendments shall be filed in the office of the Secretary of State." (Laws 1853, p. 69.)

The respondent filed its assent to these amendments and no question is made of its being bound thereby.

In 1879, a further section was added to the general act of 1848, as follows: "No plank-road company organized subject to the provision of this act, shall, without the consent of the local authorities, keep or maintain a toll-gate within the present or future corporate limits of any city or village, and no such company shall collect toll for any portion of its road within such limits, on which a pavement is maintained by such municipality. The assent of any such company to this amendment shall not be necessary in order to make this act applicable to such company. And if any plank-road company or companies in this State are, at the time of the passage of this act, maintaining any toll-gate within the present corporate limits of any city or village, said plank-road company or companies are hereby required to discontinue and remove said toll-gate beyond the limits of said city or village, within sixty days after they are notified by the municipal authorities to so discontinue or remove the same." (Public Laws 1879, p. 197.)

It is upon this last amendment that the questions in this case arise. The toll-gate of the respondent on Grand River Street is within the existing corporate limits of the city of Detroit, and the city authorities notified the respondent to discontinue and remove the same more than sixty days before this proceeding was instituted. The respondent denies the validity of the act of 1879, and refuses to conform to it. It is admitted that but for the act of 1879 respondent might lawfully maintain the gate where it is, the city having been extended to embrace it since the gate was located. *Chope v. Detroit & Howell P. R. Co.* (37 Mich. 195).

The effect of this legislation, if valid, would be to take from respondent about two miles and a half of the road upon which it now collects toll. It is not pretended that this is done by reason of any forfeiture done or suffered by the respondent, and if it were, a judicial finding would be necessary. *Flint, etc. Plank-Road Co. v. Woodhull* (25 Mich. 99). Nor is it claimed that the act of 1879 was passed as a regulation of police. It would probably be conceded that it goes quite beyond the competency of an act of mere regulation, and that it must be sustained, if at all, as an act passed in the exercise of that complete power to amend and repeal, which was reserved in passing both the general act of 1848, and the charter of respondent.

The city relies upon it as an exercise of that power, and not otherwise.

The respondent claims that the act of 1879 is unconstitutional for many reasons; one, which is especially relied upon, being that it is inconsistent with the act of 1853, by one of the provisions of which subsequent amendments were to be binding on companies which were subject to the provisions of the general plank-road act, when they should file with the Secretary of State their assent thereto. That section, it is insisted, constitutes a contract between the State and the companies, prescribing while it stands the terms and the only terms on which companies can be bound by amendments, and is irrepealable except as to such companies as may assent. The city insists, on the other hand, that so long as a general power to amend and repeal is reserved, all amendments must themselves be amendable and repealable, and that inconsistent legislation does not repeal them.

If the act of 1879 in what it proposes to accomplish is fairly within the scope of any legitimate power to amend charters, the difficulty raised upon the act of 1853 would probably not be serious. An examination of that act will show that its provisions were amendments for the ease and advantage of plank-road companies, enlarging their powers and capacities, decreasing the taxes to which they would be liable, extending the time within which they might complete their roads, relieving them of penalties, and so on, and that the consent of corporations thereto could not have been required by way of assent to onerous conditions as a consideration for favors conferred. On the contrary, the State could have passed and enforced the act without the provision for assent, and that provision can only be understood as leaving it optional with companies to claim the benefits of the act of 1853, as their interests might seem to dictate.

But so far as that act undertook to limit the power to amend in the future — if it can be understood as having done so — it must have been wholly inoperative. A legislative declaration embodied in a particular law, that it shall be binding only on those who may assent to it, may limit the scope of that law, but a declaration that any future law on the same subject shall be thus restricted must be void. *Bloomer v. Stolley* (5 McLean 158, 161); *Kellogg v. Oshkosh* (14 Wis. 623). Legislators cannot thus bind the hands of their successors where the elements of contract, concession, and consideration do not appear; and the doctrine that they may do so by contract is one so exceptional and so liable to abuses that courts will not be astute in discovering the existence of a contract between the State and those who claim franchises under it, where the essential elements of a contract are not manifest. All questions of doubt are to be solved in favor of the State in such cases, and “to be in doubt is to be resolved.” *Pennsylvania R. R. Co. v. Canal Commissioners* (21 Penn. St. 22); *East Saginaw Salt Manfg. Co. v. East Saginaw* (19 Mich. 259); *Richmond, etc. R. R. Co. v. Richmond* (26 Gratt. 83).

But leaving out of view the act of 1853, is the act of 1879 a legitimate exercise of the power to amend the plank-road charters? It has been seen that in the case of this particular company it takes from it about two miles and a half of its road, and this may be and probably is from the most profitable portion of it. That this diminishes essentially the value of the road is not to be doubted, though the extent is immaterial.

There are cases in which amendments to charters having some resemblance to this have been sustained, but it is in general easy to distinguish them. Many of these are cited in the brief for the relator. *Commissioners v. Holyoke Co.* (104 Mass. 446), in which a company having a dam across the Connecticut river was required to construct a fishway, was a case involving a mere police regulation for the preservation of rights of others in the fishery above and below. All the following cases involved the same principle: *Commonwealth v. Eastern R. R. Co.* (103 Mass. 254), where a railroad company was required to build a station house and stop its trains at a certain locality; *Albany, etc. R. R. Co. v. Brownell* (24 N. Y. 345), in which it was held competent to require a railroad company to permit and provide for the crossing of its track by highways; *Roxbury v. Boston R. R. Co.* (6 Cush. 424), in which a like question was involved; *English v. New Haven, etc. Co.* (32 Conn. 240), in which a bridge, made necessary for the convenience of a railroad company, and used by the company and the public, was required to be made wider by the company; *Worcester v. Norwich, etc. R. R. Co.* (109 Mass. 103), in which the railroads coming into a city were required to unite in a common passenger station at a point to be determined by commissioners; *Meadow Dam Co. v. Gray* (30 Me. 547), in which a company incorporated to build a dam across a river was required to construct a lock for purposes of navigation; and there are many others of the same sort. Cases involving only the right to change the methods or the extent of taxation, may be dismissed altogether from consideration, as this right must always exist when there is no express contract to the contrary. *East Saginaw Salt Manfg. Co. v. East Saginaw* (13 Wall 373). So may cases involving only the question of the liability of corporations to the control of the general police laws of the State. *Beer Company v. Massachusetts* (97 U. S. 25); *Fertilizing Company v. Hyde Park* (id. 659).

But there is no well considered case in which it has been held that a Legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant. The case of *Albany, etc. R. R. Co. v. Brownell* (24 N. Y. 345) is an illustration. It was there decided that although the Legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes, to the same burden except

in connection with provision for compensation. The decision was in accord with that in *Commonwealth v. Essex Co.* (13 Gray 239, 253), in which, while the power to alter, amend, or repeal the corporate franchises was sustained, it was at the same time declared that "no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." The same doctrine is clearly asserted and affirmed in *Railroad Company v. Maine* (96 U. S. 499), and is assumed to be unquestionable in the several opinions delivered in the Sinking Fund Cases (99 U. S. 700).

But for the provision in the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State; it is enough that it has become private property, and it is then protected by the "law of the land."

Even municipal corporations, though their charters are in no sense contracts, are protected by the Constitution in the property they rightfully acquire for local purposes, and the State cannot despoil them of it. *Terrett v. Taylor* (9 Cr. 43); *Pawlet v. Clark* (9 Cr. 292); *State v. Haben* (22 Wis. 660); *People v. Common Council* (28 Mich. 228).

We have said nothing of those cases in which charters have been amended by limiting the tolls that may be taken, as it is conceded by relator that that is not what has been attempted in this case. It was a part of the original contract that the tolls should not be reduced by the State until the annual returns should realize to the stockholders ten per centum annually on their investment, and it is not claimed that that limit has been reached. What the State claims a right to do is to deprive the respondent of the privilege any longer to take tolls for travel and traffic on two miles and a half of its road. If it may do this in respect to one part of the road, it may in respect to any other part. If it may exclude the respondent from Detroit,

it may from Howell also, or from any township on the line, and a single section of a statute may annihilate the property of respondent altogether. A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation.

It may be that what the Legislature of 1879 proposed to accomplish would in itself work no hardship to respondent, and would be highly desirable to the city; but the principle violated is the fundamental principle that underlies all property; and the first successful inroad upon it that obtains judicial sanction may be a precedent that shall let in innumerable evils. Courts must look beyond the particular case to the governing principle, and be governed by that, regardless of temporary and special inconveniences. But even such inconveniences must be trivial, since the power to appropriate private property to public uses is always ample and always at command.

It results, from what has above been said, that the *mandamus* must be denied.

The other Justices concurred.

CHAPTER XIV.

THE CORPORATION AND THE STATE.

REMEDIES OF THE STATE FOR UNAUTHORIZED ACTS.

STATE v. BUILDING ASSOCIATION.

(35 *Ohio St.* 258. 1879.)

QUO WARRANTO.

On May 24, 1878, the attorney-general filed in this court an information, on the relation of Lyman S. Colburn, praying that a judgment of ouster be pronounced against the defendant, The Oberlin Building and Loan Association, a corporation under the laws of this State. It is averred in the information that the defendant has forfeited its rights, privileges, and franchises as a corporation in various specified particulars.

An answer and a reply were filed, and the case was heard on the pleadings, an agreed statement of facts, and certain testimony. Colburn is a member of the corporation, and was formerly a director. The association has never received deposits.

OKEY, J.:—

Several questions of practical importance are involved in this case. They will be disposed of with as much brevity as the nature of the case will permit. But, in order that they may be understood, it will be necessary to extract from the voluminous record a statement of the facts.

On January 1, 1871, the defendant was organized and commenced business as a corporation, under the act of May 5, 1868, amended May 9, 1868 (65 *Ohio L.* 137, 173; *S. & S.* 194, 195), in relation to building and loan associations. The act, as amended, provides, among other things, as follows:

"Sec. 1. That any number of persons not less than five may associate together and become a corporation . . . for the purpose of raising moneys to be loaned among the members . . . for use in buying lots or houses, or in building or repairing houses, or other purposes.

"Sec. 2. Such corporation shall be authorized and empowered to levy, assess, and collect from its members such sums of money, by rates of stated dues, fines, interest on loans advanced, and premiums bid by members . . . for the right of precedence in taking loans, as

the corporation by its by-laws shall adopt; also to acquire, hold, incumber, and convey all such real estate and personal property as may be legitimately pledged to it on such loans, or may otherwise be transferred to it in the due course of such business, provided that the dues, fines, and premiums so paid by members, . . . although paid in addition to the legal rate of interest on loans taken by them, shall not be construed to make the loans so taken usurious, and provided, also, that no person shall hold more than twenty shares in any such association in his own right."

"Sec. 5. That so much of the earnings as may be necessary, not exceeding ten per cent per annum, may be set apart to defray the current expenses of said association, and for the purchase of such real estate as may be necessary for the convenient transaction of its business, and the residue of said earnings shall be transferred to the credit of the shareholders; and when said shares are fully paid, then to be paid ratably to the shareholders." (See Rev. Sts. §§ 3833-3836.)

The corporation has made no loan to any member since December 1, 1876, nor has it offered to make such loan by calling for bidders, as required by the by-laws. On April 1, 1877, P. G. Akers, a member of the corporation, applied to the directors for the purpose of obtaining a loan on four shares of stock; but the directors were not inclined to grant the request, and he accepted from them an offer of \$104 per share, and transferred the stock to the association, which is admitted to have been a good bargain on its behalf.

A by-law of the corporation, adopted September 1, 1873, provides that the directors shall determine the lowest amount of premium that will be received on loans. The directors have constantly acted in pursuance of that by-law, but have changed such minimum rate from time to time. Members sometimes bid below the premium so fixed, but the directors refuse to accept the bids.

At a meeting of the association, on June 20, 1877, a resolution was adopted, providing that as often as there is sufficient money in the treasury to divide the sum of ten dollars each to the uncanceled shares, such division shall be made, each share to be charged at the rate of ten per cent per annum for such dividend. Five distributions were made pursuant to that resolution, amounting in the aggregate to \$10,296 in cash. In addition, certain securities, hereinafter mentioned, were also distributed. But the construction given to the resolution was that the distribution should be confined to stockholders who had not taken out money on their shares.

From May 6, 1873, to March 8, 1877, the association procured at the First National Bank of Oberlin discount of twenty-two notes, amounting to \$14,814.48, made by the officers of the association and others, some of them payable in thirty days, others in sixty days, and the others in ninety days. The rate of interest was ten per cent per annum, which was usually deducted at the date of the note. Some of the notes were given in renewal of former loans. One of

them, dated October 1, 1875, was given for thirty-five shares of stock in the corporation, purchased by the directors for the association. The other sums were borrowed by the corporation for the purpose of lending the same. The shares above mentioned, and others, were purchased by the company, so as to transfer them to persons not members, who desired to obtain loans of the association.

On July 1, 1877, eight members of the association held shares of stock in excess of the number to which they were limited by statute. These shares number in the aggregate two hundred and ninety-two. Loans were made on all these shares except eighty-one. In the same year the association compromised with three of those members holding sixty-eight of such shares in excess.

From June 1, 1874, until January 1, 1878, the association compromised and settled with nine other members, whose shares were not in excess of the number to which they were limited by statute. The number of these shares was eighty-eight.

With respect to such compromises, the following appears in the answer: "Respondent says that in several instances it has, in consideration of certain of its stockholders cancelling their stock, discharged the obligations which it held against such stockholders as collateral security for certain loans which they had previously made from respondent, and upon the further consideration that such members first pay to respondent the present worth of the money so borrowed by them, and for which they gave such obligations, mortgages," etc.

Settlements were based on the assumed fact that the association would run one hundred months from the beginning, that is, that when that period is reached it can pay \$200 per share, according to the original intention. Repeated calculations showed that to be the probable duration of the company.

Where securities were taken in making settlements, they were distributed among the members in the same manner as the funds on hand, already mentioned, were distributed. The amount of securities so received and distributed was \$4,843.80.

On this state of facts our conclusions are as follows: —

1. That the association has abused its corporate powers in several particulars, admits of no doubt. It has refused to loan its funds to its members, and it has established such rules and regulations, and so conducted its business by dividing its funds and otherwise, as to prevent the loan of its funds to a member, under the system of competitive bidding contemplated in the statute, and provided for in the by-laws of the company. It has, indeed, loaned its funds, in many instances, to persons who were not members of the association. The illegality of such a course is clearly stated in *State ex rel. v. Greenville Building and Saving Association* (29 Ohio St. 92).

Again, the association has been in the habit of borrowing money for the purpose of lending it. We do not deny that corporations

possess the power to borrow money which may be needed in the transaction of their necessary business; but these transactions fall within no such principle. The money to be loaned by associations like this, if, as here, deposits are not received, can only be properly accumulated in the manner contemplated by the statute, that is, by dues, fines, premiums, and interest; and the acts complained of, and fully proved by the testimony, cannot be readily distinguished from the business of a banker. They are clearly illegal.

Equally illegal was the act of dividing the money and securities among certain stockholders. It was opposed to the principle upon which such associations are organized. It was, indeed, even if it had been done with perfect impartiality, a plain violation of the statute, which contemplates that no such division shall be made until "said shares are fully paid."

Finally, it was illegal for the association to traffic in shares of its own stock. We do not deny that a corporation has power to receive shares of its stock as security for a debt or other similar purpose; but here the association purchased its own shares of stock, in several instances, for the purpose of disposing of them to persons not intending to become members of the association, with a view of making such shares the basis of loans to such persons. The law will not uphold such transactions.

2. The association compromised with several of its members, and released them from further obligation to the corporation, as well on account of indebtedness for loans, as on subscription. We have examined the evidence, and we do not find there was any want of good faith in these transactions. The interest of the stockholders, as well as the public, seems to have been kept in view. Of course, without this such acts could not be upheld; but we are not able to find in the statute any inhibition of the power to make such compromises, and, on the fullest consideration, we unite in holding that the power exists.

3. Where a corporation has been guilty of acts, which, by statute, are made a cause of forfeiture of its franchise to be a corporation, this court has no discretion to refuse such judgment. *State ex rel. v. Penn. & O. Canal Co.* (23 Ohio St. 121). But, in other cases, we are vested with discretion to determine whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be ousted from the exercise of the powers illegally assumed. With some hesitation, a majority of the court have reached the conclusion that it will be for the interest of the stockholders, as well as the public, that we should render the latter instead of the former judgment. The evidence satisfies us that if the corporation is permitted to wind up its affairs, the work will be accomplished in a few months; but if the association should be ousted from its franchise to be a corporation, we would be required to appoint trustees under the Act of 1878 (75 Ohio L. 817, § 22; Rev. Stats. § 6781), and this would occasion delay and involve increased

expense. Accordingly, the corporation will be ousted from the exercise of the powers referred to in the first paragraph of the syllabus,¹ and from the power of permitting any member to hold in his own right more than twenty shares of stock, but not from its franchise to be a corporation, nor from the exercise of the power referred to in the second paragraph of the syllabus.

GILMORE, C. J.: —

I dissent only as to the judgment entered. Such flagrant and persistent violations of corporate powers and duties, as are shown in this case, in my opinion, call for and require an application of the severest penalties of the law. The judgment should oust the defendant from being a corporation.

Judgment of ouster as to specified powers.

PEOPLE v. NORTH RIVER SUGAR REFINING COMPANY.

(121 N. Y. 582. 1890.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the trial court, and affirmed an order denying a motion for a new trial.

This action was brought by the attorney-general to have the defendant "dissolved, its charter vacated, and its corporate existence annulled."

The complaint alleged, and it was found, that defendant is a corporation organized under the General Manufacturing Act; that it, together with other corporations and firms, in violation of law and in abuse of its powers became a party to and carried out an agreement² containing the following provisions among others:—

NAME.

The board herein provided for shall be designated by the name of "The Sugar Refineries' Company."

¹ The first two paragraphs of the syllabus are as follows:—

"1. A building and loan association, incorporated under the acts of May, 1868 (S. & S. 194, 195), has not the power to refuse to loan its funds to its members; nor to establish such rules and regulations or so conduct its business as to prevent the loan of its funds to a member who bids the highest premium therefor; nor to borrow money for the purpose of lending it: nor to divide or distribute its funds among its members in advance of the distribution at the winding up of the corporation; nor to traffic in shares of its own stock.

"2. Such corporation, acting in good faith and reasonably, may compromise with a member and release him from further obligation to the corporation, whether the indebtedness be for a loan or on subscription."

² Part of the statement of facts is omitted.

BOARD.

Each corporation subscribing hereto agrees, and the parties hereto who are not corporations agree as to the corporations which they are to form, that all the shares of the capital stock of all such corporations shall be transferred to a board, consisting of eleven persons, which may be increased to thirteen by vote of a majority of the members of the entire board, and two additional members to belong respectively to the first and second classes hereinafter provided for.

The board may transfer, from time to time, to such persons as it may be desired to constitute trustees or directors or other officers of corporations, so many of the shares as may be necessary for that purpose, to be held by them subject to the provisions of this instrument.

PLANS.

The several corporations, parties to this agreement, shall maintain their separate organizations, and each shall carry on and conduct its own business.

The capital stock of each corporation shall be transferred to the board, and in lieu of the same, certificates not exceeding \$50,000,000, divided into 500,000 shares, each of \$100, shall be issued by the board and distributed as hereinafter provided.

TITLE.

The shares of the capital stock of the several corporations to be transferred to the board as herein provided shall be transferred to the names of the board as trustees, to be held by them and by their successors as members of the board strictly as joint tenants.

By the death, resignation, or removal of any member of the board, the whole title shall remain in the others. All members ceasing to be such shall execute such instrument as may be necessary, if any, to keep the title vested in the persons who from time to time shall be members of the board.

The board shall hold the stock transferred to it with all the rights and powers incident to stockholders in the several corporations, and subject only to the purposes set forth in this deed.

PROFITS.

The profits arising from the business of each corporation shall be paid over by it to the board hereby created, and the aggregate of said profits, or such amount as may be designated for dividends, shall be proportionately distributed by said board, at such times as it may determine, to the holders of the certificates issued by said board for capital stock as hereinbefore provided.

In witness whereof the parties have hereunto set their seals and affixed their names, these presents to become binding when completely executed by all the parties, and to take effect from Oct. 1, 1887.

Dated August 16, 1887.

Havemeyers & Elder.

Donner & De Castro Sugar Ref'g Co.,

Per H. O. HAVEMEYER, *Manager*.

(Subject to confirmation stock and scripholders.)

F. O. Matthiessen & Weichers Sugar Ref. Co.,

F. O. MATTHIESSEN, *P.*

North River Sugar Refining Co.,

(GEO. H. MOLLER, *Secretary*).¹

¹ The names of the other parties to the agreement are omitted.

FINCH, J.:—

The judgment sought against the defendant is one of corporate death. The State, which created, asks us to destroy; and the penalty invoked represents the extreme rigor of the law. Its infliction must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is indeed less than that of the humblest citizen, and yet it envelopes great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason. That would be true even if the Legislature should debate the destruction of the corporate life by a repeal of the corporate charter; but is beyond dispute where the State summons the offender before its judicial tribunals, and submits its complaint to their judgment and review. By that process it assumes the burden of establishing the charges which it has made, and must show us warrant in the facts for the relief which it seeks.

Two of the charges preferred in the complaint have dropped out of sight. They were of little importance, and have been prudently dismissed from the inquiry for that reason; and we are left to consider the one grave and serious accusation to which alone the proofs and argument have been directed. That accusation is adequate to the purposes for which it was framed, but upon two conditions, which dictate the line of inquiry and limit the area of discussion. It appears to be settled that the State as prosecutor must show on the part of the corporation accused some sin against the law of its being, which has produced, or tends to produce, injury to the public. The transgression must not be merely formal or incidental, but material and serious; and such as to harm or menace the public welfare. For the State does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action. Corporations may, and often do, exceed their authority where only private rights are affected. When these are adjusted, all mischief ends and all harm is averted. But where the transgression has a wider scope and threatens the welfare of the people, they may summon the offender to answer for the abuse of its franchise or the violation of its corporate duty. The Code of Civil Procedure authorizes an action for that purpose when the corporation has "violated any provision of law whereby it has forfeited its charter or become liable to be dissolved by the abuse of its powers." In *Thompson v. People* (23 Wend. 583), the ground of forfeiture was tersely described as "some misdemeanor in the trust injurious to the public;" and as recently as the case of *Leslie v. Lorillard* (110 N. Y. 531), we said, "In the granting of charters the Legislature is presumed to have had in view the public interest; and public policy is concerned in the restriction of corporations within chartered limits; and a departure therefrom is only deemed excusable when it cannot result in prejudice to the public."

Two questions, therefore, open before us; first, has the defendant corporation exceeded or abused its powers; and, second, does that excess or abuse threaten or harm the public welfare.

The first question requires us to ascertain what the defendant corporation has done in violation of its duty, or omitted to do in performance of its duty. We find disclosed by the proof that it has become an integral part and constituent element of a combination which possesses over it an absolute control, which has absorbed most of its corporate functions, and dictates the extent and manner and terms of its entire business activity. Into that combination, which drew into its control sixteen other corporations engaged in the refining of sugar, the defendant has gone, in some manner and by some process, for as an unquestionable truth we find it there. All its stock has been transferred to the central association of eleven individuals denominated a "Board;" in exchange it has taken and distributed to its own stockholders certificates of the board carrying a proportionate interest in what it describes as its capital stock; the new directors of the defendant corporation have been chosen by the board, made eligible by its gift of single shares, and liable to removal under the terms of their appointment at any moment of independent action. It has lost the power to make a dividend, and is compelled to pay over its net earnings to the master whose servant it has become. Under the orders of that master it has ceased to refine sugar, and by so much, has lessened the supply upon the market. It cannot stir unless the master approves, and yet is entitled to receive from the earnings of the other refineries, massed as profits in the treasury of the board, its proportionate share for division among its own stockholders holding the substituted certificates. In return for this advantage it has become liable to be mortgaged, not for its own corporate benefit alone, but to supply with funds the controlling board when reaching out for other and coveted refineries. No one can look these facts fairly in the face without being compelled to say that the defendant is in the combination and in to stay. Indeed, so much is with great frankness admitted on the part of the appellant. Its counsel concedes that the stock was transferred "to the board mentioned in the agreement and on the terms and for the purposes mentioned in the agreement; and that this action effectually lodged the control of the defendant company, so far as such control can be secured by the voting power, in that board."

But that truth does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordinate and servant of the board by its own voluntary action, or the will and power of others than itself; by force of a contract to which it was in reality a party, or as the simple consequence of a change of owners; by its fault or its misfortune; by a sale or by a trust. For, if it has done nothing, if what has happened, and all that has happened, is

ascertained to be that the stockholders of the defendant, one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth and the entire and exact truth, it is difficult to see wherein the corporation has sinned, or what it has done beyond merely omitting for a time to carry on its business. That is the theory upon which the appellant stands, and which it submits to our examination.

On the other hand it is contended that there never was a sale, but a trust constituted by mutual agreement; that they who agreed were the whole body of stockholders in each corporation necessarily representing and binding the corporation itself; that they transferred their shares to the board upon the trusts declared in the deed; that the certificates issued by the board were the formal declaration of the trust; that the corporate stockholders parted with the legal title of their stock to the chosen trustees with the power to vote upon it, but retained, nevertheless, its beneficial ownership through the operation of the certificates; and so the corporations entered into a partnership with each other, vesting the partnership power in a board of control.

I have brought these two theories face to face where they may confront each other, because when a choice is made between them, we have gone a long distance towards the end of the controversy.

In making that choice we must necessarily analyze and construe the deed or contract which formed the terms of the combination, and which not only dictated its character, but brought it into existence. That contract, on the theory of a sale, is an unexpected and unaccountable document. A sale presumes vendors on the one side and vendees on the other, each having life and existence and the power and ability to contract. Here there was no joint stock association existing or organized until the vendors themselves created it, and they were obliged to construct their vendee in the very act of transfer. A contract of sale implies some negotiation between buyer and seller, each consulting his own interest and acting independently and of his own free choice. Here there was no negotiation with the board, but the vendors having created their vendee, themselves alone dictated the terms on which they should sell and it should buy. The selling stockholder explicitly swears that the board had nothing whatever to do with fixing the price. In a contract of sale covering property valued at some fifty millions of dollars and containing a patient statement of the terms of the trade; we should naturally expect that at least the buyer would give it his signature and bind himself to the purchase. This contract of sale is not signed by the vendees at all, and their assent is left to be supplied by inference from their action. In an ordinary sale the vendee becomes owner,

and has the rights of an owner and may do what he pleases with his own; but this contract tells the owners what they shall do with the property bought, and how they shall hold it, and inferentially at least forbids its further sale or transfer. As a general rule the vendor fixes the value or price of the property which he sells, or sometimes submits the question to disinterested appraisers, but this contract of sale generously allows the value of the personal property, separate from the plant, to be appraised and fixed by five persons, all of whom are themselves among the purchasers.

These are general considerations which make one hesitate over the theory of a sale as distinguished from a trust, but the doubt increases as we come closer to the details of the agreement and scrutinize its exact terms.

It is observable that the selected transferee of the stock of the corporations was denominated simply a "board." That implied agency, a committee of managers, official servants charged with executive duties and acting for and in the interest of others. The idea of a joint-stock association, capable of buying and acting as purchaser, had not yet dawned. Explicitly the deed declares "The shares of the capital stock of the several corporations to be transferred to the board as herein provided shall be transferred to the names of the board as trustees, to be held by them and by their successors as members of the board strictly as joint tenants." If beyond the inference of agency, suggested by the name and description of the board, more was needed to indicate the real aim and intention, it is supplied by the frank declaration that the transferees shall take as trustees, and hold in joint tenancy, which is the characteristic manner of a trust.

Other clauses in the instrument point significantly to the same construction. The purchase of stock in a corporation makes the buyer a stockholder. No such purchaser would think for a moment of requiring from the corporation a stipulation that he should have the rights of a stockholder, for those rights attach at once by force of his ownership. Yet we find in the document under examination, following the provision which requires the board to take as trustees, a clause entirely superfluous if a sale was meant, but a reasonable stipulation if a trust was intended, that "the board shall hold the stock transferred to it with all the rights and powers incident to stockholders in the several corporations." The clause carries with it a distinct suggestion that no absolute sale was intended, but a transfer in trust which might leave the assignors who became the beneficiaries some equitable right over the voting power; and to make sure of the vesting of that right in the trustees a specific and broad covenant was adopted adequate for all emergencies.

The owners of corporate stock, by force of their ownership, may put a mortgage upon the corporate property when the statute permits. Nobody doubts that, and no buyer would demand that per-

mission of the seller. But the contract in question explicitly authorizes the board to raise money by mortgages upon the property of the corporations. It strikes one as odd to see an absolute purchaser requiring his vendor in the deed of conveyance to covenant that the grantee may be at liberty to incumber by mortgage his own property. The astute pen which framed the deed of association had a very different aim, and realized that trustees, holding for trust purposes, should have power to mortgage given them if that necessity was contemplated.

A vendor about to sell his property, and to a very large amount, naturally looks carefully to his pay. A merchant or manufacturer who should sell his wares to a corporation having no other capital than the exact property bought, and take his pay in the stock of such corporation, would scarcely be deemed sane in business circles. The board organized by the refineries had a nominal capital of fifty millions, but not a single dollar of actual capital beyond the corporate shares transferred; and so the sellers, if indeed they were such, got aliquot parts of their own property in payment for the transfer. If they sold it, they simply got it back under a new name, and, as we shall see, heavily watered, and with its care and management intrusted to others, under an arrangement which might or might not add to its earning power.

If in truth, the board was meant to be anything more than a trustee or manager of the combined corporations, if it was contemplated that it should become and be a joint-stock association at all, it was put by the very articles of its creation under the most singular and oppressive restrictions. What shall we say of a joint-stock association without a dollar of actual capital, and yet forbidden to incur the least debt or obligation? It was commanded that "no action be taken by the board which shall create liability by it or by its members." Without a dollar it could not borrow a dollar; without money it could incur no debt; its cash resources were to come from a sale of its own certificates reserved over and above those allotted, or from mortgages made by the separate corporations, and yet this curious creation, viewed as a joint stock association, was able to induce the sale to it of twenty corporations. The stockholders with astonishing generosity sold and transferred to it all their stock, allowed it to pocket fifteen per cent of its agreed value, and took aliquot parts of the remainder of their own property for their pay. It seems to me that the theory of an absolute sale involves us in difficulties and complications on almost every page of the deed or combination agreement, and that it is an afterthought framed under pressure, and mismatching the entire tenor and terms of the instrument which it was invented to sustain. Indeed, I notice, among the briefs submitted to our study a reprint of an article from a distinguished pen, which traces the origin and history of economic combinations and monopolies, and ends with a determined defence of the one under

review, but concedes it to be a trust, created by contract, and organized and existing as such.

The combination, therefore, framed by the deed was a trust; and, if created by the corporations, or in any respect the consequence or product of their action, some inevitable results would be certain to follow. But here we encounter the stronghold of the appellant's argument, which is, that if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own; are there without corporate action on their part; and so are sufferers and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators; as it were, to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure. Let us first recall the facts in the order of their occurrence.

On the 22d day of April, 1887, there was a meeting of defendant's stockholders at which all the trustees were present. At that meeting the following preamble and resolutions were adopted by a unanimous vote: —

"Whereas, It is contemplated that the several sugar refineries in New York and other cities shall consolidate their several refineries in one large concern or company; and

"Whereas, We deem it for the interest of the North River Sugar Refining Company to participate in the above said consolidation; therefore be it

"Resolved, That Peter Moller, Jr., George H. Moller and Gerd Martens be, and they are hereby, appointed a committee to make arrangements to perfect the said consolidation in behalf of the North River Sugar Refining Company with full power to act and to sign all contracts and agreements in the name of the said North River Sugar Refining Company, of whatever name or nature, concerning the said consolidation.

"Resolved, That we authorize the president and secretary of the North River Sugar Refining Company to sign all contracts, agreements, and papers which the above-named committee may make in relation to the said consolidation."

In September following the secretary of the corporation added its signature to the deed. He tells us under oath, "I made that signature by virtue of authority from the stockholders and the board of officers of the North River Sugar Refining Company, the stockholders and trustees." It follows that the committee to whom authority was given to make the agreement, had made it. The stockholders by a unanimous vote decided to go into the proposed combination, and authorized their committee to agree on the terms. A trust of personal property may be created by parol. That the committee acted,

that they contracted for their company upon the terms of the deed, is an inevitable inference from the action of the secretary, who swears that he signed by authority, and could have had none except upon the agreement of the committee. It was, therefore, actually made, and the official signature was but the evidence of the agreement entered into by them. Here was a deliberate corporate act, if stockholders and trustees united can ever perform one, attested by one of the two officers who were authorized to sign. At that moment the defendant company had become a party to the contract by the consent of everybody connected with the corporation, and by force of the agreement to that effect which the signature of the secretary shows had been made by the authorized agency.

But it is said the corporation repented and withdrew from the agreement. I do not stop to discuss the question whether they could revoke without the consent of the board and their associates in the trust-deed, for assuming that they could, I prefer to analyze their revocation and see the scope and range of their repentance. The corporation remained a contracting creator of the trust until November 4, 1887. By the deed, the trust took effect on October first of that year, so that the defendant in its full corporate character became a party to it according to the terms of the deed, and remained bound by it for at least one month. But then there did come either repentance or fear. In November the stockholders again assembled and passed the resolution which is relied upon as a revocation. Its preamble recites a series of denials that the committee had made any agreement or that the president and secretary had signed any, and then, after declaring "it is deemed inexpedient at the present time to enter into any such consolidation," they revoked the powers conferred and the resolutions conferring them. That is to say, after the powers had been executed and had put the corporation into the combination, and it had become a constituent element of the trust, those powers were revoked upon a false assertion that they remained executory and so their revocation could be effective. I say a false assertion, for we are not at liberty to believe that George H. Moller, who was secretary of the corporation and one of the very committee authorized to make the agreement of consolidation, signed the deed when he knew that the committee had not agreed, and so in violation of his duty and without authority, and then positively swore that he signed by authority of the stockholders and trustees. His act and his oath heavily outweigh the resolutions of repentance. Let us not fail to observe that no signature is withdrawn, no notice is served upon the board or the associates, no consent of theirs asked or demanded, but the parties of one part to a contract come together and pass a resolution that they have not contracted and do not mean to, and rely upon that as releasing them from their obligation. All that they effectively did was to raise a question of veracity which must be decided against them upon the act and the oath of their own officer.

That repentance proved to be only a prelude to the exact sin claimed to have been avoided. On the 25th of November, 1887, which was just three weeks after the resolutions of revocation, the stockholders of the defendant company formally resolved to sell their capital stock for \$325,000 to John E. Searles, Jr. It is not unworthy of notice that the resolution to sell is prefaced by a recital that their secretary had signed a deed of consolidation "under the belief that he was authorized so to do," a matter which had nothing to do with the new agreement to sell unless the purpose of that agreement lay beneath the surface. The committee to deliver the stocks consisted of the same three persons who had originally been authorized to make the agreement of consolidation which had already been signed by Searles as treasurer of the Havemeyer Sugar Refining Company. The stock was delivered to him, the price paid to the stockholders, and so Searles became the one sole and only stockholder of the defendant company. He and the "legal entity" alone survived, and the latter apparently in a state of suspended animation. An effort was made to ascertain from what source the purchase-money came, but was not altogether successful. Searles did not furnish it. A certain committee of three did, who were to transfer the stock to the board. Searles adds: "Those three gentlemen whom I have named as trustees of certain funds paid for the stock, — fund received by them for mortgages and other matters connected with the organization. Q. What organization? A. The Sugar Refineries Company, the board." Well, the board got the stock from Searles, sole owner and sole stockholder, and gave in exchange certificates for \$700,000, or a little more than double the purchase-price, and which indicates the amount of water in the board's capital stock. From that, however, was deducted the fifteen per cent retained by the combination. What Searles did with the certificates we do not know, nor is it important to ascertain. We do know that new directors were chosen by the vote of the board; that Searles became president of the corporation; that its share of the regular dividend has been allotted to it for its certificate holders, and that it has wholly ceased to refine sugar. And thus its baptism in the pool of the board became complete and final.

And yet it is argued that the corporation, the legal entity, has done nothing; that Searles was guilty, but the corporate robe that enveloped him was innocent, and so he must be left to wear it undisturbed; that while all that was human and could act had sinned, yet the impalpable entity had not acted at all and must go free. I believe that the history of what occurred, as I have already described it, furnishes a sufficient answer, assuming that stockholders and trustees acting together can do a corporate act at all. There was corporate action in making the combination agreement which bound the defendant. The revocation of an executed authority left the contract standing. The corporation thus helped to make the trust

and became an element of it. If there was anything imperfect in its action, the new stockholder and his associates waived the imperfection, by acting upon the agreement of the corporation, and so confirming it in all particulars.

But the assumption underlying the view I have expressed is itself contested, and a proposition asserted which denies the possibility of any corporate action, except by the trustees or directors acting formally as such; a proposition which, if sound, dominates the whole field of controversy, and, establishing that there has been no corporate action at all, effectually shuts out every question of illegality or public injury. I cannot admit that proposition. I think there may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and if illegal and injurious may deserve and receive the penalty of dissolution. There always is, and there always must be, corporate conduct without formal corporate action where the thing challenged is an omission to act at all. A corporation organized in the public interest, with a view to the public welfare, and in the expectation of benefit to the community, which is the motive of the State's grant, may accept the franchise and hold it in sullen silence, doing nothing, resolving nothing, furnishing no formal corporate action upon which the State can put its finger and say, this the corporation has done by the agency through which it is authorized to act. That is corporate conduct which the State may question and punish without searching for a formal corporate act. The directors of a corporation, its authorized and active agency, may see the stockholders perverting its normal purposes by handing it over, bound and helpless, to an irresponsible and foreign authority, and omit all action which they ought to take, offer no resistance, make no protest, but silently acquiesce as directors in the wrong which as stockholders they have themselves helped to commit. That again is corporate conduct, though there be an utter absence of directors' resolutions. Is it asked what they could have done to prevent the organization of the trust; how they were negligent and unfaithful as corporate officers by their omission to act; what good a mere protest or objection would have accomplished; what effective form their resistance could have assumed? The answer is that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock-books; they could have said, and acted upon their words, that the original stockholders remained not only the beneficial, but the legal owners of the stock; and, if the board trustees appealed to the law, the resisting directors could challenge the legality of the transfer as moulded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career. So much

they could have done as corporate officers; so much it was their duty to have done as representatives of the corporation; and when, beyond that corporate neglect, they recognized the validity of the stock transfers in trust, put the new and unlawful ownership upon their books, and accepted its votes in the choice of new directors who were to throttle the independence of the corporation and chain it to the will of the trust, I think we must shut our eyes in wilful blindness if we fail to see both corporate neglect and corporate action.

It is true, as we are reminded, that the statute confers upon trustees and directors general authority to manage the stock, property, and concerns of manufacturing corporations; and equally true that, as a general rule and as between the companies and those with whom they deal, the corporate action must be manifested through and by the directors; but other statutes indicate with equal plainness that there are corporate acts which the trustees cannot perform, and which affect and bind the corporation only upon the condition that they proceed from the stockholders, or from them and the trustees acting together. In increasing or diminishing the capital stock, the corporate act is wholly that of the corporators, and in consolidating two or more companies into one, there must be the joint action of both trustees and stockholders. The trust of the refineries, in substance and effect, approached very near to these two corporate acts, so far as the resultant consequences affected the corporators acting. The trust stipulations practically doubled their corporate stock through the agency of the certificates issued, and the combination in its result is largely the equivalent of a substantial consolidation. If these things had been done lawfully, they would have been accomplished by the united action of trustees and corporators, and beyond any question would have been corporate acts. Having been done unlawfully, but by the same united agency aiming at similar results, they must still constitute corporate conduct, unless the bare fact of their illegality takes away their corporate character. To say that, would disarm the State in every case of misuse or abuse of chartered powers.

The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is, what in a given case has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material, but as between it and the State, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The State gave the franchise, the charter, not

to the impalpable, intangible, and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hands and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act collectively as an aggregate body, without the least exception, and, so acting, reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the State may review, and not be defeated by the assumed innocence of a convenient fiction. As was said in *People ex rel. v. K. & M. T. R. Co.* (23 Wend. 193), "though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court."

It remains to determine whether the conduct of the defendant in participating in the creation of the trust, and becoming an element of it, was illegal and tended to the public injury, and we may consider the two questions together and without formal separation.

It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the State the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control. When it had passed into the hands of the trust, only a shell of a corporation was left standing, as a seeming obedience to the law, but with its internal structure destroyed or removed. Its stockholders, retaining their beneficial interest, have separated from it their voting power, and so parted with the control which the charter gave them and the State required them to exercise. It has a board of directors nominally and formally in office, but qualified by shares which they do not own, and owing their official life to the board which can end their power at any moment of disobedience. It can make no dividends whatever may be its net earnings, and must encumber its property at the command of its master, and for purposes wholly foreign to its own corporate interests and duties. At the command of that master it has ceased to refine sugar, and without any doubt for the purpose of so far lessening the market supply as to prevent what is termed "over-production." In all these respects it has wasted and perverted the privileges conferred by the charter, abused its powers, and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the State had a right to expect and require. It has helped to create an anomalous trust which is in substance and effect a partnership of

twenty separate corporations. The State permits in many ways an aggregation of capital, but mindful of the possible dangers to the people, over-balancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants. It is a violation of law for corporations to enter into a partnership. *N. Y. & S. C. Co. v. F. Bank* (7 Wend. 412); *Clearwater v. Meredith* (1 Wall. 29); *Whittenton Mills v. Upton* (10 Gray, 596). The case last cited furnishes the reasons with precision and at length. It shows the utter inconsistency of a double allegiance by those who act for the corporation to two different principals, and demonstrates that the vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership. That the combination of the refineries partakes of the nature of a partnership is not denied. Indeed, in one of the papers added to the appellant's brief, it is not only admitted but asserted and defended. That paper shows quite clearly, that by force of the arrangement there was a community of interest in the fund created by the corporate earnings before division, and that each member of the trust shared in the profit and loss of all. It is said, however, that a consolidation of manufacturing corporations is permitted by the law, and that the trust or combination or partnership, however it may be described, amounts only to a practical consolidation which public policy does not forbid, because the statute permits it (Laws of 1867, chap. 960; Laws of 1884, chap. 367). The refineries did not avail themselves of that statute. They chose to disregard it, and to reach its practical results without subjection to the prudential restraints with which the State accompanied the permission. If there had been a consolidation under the statute, one single corporation would have taken the place of the others dissolved. They would have disappeared utterly, and not, as under the trust, remained in apparent existence to threaten and menace other organizations and occupy the ground which otherwise would be left free. Under the statute the resultant combination would itself be a corporation deriving its existence from the State, owing duties and obligations to the State, and subject to the control and supervision of the State, and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owing no corporate allegiance. Under the statute the consolidated company taking the place of the separate corporations could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed; and not as here a capital stock double that value at the outset and capable of an elastic and irresponsible increase. The difference is very great, and serves further to indicate the inherent illegality of the trust combination.

And here I think we gain a definite view of the injurious tendencies developed by its organization and operation, and of the public

interests which are menaced by its action. As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest; and that to a much greater extent when beyond their own several aggregations of capital they compact them all into one combination which stands outside of the ward of the State, which dominates the range of an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the State to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their forces in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations, vastly exceeding in number and in strength and in their power over industry any possibilities of individual ownership; and the State by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing, what it should cause and create is quite another.

And so we have reached our conclusion, and it appears to us to have been established, that the defendant corporation has violated its charter, and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration. Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this State there can be no partnerships of separate and independent corporations, whether directly, or indirectly, through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints;•

but that manufacturing corporations must be and remain several as they were created, or one under the statute.

The judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

ATTORNEY-GENERAL *v.* TUDOR ICE COMPANY.

(104 Mass. 239. 1870.)

INFORMATION in equity by the attorney-general, on behalf of the Commonwealth, and at the relation of Richard Price, to restrain the defendants from engaging in or carrying on any business other than the cutting, storing, and selling of ice. Hearing, on a motion for an injunction, before the chief justice, who reported the case as follows:—

“The company was organized in 1861, under the Gen. Sts. c. 61, for the purpose of cutting, storing, and selling ice. Its capital stock was fixed at \$360,000. It has carried on this business ever since, but has also carried on various other branches of business; has been in the habit of chartering vessels for the East Indies, loading them with ice so far as was proper, and completing the cargo by purchasing and exporting kerosene oil, tobacco, rosin, and lumber; and has also imported merchandise of various kinds, including paddy, jute, linseed, and tea. It has also erected buildings and placed machinery in them, which cost about \$400,000. Some of the machinery is for the manufacture of tobacco, but the manufacture was discontinued about two years ago. Some of it is for cleaning rice, some for the manufacture of jute into gunny cloth, and some for the manufacture of linseed into oil. These branches of business it still carries on, and the capital invested in them is three or four times larger than its capital stock. The business is connected with the exportation of ice, and has increased the profits of the company, but does not appear to be necessary to its legitimate business. It has imported two cargoes of tea, worth \$300,000, which had no connection with the ice trade. It does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its act of incorporation, and are alleged to be against public policy for that reason. I report the case for determination upon the questions, whether this information in equity can be maintained, and, if it can be maintained, whether a temporary injunction ought to be issued, upon the facts above stated.”

GRAY, J:—

This court, sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is

limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common-law side of this court or of the other courts of the Commonwealth.

The Tudor Ice Company is a private trading corporation. It is not in any sense a trustee for public purposes. This is not a suit by a stockholder or a creditor. The acts complained of are not shown to have injured or endangered any rights of the public, or of any individual or other corporation; and cannot, upon any legal construction, be held to constitute a nuisance. It is expressly stated, in the report of the chief justice, that "it does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its acts of incorporation and are alleged to be against public policy for that reason." No case is therefore made, upon which, according to principles of equity jurisprudence and the practice of this court, an injunction should be issued upon an information in chancery.

In *Attorney-General v. Utica Insurance Co.* (2 Johns. Ch. 371), Chancellor Kent, in a very able and elaborate judgment, after a thorough discussion of the question on principle, and an extensive examination of the earlier authorities, held that such an information could not be maintained to restrain an insurance company from exercising banking powers in violation of a statute of New York; but that the proper remedy was at law, by information in the nature of a *quo warranto*; and no appeal appears to have been taken from his decree. An information in the nature of a *quo warranto* was thereupon filed, and sustained by the Supreme Court of New York, and judgment rendered thereon that the corporation be ousted from the franchise which it had usurped. *People v. Utica Insurance Co.* (15 Johns. 358). Similar proceedings may be had at law in this Commonwealth in a proper case. *Goddard v. Smithett* (3 Gray, 116, 122, 123); *Attorney-General v. Salem* (103 Mass. 138); *Boston & Providence Railroad Co. v. Midland Railroad Co.* (1 Gray, 340); Gen. Sts. c. 145, §§ 16-24.

One early English case of high authority, not cited by Chancellor Kent, nor at the argument of the present case, is so much in point as to be worth quoting in full. Upon a bill in equity, filed by the attorney-general, at the relation of several freemen of the Weavers' Company, against the officers of that company, setting forth "that the defendants had been guilty of many breaches and violations of their charters, and had oppressed the freemen, etc., and mentioned some particulars; and for a discovery of the rest, and that they might be decreed for the future to observe the charters, and to have an account of the revenue of the corporation which the defendants had misspent, etc., was the end of the bill. To which the defendants demurred, because, as to part of the bill, it was to subject them to prosecutions at law, and to a *quo warranto*; and as to the other parts,

the plaintiffs had remedy by mandamus, information, or otherwise, and not here. And of the same opinion," the report proceeds, was Lord Cowper, "who said it would usurp too much on the King's Bench; and that he never heard of any precedent for such a case as this; and so allowed the demurrer." *Attorney-General v. Reynolds* (1 Eq. Cas. Ab. (3 ed.) 131).

The modern English cases, cited in support of this information, were of suits against public bodies or officers exceeding the powers conferred upon them by law, or against corporations vested with the power of eminent domain and doing acts which were deemed inconsistent with rights of the public.

Some of them were cases of misapplication of funds raised by taxation and held by municipal corporations or officers upon specific public trusts. Such were *Attorney-General v. Norwich* (16 Sim. 225); *Attorney-General v. Guardians of Poor of Southampton* (17 Sim. 6); and *Attorney-General v. Andrews* (2 Macn. & Gord. 225).

The hypothetical case, in which Lord Westbury, in *Stockport District Waterworks v. Manchester* (9 Jur. (N. S.) 266), said that he should "probably not hesitate" to act upon the information of the attorney-general was of a suit to restrain the making of a contract between an aqueduct corporation and a city to carry water beyond the limits which the city was authorized by law to supply.

The passages cited from *Liverpool v. Chorley Water Works Co.* (2 De Gex, Macn. & Gord. 852, 860), and *Ware v. Regent's Canal Co.* (3 De Gex & Jones, 212, 228), were but dicta that an unauthorized diversion of water or flowing of land by an aqueduct or canal corporation, without proof of actual or imminent injury to property, gave no right of suit to an individual, and could only be checked on an application to the court by the attorney-general.

The case of *Attorney-General v. Great Northern Railway Co.* (4 De Gex & Smale, 75), was a clear case of nuisance, the unlawful obstruction of a public highway by a railroad. That of *Attorney-General v. Oxford, Worcester & Wolverhampton Railway Co.* (2 Weekly Rep. 330), was the case of the opening of a railway line in violation of an order which an unauthorized public board had made, upon the ground that it would be unsafe to the public.

The single case, in which an information has been sustained in an English court of chancery against a corporation for carrying on a business beyond its corporate powers, is *Attorney-General v. Great Northern Railway Co.* (1 Drewry & Smale, 154), in which Vice Chancellor Kindersley in 1860 restrained a railway company from trading in coal in large quantities, upon the ground that there was danger that, if allowed to go on, it might get into its hands the coal trade of the whole district from or through which its railway ran, and thus acquire a monopoly injurious to the public. That case is evidently the foundation of the dictum of Vice Chancellor Wood, two

years later, in *Hare v. London & Northwestern Railway Co.* (2 Johns. & Hem. 80, 111).

In *Attorney-General v. Mid Kent Railway Co.* (Law Rep. 3 Ch. 100), a mandatory injunction was granted upon the information of the attorney-general to compel a railway company to construct a bridge over a public road, and with as gradual a slope as was required by a special clause in its charter; and the objection that the attorney-general might have had an equal and complete remedy at law was stated by each of the lords justices as if it required no answer, and afforded no ground for refusing to entertain jurisdiction in equity. It is often said, in the English books, that the king or his attorney-general, suing in behalf of the public, has the election to sue in either of his courts, and may therefore enforce a legal right in the court of chancery. 1 Dan. Ch. Pract. (3d Am. ed.) 6, 7; *Attorney-General v. Galway* (1 Molloy, 95, 103). However that may be, by our statutes the general equity jurisdiction of this court is limited to cases where there is no plain, adequate, and complete remedy at law, as well in suits by the Commonwealth as those brought by private persons. Gen. Sts. c. 113, § 2; *Commonwealth v. Smith* (10 Allen, 448); *Clouston v. Shearer* (99 Mass. 209, 211), and other cases there cited. The 38th of the former rules in chancery of this court (14 Gray, 360) by which the court adopted, as the outlines of its practice, the practice of the high court of chancery in England, so far as the same was not repugnant to the Constitution and laws of the Commonwealth, nor to those or such other rules as the court might from time to time make, cannot enlarge the jurisdiction of this court as defined by statute, and has been repealed by the new rules recently established (Rules of 1870, 104 Mass. 555).

The only cases in which informations in equity in the name of the attorney-general have been sustained by this court are of two classes. The one is of public nuisances, which affect or endanger the public safety or convenience, and require immediate judicial interposition, like obstructions of highways, or navigable waters. *District Attorney v. Lynn & Boston Railroad Co.* (16 Gray, 242); *Attorney-General v. Cambridge* (Ib. 247); *Attorney-General v. Boston Wharf Co.* (12 Gray, 553); *Rowe v. Granite Bridge Co.* (21 Pick. 344, 347). The other is of trusts for charitable purposes, where the beneficiaries are so numerous and indefinite that the breach of trust cannot be effectively redressed except by suit in behalf of the public. *County Attorney v. May* (5 Cush. 336); *Jackson v. Phillips* (14 Allen, 539, 579); *Attorney-General v. Garrison* (101 Mass. 223); Gen. Sts. c. 14, § 20. If there are any other cases to which this form of remedy is appropriate, that of a private trading corporation, whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely upon the ground that they are not authorized by its act of incorporation and are therefore against public policy, is not one of them.

Information dismissed.

ATTORNEY-GENERAL *v.* AQUEDUCT CORPORATION.(133 *Mass.* 361. 1882.)

MORTON, C. J.:—

This information in equity alleges that Jamaica Pond is one of the great ponds of the Commonwealth; that the defendant, by its charter and other statutes, was authorized to draw water from the pond for the purposes of its incorporation, provided it did not reduce the level of the pond below a certain limit referred to in the statutes; that by the St. of 1868, c. 182, the corporation was further authorized, for the purpose of better supplying fresh water and of saving and restraining the water that might percolate from Jamaica Pond into what was formerly known as Spring Pond, to take, hold, or purchase certain land near Spring Pond, and to enlarge Spring Pond and to raise a dam on said land; that said corporation, under the St. of 1868, took a certain tract of land of the Brookline Land Company; that it is now digging upon the land so taken a large well as a source of water supply, and is erecting a building, and proposes to establish extensive machinery in connection with said well, for the purpose of taking water from said well and distributing it through the pipes of the corporation; that the corporation has no legal right to use the land taken for these purposes, or to dig wells or draw from wells as a source of water supply; and that the necessary effect of sinking the well and drawing water from it will be to lower the water in Jamaica Pond below the limit fixed as aforesaid, to impair the rights of the public in the use of the pond for fishing, boating, and other lawful purposes, and to create and expose upon the shores of said pond a large quantity of slime, mud, and offensive vegetation very detrimental to the public health.

The defendant has demurred to the information; and the first ground taken is, that it does not state a case which is within the equity jurisdiction of the court. Assuming, for the purposes of this question, that the defendant has no right or authority to sink wells for the purpose of obtaining a supply of water, the information presents a case where a quasi public corporation is doing and contemplating acts which are *ultra vires* and illegal, the necessary effects of which are not only to impair the rights of the public in the use of one of the great ponds for the purposes of fishing and boating, but to create a nuisance by lowering the pond and exposing upon its shores slime, mud, and offensive vegetation detrimental to the public health.

The cases are numerous in which it has been held that the attorney-general may maintain an information in equity to restrain a cor-

poration, exercising the right of eminent domain under a power delegated to it by the Legislature, from any abuse or perversion of the powers, which may create a public nuisance or injuriously affect or endanger the public interests. *Agar v. Regent's Canal Co.* (Coop. temp. Eldon, 77); *Attorney-General v. Great Northern Railway* (1 Dr. & Sm. 154); *Attorney-General v. Mid Kent Railway* (L. R. 3 Ch. 100); *Attorney-General v. Leeds Corporation* (L. R. 5 Ch. 583); *Attorney-General v. Great Eastern Railway* (11 Ch. D. 449); *Attorney-General v. Great Northern Railway* (4 De G. & Sm. 75); *Attorney-General v. Cohoes Co.* (6 Paige, 133).

The information in this case alleges not only that the defendant is doing acts which are *ultra vires* and an abuse of the power granted it by the Legislature, but also that the necessary effect of such acts will be to create a public nuisance. This brings the case within the established principle that the court has jurisdiction in equity to restrain and prevent nuisances. And when the nuisance is a public one, an information by the attorney-general is the appropriate remedy. *District Attorney v. Lynn & Boston Railroad* (16 Gray, 242); *Attorney-General v. Cambridge* (16 Gray, 247); *Attorney-General v. Tudor Ice Co.* (104 Mass. 239); 2 Story Eq. Jur. §§ 921-923.

This information, therefore, can be sustained on the ground that the unlawful acts of the defendant will produce a nuisance, by partially draining the pond and exposing its shores, thus endangering the public health.

The defendant contends that the law furnishes a plain, adequate, and complete remedy for this nuisance by an indictment, or by proceedings under the statutes for the abatement of the nuisance by the board of health. Neither of these remedies can be invoked until a part of the mischief is done, and they could not, in the nature of things, restore the pond, the land, and the underground currents to the same condition in which they are now. In other words, they could not remedy the whole mischief. The preventive force of a decree in equity, restraining the illegal acts before any mischief is done, gives clearly a more efficacious and complete remedy. *Cadigan v. Brown* (120 Mass. 493).

There is another ground upon which, in our opinion, this information can be maintained, though perhaps it belongs to the same general head of equity jurisdiction, of restraining and preventing nuisances. The great ponds of the Commonwealth belong to the public, and, like the tide waters and navigable streams, are under the control and care of the Commonwealth. The rights of fishing, boating, bathing, and other like rights which pertain to the public, are regarded as valuable rights, entitled to the protection of the government. *West Roxbury v. Stoddard* (7 Allen, 158); *Attorney-General v. Woods* (108 Mass. 436); *Commonwealth v. Vincent* (108 Mass. 441). If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair

these rights and privileges, it furnishes a proper case for an information by the attorney-general to restrain and prevent the mischief.

Suppose a city or an aqueduct corporation commences a canal or an aqueduct, without authority from the Legislature, designed to draw off great quantities of the water, and to reduce the size and level of a pond, so as to injure or endanger the rights of the public therein, an information in equity would furnish the only adequate means of asserting and protecting the rights of the government and of the public. The Legislature has the right to determine to what extent the defendant corporation may draw down the waters of Jamaica Pond for the purposes for which it was incorporated.

The information in this case alleges that the necessary effect of the acts of the defendant will be to lower the water below the point limited by the Legislature, and to impair greatly the rights of the public in the pond for the purposes of boating, fishing, and other lawful uses. We are of opinion that, upon this ground, it states a case within the equity jurisdiction of this court, as well as upon the ground that the acts of the defendant will produce a nuisance deleterious to the public health.

We are thus brought to the question whether the acts of the defendant, of which the information complains, are *ultra vires* and illegal. This depends upon the construction of the St. of 1868, c. 182. The first section of this statute provides that "The Jamaica Pond Aqueduct Corporation is hereby authorized and empowered, for the purpose of better supplying fresh water, and for saving and restraining the water that may percolate from Jamaica Pond, into what was formerly known as Spring Pond, in land now owned by said corporation, to take, hold, or purchase any land near, or adjoining said land, now owned by said corporation, on the northerly side of Perkins Street and easterly side of Chestnut Street, and may enlarge said pond, formerly called Spring Pond, and raise a dam on said land taken or purchased, to such height as may best serve to save and restrain the water now running to waste from said Spring Pond, the better to save and supply fresh water from said Spring Pond for aqueduct purposes; but the said corporation are not authorized by this act to take land within fifty feet of any part of the stream that flows from the western side of Pond Avenue or Chestnut Street; provided, that the water of said pond shall never be drawn lower than one foot in the shallowest part, except for the purpose of repairs of the dam, or clearing out the pond."

The defendant contends that, when it took under this statute the land in question, it took the entire fee of the land, and thereby acquired the right which any owner has to sink wells in his land and intercept the underground streams or currents. But this claim cannot be sustained. The uniform rule in Massachusetts is, that when the Legislature delegates to a corporation or person the power to take land of another in the exercise of the right of eminent domain,

such corporation or person takes only such estate in the land taken as is necessary to carry out the purposes for which it or he is permitted to take it. This rule is constantly applied in the cases of highways, turnpikes, railroads, canals, aqueducts, sewers, and other like cases. *Harback v. Boston* (10 Cush. 296); *Clark v. Worcester* (125 Mass. 226). It is not necessary that the defendant should have a fee to enable it to carry out all the purposes of the act, and it therefore took only an easement, and the fee remained in the original owner. *Aetna Mills v. Brookline* (127 Mass. 69-72).

The defendant contends that the sinking of wells and constructing hydraulic pumps and other machinery are within the purpose of the Legislature and within the scope of the St. of 1868. In this country as in England, a grant from the sovereign power is to be construed strictly against the grantee. Nothing will be included in the grant except what is granted expressly or by clear implication. *Fertilizing Co. v. Hyde Park* (97 U. S. 659, 666); *Newton v. Commissioners* (100 U. S. 548); *Commissioners on Inland Fisheries v. Holyoke Water Power Co.* (104 Mass. 446). The St. of 1868 declares the purposes for which the defendant may take such land to be for saving and restraining the water that may percolate from Jamaica Pond into Spring Pond, and by raising a dam on the land taken, to such a height as to save and restrain the water now running to waste from Spring Pond, the better to save and supply fresh water from Spring Pond for aqueduct purposes. The object of the statute was to save the water percolating from Jamaica Pond, and by preventing waste from Spring Pond to increase the efficiency of that pond as a source of supply.

There is nothing in the statute which points to the sinking of wells to be used as a source of supply by intercepting the underground currents which help to supply Jamaica Pond, and to establishing hydraulic pumping machinery. The purposes for which the defendant is using the land taken are different from and foreign to the purposes for which it was authorized to take it. Its use of it for such purposes is a perversion of the powers granted it by the Legislature. We are of opinion that the defendant has no authority to use the land taken for the purpose of digging wells and appropriating underground currents. *Bailey v. Woburn* (126 Mass. 416).

The provisions of the second section, giving a remedy to any person whose land or water or water-rights shall be taken or injured, cannot, as contended by the defendant, enlarge the powers granted by the first section; they being merely intended to give a remedy to those who may be injured by the exercise of the power or franchise given in the first section, and not to confer new or additional powers.

Upon the whole case, therefore, we are of opinion that the information states a case within the equity jurisdiction of the court.

Demurrer overruled.

STATE v. TURNPIKE.

(15 N. H. 162. 1844.)

INFORMATION in the nature of *quo warranto*, filed by the Attorney-General against the defendants, and stating that they, without any charter, warrant, or grant, used the privilege of erecting and maintaining a gate across the highway called the Fourth Turnpike Road in New Hampshire, in the town of Wilmot, and of demanding and receiving tolls thereat for the year past, which privilege and franchise the defendants have usurped upon the State.

Plea, that by an act of the Legislature, passed on the 8th day of December, 1800, the defendants were incorporated, and empowered to build and maintain a turnpike road from Lebanon to Salisbury or Boscawen, and to erect and fix so many gates as might be necessary to collect the tolls granted by their charter; that they built the road and established a gate across it in the town of Wilmot, and collected tolls thereat, as they lawfully might do, and that they have always claimed and exercised the privileges given them by their charter, and have not usurped them upon the State, and concluding with a verification.

Replication, that by the charter it is enacted that at the end of every six years after the setting up of any toll-gate, an account of the expenditures and profits of the road shall be laid before the Legislature. under forfeiture of the privileges of said act in future, and alleging that, forty years next before the filing of the information, the defendants did set up toll-gates upon the road, and did take toll, and have ever since kept up gates and taken toll, yet that they have never rendered any account to the Legislature of the expenditures and profits of the road, as they were bound to do, by reason whereof they have forfeited the privileges conferred by their charter.

Rejoinder, protesting that at the end of every year after the setting up of any toll-gate, the defendants have rendered an account to the Legislature of the expenditures and profits of the road, according to the true intent and meaning of the act, and alleging that the act farther provides, that whenever the net income of the road shall amount to the sums expended, with twelve per cent interest thereon from the time of their disbursement, the road shall revert to and become the property of the State, and that the State may, at any time after the expiration of forty years from the passage of the act, repay to the defendants the amount of expenses incurred with twelve per cent interest thereon, deducting the tolls received, and in that case the road should become the property of the State; that the net income has never amounted to the sums expended, with twelve per cent in addition thereto, nor has the State ever repaid or offered

to repay the sums expended, with twelve per cent in addition thereto; that toll-gates were erected on the road on the 2d day of March, 1806, and that in each of the years 1830, 1836, and 1842, at the end of the several terms of six years which terminated in those years respectively, the defendants laid before the Legislature a true account of the expenditures and profits of the road; that each account contained a statement of the income and expenditures of the road for a period of six years next preceding its rendition, and of the whole income and expenditures of the road before the rendition, each of which accounts was received by the Legislature as sufficient and satisfactory; that by an act passed on the 6th day of July, 1833, the defendants were authorized to change the route of the road in such places as they might deem expedient, in the towns of Lebanon and Enfield; that the defendants accepted the act, and by its authority changed the route of the road at great expense in those towns; that they have always enjoyed the privileges conferred by their charter; that they are a body politic and corporate; that their privileges still continue; that they have full right to maintain toll-gates and receive tolls, their privileges having been confirmed and continued to them in manner aforesaid.

To this rejoinder there was a general demurrer.

GILCHRIST, J. : —

The charter makes it the duty of the corporation to lay before the Legislature, at the end of every six years after the setting up of any toll-gate, an account of the expenditures and profits of the road, under the penalty of forfeiting the privileges of the act in future. These accounts, however, were not submitted until the years 1830, 1836, and 1842, in which years they were submitted to the Legislature and accepted by them as sufficient and satisfactory. In the year 1833 the Legislature passed an act authorizing the corporation to change the route of their road in certain places. These are the facts laid before us, upon which we are to determine whether the defendants are now an existing corporation.

The accounts not having been laid before the Legislature the penalty of forfeiture was incurred in terms. But the subsequent accounts were accepted by the Legislature as sufficient and satisfactory, and farther powers were conferred upon the defendants by the Act of 1833. Has the Legislature power to waive the forfeiture? And if it has, do these facts amount to such waiver? These are the questions presented to us by the pleadings.

The doctrine of the waiver of a forfeiture by the Legislature by subsequent legislative acts does not apply, if, by the terms of the charter, the franchise absolutely determines on failure to perform the condition; for as in such case the corporation has ceased to exist, the doctrine of waiver is inapplicable. The charter in this case provides that the accounts shall be laid before the Legislature, "under forfeiture of the privileges of the act in future." The meaning of

this is, that the forfeiture shall be proved in the regular, legal manner; upon the institution and prosecution of proceedings in the established course, such neglect of this duty shall be cause of forfeiture. It probably would not be competent for a debtor of the corporation, when sued, to set up by way of defence that the charter of the corporation was forfeited, unless the forfeiture had been established by the judgment of this court. *Chester Glass Co. v. Dewey* (16 Mass. 102); *Bank of Niagara v. Johnson* (8 Wend. 645); *The People v. The Manhattan Co.* (9 Wend. 382). That is a matter to be judicially tried and determined, and not to be inquired into collaterally. Where a charter imposes the duty of making stated returns of the expenditures and profits, the government alone can enforce a forfeiture for a neglect of the duty. *Peirce v. Somersworth* (10 N. H. Rep. 369); *The State v. Carr* (5 N. H. Rep. 367). In the case of the *Bear Camp River Co. v. Woodman* (2 Greenl. 404), the charter was to become void, if, at the end of one year, the river should not be cleared of certain obstructions. In an action of assumpsit to recover tolls of the defendant, he offered to prove that the removal of the obstructions had never been effected; but the evidence was rejected at the trial, and the ruling was held to be correct. This case affords a strong illustration of the necessity of specific judicial proceedings for the purpose of causing the charter to be declared forfeited. And in the case before us, we think that by the omission to lay the accounts before the Legislature, the corporation did not, *ipso facto*, cease to exist, but proceedings must have been instituted to establish the fact that the penalty of forfeiture was incurred. *Rex v. Pasmore* (3 T. R. 244). A *quo warranto* is necessary where there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but from some defect in their constitution cannot legally exercise the powers they affect to use. Ashhurst, J. Chancellor Kent says that he believes there is no instance of calling in question the right of a corporation, as a body, for the purpose of declaring its franchises forfeited and lost, but at the instance and on behalf of the government. *Slee v. Boom* (5 Johns. Ch. 381). In *The People v. The Manhattan Co.* (9 Wend. 382), Mr. Justice Sutherland says, "where the corporation expires by lapse of time, it may be otherwise, and in such case only." A corporation may forfeit its franchises for misfeasance or nonfeasance, but the information for that purpose must be presented under the authority of the State, which must be a party to the suit and a party to the judgment for the seizure of the franchise. *The Commonwealth v. Union Ins. Co.* (5 Mass. 230); *Rex v. Amery* (2 T. R. 515); *Vernon Society v. Hills* (6 Cowen, 23).

The corporation, then, being in existence in the year 1830, did the reception of the accounts and the passage of the Act of 1833 constitute a waiver of the pre-existing ground of forfeiture, so that it cannot now be insisted on? It is said expressly, by Parsons, C. J., in

The Commonwealth v. Union Ins. Co. (5 Mass. 232), that the Commonwealth may waive any breaches of any condition, expressed or implied, on which the corporation was created. The surrender of a charter can be made only by some solemn, formal act of the corporation, and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve that there was to form the compact. *Morton, J., Boston Glass Man. v. Langdon* (24 Pick. 53). If acts of the Legislature recognize the subsequent and continued existence of the corporation, such recognition will be a waiver of a forfeiture. *The People v. The Manhattan Co.* In the case of *The People v. The Kingstown Turnpike Co.* (23 Wend. 193), it was held, that an act extending the time for the completion of the road was not a waiver of breaches of conditions; for such was not expressly declared to be the intent of the Legislature, nor was the intent necessarily to be implied from the act. From this position Mr. Justice Cowen dissented, and held that a statute expressly giving time to complete the road was equivalent to a renewal or confirmation of the original charter.

In the present case, the Legislature did not expressly declare that they recognized the corporation as in existence or confirmed its privileges, but we think no other construction can be given to their proceedings. It is a reasonable doctrine, that a breach of condition may be waived. It is an important element in the law relating to landlord and tenant. In *Goodright v. Davids* (Cowp. 803), Lord Mansfield observed that forfeitures are not favored in law, and where the forfeiture is once waived the court will not assist it. *Coon v. Brickett* (2 N. H. Rep. 163); *Doe v. Pritchard* (5 B. & Ad. 765). There is as much reason for considering the acts of the legislative body as a waiver of a forfeiture, as there is for giving that effect to the act of a landlord. The State can claim no exemption from the ordinary rules which govern contracts, and there is not to be one law for them and another for private persons. The Legislature accepted the accounts laid before them in 1830, and the subsequent years, as sufficient and satisfactory; that is, they were satisfied with the accounts as a sufficient compliance with the charter. The Act of 1833 is an equally clear waiver of a forfeiture. Notwithstanding what had occurred, they authorized the corporation to alter the route of their road. The act is susceptible of no other construction in this regard, than that the Legislature intended to waive any forfeiture consequent on the prior omissions of the corporation. If they had intended to insist on any forfeiture, the act certainly would not have been made. The act was intended to be beneficial to the corporation. But it would not have been so unless they retained the other corporate powers necessary to enable them to carry into effect the purposes of the act. We are, therefore, of opinion that the rejoinder is a sufficient answer to the replication, and that upon the demurrer there must be

Judgment for the defendants.

PEOPLE v. BANK.

(24 *Wendell*, 431. 1840.)

INFORMATION in the nature of a *quo warranto* against the defendants for claiming to be and acting as a corporation. The information was filed March 25, 1838. The defendants pleaded the several acts of the Legislature by which they were created and continued a corporation. They were originally incorporated by the name of the New York Manufacturing Company. Statutes of 1812, p. 509. The affairs of the company were to be managed by fifteen directors, of whom the stockholders were to choose all but one, who was to be appointed annually by the council of appointment, in behalf of the State, and was to hold his office for one year, and until another should be appointed in his stead (§§ 3, 5). The corporation subsequently took its present name (Statutes of 1817, p. 30, § 4); and in 1831, the charter was extended until 1854, and the company was subjected to various provisions of the revised statutes, and to the safety fund law. Statutes of 1831, p. 28.

The Attorney-General put in sixty-two replications, each of which alleged that the defendants had taken usury on making a loan or discount in the course of their business as bankers. The acts were alleged to have been done in the years 1836 and 1837.

On the 19th March, 1840, the defendants rejoined, that on the tenth day of that month, William B. Townsend was by the governor and senate nominated and appointed a director of the company in the place of James Campbell, whose term of office had expired; that he was commissioned, and had entered on the duties of his office. Verification, &c. The Attorney-General demurred, and the defendants joined in demurrer.

By the court, BRONSON, J.:—

No question has been made upon the sufficiency of the replications. The case, then, comes to this: The Attorney-General alleges that the defendants have forfeited their corporate privileges by taking usury. The defendants answer, that a State director has since been appointed by the governor and senate; and this act, they insist, amounts to a waiver or pardon of the forfeiture. The conclusion does not follow from the premises.

No one could take advantage of the forfeiture in a collateral manner. It could only be asserted by a direct legal proceeding on the part of the government to dissolve the corporation. Notwithstanding the existing cause of forfeiture, the defendants were a corporation *de facto*, and might continue to exercise their franchise until judgment of ouster should be pronounced against them. In the mean time, it was the duty of the governor and senate, as well as all others, to treat the defendants as a legally existing corporation.

The appointment of a State director was, therefore, perfectly consistent with the intention to continue this prosecution, and insist on the forfeiture.

Should it be conceded that the governor and senate had a dispensing power, it does not appear that the power has been exercised. We are not authorized to follow the suggestion of the defendant's counsel, and assume that the appointment was made for the purpose of waiving the forfeiture. There is no such allegation in the rejoinder; and besides, we cannot shut our eyes to the fact that there was another and a sufficient ground for the exercise of the appointing power. Indeed, if the public officers believed that the defendants had violated their charter, they had a cogent reason for making the appointment, to the end, that there might be one director in the board to watch over the public interests until the forfeiture could be asserted, and the corporation dissolved in the forms prescribed by law.

Enough has been said to dispose of this case. But I must not be understood as admitting that the governor and senate, without the concurrence also of the assembly, had any dispensing power. They had no more authority to waive or pardon the forfeiture than any other public officer or body of men. Indeed, the Attorney-General had more power over this matter than the governor and senate united; for if he refused to prosecute, the wrong charged upon the defendants would go unpunished, and the corporation would continue to exist and enjoy its privileges in the same manner as though there had been no violation of the charter. Still, the neglect to prosecute would not amount to a pardon; it could only operate as a waiver so long as the omission continued, and would be no answer to a *quo warranto* whenever he, or his successor in office, might choose to insist on the penalty.

In England, where corporations may be created by royal charter, the king can pardon a forfeiture, by granting restitution; but he has, I think, no such power in relation to corporations created by act of Parliament. *The King v. Amery* (2 T. R. 568, 9); *Newling v. Francis* (3 id. 189); *The King v. Miller* (6 id. 277). So, here, where corporations are created by the Legislature, that body can waive the forfeiture, by ratifying and confirming the original grant. *The People v. The Manhattan Company* (9 Wendell, 351). But no other body of men has any such dispensing power. The franchise is granted upon condition that it shall become void in case of misuser; and although the corporation will continue to exist until the forfeiture is asserted in the forms prescribed by law, the condition can only be changed, or the penalty released, by the power which made the original grant. The Legislature may, perhaps, delegate its authority to pardon the offence; but that has not been done.

The rejoinder does not show that any act has been done which is inconsistent with the assertion of the forfeiture; and if it were otherwise, the governor and senate, without the concurrence of the assembly, had no dispensing power. *Judgment for the people.*

COMMONWEALTH v. INSURANCE COMPANY.

(5 Mass. 230. 1809.)

THIS was a motion for a rule upon the defendants to show cause why the Solicitor-General should not be directed to file an information in the nature of a *quo warranto* against them, that the said company might be dissolved, and their corporate powers be adjudged void.

The motion was made by Sullivan in behalf of seventeen persons alleging themselves to be members of the corporation, and a rule was granted returnable at the term of this court next to be holden in the county of Essex. That rule not having been served on the corporation, a new rule to the same effect was moved for at the term in Essex, and granted, returnable at the July adjournment of this term, and being duly served, the parties appeared, and

Jackson, for the defendants, contended that the corporation could not by law be called to answer out of their own county. The relators as well as the corporation all have their residence in Essex. There the facts, of which there will be many in question, must be tried, and in the discussion of them the books and papers of the company must be produced. He therefore moved that the rule, if it is to be sustained, should be enlarged to the next November term in Essex.

But he insisted that an information to seize the franchises of a corporation is never ordered at the motion of an individual. Here it ought to be directed by the government, or at least filed by the Attorney or Solicitor General *ex officio*.

The Solicitor-General, acknowledging himself to appear, not in his official character, but as counsel for the relators, insisted that where the mischief or cause complained of is such as affects the public, the court will order an information at the relation of any individual not specially interested, and *a fortiori* at the instance of corporators, who complain of an injury to themselves.

The facts charged in this case, if proved, would certainly incur a forfeiture of the charter, as they imply a gross misuser of the powers of the corporation. It will not be denied that there is ground from the affidavit of the complainants to believe them true. As they are denied, the truth of them is a proper subject of inquiry by this court, who have the general superintendence of all this species of corporations. If this process does not lie, the mischief is irremediable, and these companies will continue to misuse their powers, and abuse their privileges, under an idea that no authority exists in the government to correct or punish their malpractices.

The opinion of the Court was afterwards delivered to the following effect by

PARSONS, C. J.:—

This corporation was created by the Statute of 1806, c. 89, which required the holders of the corporate stock to pay fifty per cent of their subscriptions within sixty days after the first meeting of the company; and that no insurance on any one risk should be made for a larger sum than ten per cent of the capital stock actually paid in.

The parties applying for this rule have alleged that the corporation have been guilty of malfeasance, in not requiring from the members payment of the fifty per cent of their subscriptions within the time limited by the statute of incorporation, and also in taking greater risks than are authorized by the terms of their incorporation.

We have not inquired into the truth of these allegations, as we are satisfied that, in this case, such inquiry would be immaterial, because this rule is not moved for in behalf of the Commonwealth, or by its authority.

Informations of this nature are properly grantable for the purpose of inquiring into the election or admission of an officer or member of a corporation, when moved for by any person interested in, or injured by such election or admission if the same was unduly made. And upon such information, if the election or admission was illegal, judgment of a motion might be entered, and a fine might also be imposed on the party who had usurped upon the Commonwealth.

In this case the parties applying for the rule do not complain of any illegal election or admission of any officer or member of the corporation: but the object of the application is to obtain a judgment of forfeiture of the franchises of the corporation, and a seizure of them by the Commonwealth.

We are well satisfied that a corporation, as well when created by charter under the seal of the Commonwealth, as by a statute of the Legislature, may by nonfeasance or malfeasance forfeit its franchises, and that by judgment on an information the Commonwealth may seize them. And if the allegations stated in the motion for the rule in this case were true, and the Commonwealth had caused an information to be filed and prosecuted, for the purpose of seizing the corporate franchises for such malfeasance, judgment for those causes might have been rendered for the Commonwealth.

But an information for the purpose of dissolving the corporation, or of seizing its franchises, cannot be prosecuted but by the authority of the Commonwealth, to be exercised by the Legislature, or by the Attorney or Solicitor General, acting under its direction, or *ex officio* in its behalf. For the Commonwealth may waive any breaches of any condition expressed or implied, on which the corporation was created; and we cannot give judgment for the seizure by the Commonwealth of the franchises of any corporation, unless the Common-

wealth be a party in interest to the suit, and thus assenting to the judgment.

This distinction between informations in the nature of a *quo warranto*, to impeach any election or admission of a corporate officer or member, and informations to dissolve a corporation, is well settled, and upon sound principles of law. *Rex v. Corporation of Carmarthan* (2 Burr. 869).

Rule discharged.

PART SECOND.

STOCKHOLDERS AND CREDITORS OF A CORPORATION.

CHAPTER XV.

SHARES OF STOCK AND THE TRANSFER OF STOCK.

HUMBLE v. MITCHELL.

(11 *Ad. & El.* 205. 1839.)

ASSUMPSIT by the purchaser of shares in a joint stock company, called the Northern and Central Bank of England, against the vendor for refusing to sign a notice of transfer tendered to him for signature, and to deliver the certificates of the shares, without which the shares could not be transferred.

Pleas. 1. That the contract mentioned in the declaration was an entire contract for the sale of goods, wares, and merchandises for a price exceeding £10, and that plaintiff had not accepted or received the said goods, etc., or any part thereof, and did not give anything in earnest to bind the bargain, or in part payment, and that no note or memorandum in writing of the bargain was made and signed by defendant or his agent thereunto lawfully authorized. Verification.

2. That the contract was a contract for the sale of, and relating to, an interest in and concerning lands, tenements, and hereditaments of and belonging to the said company, and that there was not in respect of, or relating to, the said contract, an agreement or any memorandum or note thereof in writing signed by defendant, or by any other person thereunto by him lawfully authorized according to the form of the statute, etc. Verification.

Replication: to the first plea, denying that the contract was for the sale of goods, wares, etc.; to the second, denying that it was for the sale of an interest in lands, etc. Issues thereon.

At the trial of the cause before Coleridge, J., at the Liverpool Spring assizes, 1838, it was proved that the company was in posses-

sion of real estate; but no title deeds to the estate were produced; nor was it shown what was the nature of the property belonging to the company, or the extent of their interest therein. The jury found a verdict for the plaintiff on both issues, subject to a motion to enter a verdict for the defendant. In the following Easter term Alexander obtained a rule *nisi* according to the leave reserved, citing, on the first plea, *Ex parte Vallance* (2 Deacon, B. C. 354), and, on the second plea, *Ex parte The Vauxhall Bridge Company* (1 Glyn & J. 101), and *Ex parte Horne* (7 B. & C. 632).

Cresswell and Crompton now showed cause. As to the second issue, the shares are not an interest in land within the fourth section of the Statute of Frauds, 29 Car. 2, c. 3; *Bradley v. Holdsworth* (3 M. & W. 422); *Bligh v. Brent* (2 Y. & Coll. 268). It was not proved that the shareholders were at all interested in the land, or that the real property in the possession of the company was of a beneficial nature, or was in their possession at the time of the sale; nor was the nature of their interest shown. [Upon this point counsel were stopped by the Court.] As to the first plea, there is an essential difference between the language of sect. 72 of the Bankrupt Act, 6 G. 4, c. 16. and of section 17 of the Statute of Frauds. The words of the former are "goods and chattels;" those of the latter are "goods, wares, and merchandises." The word "chattel" is more comprehensive than any word used in the Statute of Frauds, and has been construed to include debts, bills, bonds, policies of insurance, and shares in a joint stock company, all of which pass to the assignees when in the possession, order, or disposition of the bankrupt; *Hornblower v. Proud* (2 B. & Ald. 327). Here no stock, goods, or tangible property passed to the plaintiff, but only a right to participate in the partnership profits, from whatever source those profits might be derived. A mere right of action is a chattel within the Bankrupt Act, but the merchandises within the meaning of the Statute of Frauds must be such as are capable of part delivery. The owner of a share is not necessarily entitled to any of the real or personal estate or property of the company; or, if he is, the defendant has not proved it.

Alexander, *contra*. The defendant has no means of compelling the production of title deeds to show the interest which the company, or the plaintiff as a shareholder, had in the real estate; but possession was shown, which is, at all events, *prima* evidence of property; and the interest of the shareholders in such partnership property is a necessary consequence, or probable inference. [Lord Denman, C. J. Mere possession is not enough; you should have proved that the company was entitled to real property, and that the shareholders had an interest in it.] As to the first plea, there is no direct authority in point; but the language of the Bankrupt Act is not substantially different from that of the Statute of Frauds; and it has been frequently decided that shares in public companies are "goods and

chattels," of which a bankrupt may be the reputed owner so as to vest them in the assignees. *Ex parte Burbridge* (1 Deacon, B. C. 131); *Ex parte Ord* (1 Deacon, B. C. 166); *Ex parte Vallance* (2 Deacon, B. C. 354). In *Hall v. Franklin* (3 M. & W. 259), it was held that a banking company is a trading company.

LORD DENMAN, C. J.:—

With respect to the question arising on the second plea, we have already disposed of it. The other point is whether the shares in this company are goods, wares, or merchandises, within the meaning of sect. 17 of the Statute of Frauds. It appears that no case has been found directly in point; but it is contended that the decisions upon reputed ownership are applicable, and that there is no material distinction between the words used in the Statute of Frauds, and in the Bankrupt Act. I think that both the language and the intention of the two acts are distinguishable, and that the decisions upon the latter act cannot be reasonably extended to the Statute of Frauds. Shares in a joint stock company like this are mere choses in action, incapable of delivery, and not within the scope of the seventeenth section. A contract in writing was therefore unnecessary.

PATTESON, WILLIAMS, and COLERIDGE, JJ., concurred.

Rule discharged.

TISDALE v. HARRIS.

(20 Pick. 9. 1838.)

ASSUMPSIT by the plaintiff, an inhabitant of New York, against the defendant, a merchant of Boston, on a contract alleged to have been made in October, 1835, by which the defendant agreed to sell to the plaintiff two hundred shares, with all the earnings thereon, in the capital stock of the Collins Manufacturing Company, a corporation established in Connecticut, at \$10.80 per share, the par value being \$10 per share. The object of the suit was to recover \$300, being the amount of a dividend of 15 per cent on the two hundred shares, declared on the 7th of October, 1835, and payable on the 15th.

At the trial, before Shaw, C. J., Nathaniel Curtis, junior, of the firm of Curtis & Leavins, being called as a witness by the plaintiff to prove the contract and the breach, the defendant objected to any parol evidence of the contract, because the contract was reduced to writing, and he produced a memorandum as follows, dated Boston, Oct. 14, 1835, directed to the defendant and signed by Curtis & Leavins:—“Sir, When you will furnish the certificate of 200 shares in the Collins Manufacturing Company to Mr. Samuel T. Tisdale, of New York, we hereby agree to pay you for the same at 108 cents per dollar or 8 per cent advance on the par amount of ten dollars each.”

But it was ruled, that this paper was not to be considered as the contract of the defendant to sell, but of the plaintiff by his agents to pay; that if the contract of the defendant to sell was not reduced to writing, the objection to the parol evidence could not prevail.

The witness testified, that at the request of the plaintiff he applied to the defendant about the 10th of October, 1835, in order to ascertain whether he would sell his shares; that the defendant said he was disposed to sell them at a fair price; but subsequently the witness offered him the par value; that the defendant said he would not sell at that rate, and that he had been recently informed that there would probably be a dividend of 10 per cent in December; that the witness took the refusal of them at \$10.80 per share, until he could hear from New York; that having received a letter from the plaintiff, dated October 13th, he called on the defendant and asked him whether in offering the shares he intended to include all the earnings, and the defendant said yes, all that belongs to them, all that they have earned; that the witness read to the defendant the letter of October 13th, in which the plaintiff says he will take the stock at \$10.80 cash, all earnings or dividends of the company up to the time of sale to be included; that the defendant wrote a letter to his agent at Hartford, instructing him to transfer the shares into the name of the plaintiff, and send the certificate to the defendant, and the defendant handed the letter to the witness to forward, which he did; that the defendant said he did not know the plaintiff, and he thought, as the shares would be transferred, he ought to have something to secure him, to which the witness assented, and the defendant wrote the memorandum which the witness signed, agreeing to pay him the money; that after sufficient time had elapsed for an answer, the witness called on the defendant, and at that time both the witness and the defendant had received information that a dividend of 15 per cent had been declared upon the shares; that at subsequent interviews the witness demanded the certificate of stock with an authority to receive the dividend, and was ready thereupon to pay the money, but the defendant declined giving the authority to receive the dividend; that some weeks afterwards, and after this action had been commenced, the defendant called on the witness for the money and threatened to sue him upon the contract which he had given for the plaintiff, if he did not pay it, whereupon the witness took the certificate and paid the money, but under an express declaration that it was not to prejudice the claim of the plaintiff for the dividend.

The question of fact was left to the jury, whether the bargain made by the defendant for the sale of the shares included all dividends then due or growing due, with directions, if it did, to find a verdict for the plaintiff; otherwise to find a verdict for the defendant.

A verdict was returned for the plaintiff; which the defendant

moved to set aside: 1. Because parol evidence was admitted to add to and vary a written contract made subsequently to the conversation and letters referred to; 2. Because the contract set up was within the Statute of Frauds, being a contract for the sale of goods, wares, or merchandise for the price of fifty dollars or more, under which, at the time of action brought, there had been no acceptance of the same or any part thereof by the purchaser, nor any earnest or part payment made, and so was incapable of proof otherwise than by memorandum, in writing, signed by the defendant or his agent.

SHAW, C. J., delivered the opinion of the Court:—

Several points reserved at the trial of this cause are now waived, and the motion made by the defendant for a new trial is placed on two grounds.

First, that under the circumstances, parol evidence was not admissible, because the contract of the parties was reduced to writing, and that such writing was the best evidence. But the Court are of opinion, that the objection is not sustained by the fact. No contract in writing was made by the defendant with the plaintiff, to sell those shares. After the negotiation had resulted in an agreement, the agent of the plaintiff, in the name of his firm, gave the defendant a memorandum in writing, undertaking to pay the money, on the performance of the defendant's agreement to transfer the shares. But it was not signed by the defendant, nor by any person for him, nor did it purport to express his agreement. The Court are therefore of opinion, that the defendant's agreement not being reduced to writing, the parol evidence was rightly admitted.

But by far the most important question in the case arises on the objection, that the case is within the Statute of Frauds. This statute, which is copied precisely from the English statute, is as follows. "No contract for the sale of goods, wares, or merchandise for the price of ten pounds (\$33.33) or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agent thereunto lawfully authorized."

This being a contract for the sale of shares in an incorporated company in a neighboring State, for the price of more than ten pounds, and no part having been delivered, and no purchase-money or earnest paid, the question is, whether it can be allowed to be good, without a note or memorandum in writing, signed by the party to be charged with it. This depends upon the question, whether such shares are goods, wares, or merchandise within the true meaning of the statute.

It is somewhat remarkable that this question, arising on the St. 29, Car. 2, in the same terms, which ours has copied, has not been definitively settled in England. In the case of *Pickering v. Appleby*

(Com. Rep. 354), the case was directly and fully argued, before the twelve judges, who were equally divided upon it. But in several other cases afterwards determined in Chancery, the better opinion seemed to be, that shares in incorporated companies were within the statute, as goods or merchandise. *Mussell v. Cooke* (Prec. in Ch. 533); *Crull v. Dodson* (Sel. Cas. in Ch. 41).

We are inclined to the opinion, that the weight of authorities, in modern times, is, that contracts for the sale of stocks and shares in incorporated companies, for more than ten pounds, are not valid, unless there has been a note or memorandum in writing, or earnest or part payment. 4 Wheaton, 89, note; 3 Starkie on Evid. 4th Amer. Edit. 608.

Supposing this a new question now for the first time calling for a construction of the statute, the Court are of opinion, that as well by its terms as its general policy, stocks are fairly within its operation. The words "goods" and "merchandise," are both of very large signification. *Bona*, as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word "merchandise" also, including in general objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies.

There are many cases indeed in which it has been held in England that buying and selling stocks did not subject a person to the operation of the bankrupt laws, and thence it has been argued that they cannot be considered as merchandise, because bankruptcy extends to persons using the trade of merchandise. But it must be recollected that the bankrupt acts were deemed to be highly penal and coercive, and tended to deprive a man in trade of all his property. But most joint stock companies were founded on the hypothesis at least, that most of the shareholders took shares as an investment and not as an object of traffic; and the construction in question only decided, that by taking and holding such shares merely as an investment, a man should not be deemed a merchant so as to subject himself to the highly coercive process of the bankrupt laws. These cases, therefore, do not bear much on the general question.

The main argument relied upon, by those who contend that shares are not within the statute, is this. That statute provides that such contract shall not be good, etc., among other things, except the purchaser shall accept part of the goods. From this it is argued, that by necessary implication the statute applies only to goods of which part may be delivered. This seems, however, to be rather a narrow and forced construction. The provision is general, that no contract for the sale of goods, etc. shall be allowed to be good. The exception is, when part are delivered; but if part cannot be delivered, then the exception cannot exist to take the case out of the general prohibition. The provision extended to a great variety of objects, and the exception may well be construed to apply only to such of

those objects to which it is applicable, without affecting others, to which from their nature it cannot apply.

There is nothing in the nature of stocks, or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions, designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary *indicia* of property, arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them. As they may properly be included under the term "goods," as they are within the reason and policy of the act, the Court are of opinion, that a contract for the sale of shares, in the absence of the other requisites, must be proved by some note or memorandum in writing; and as there was no such memorandum in writing, in the present case, the plaintiff is not entitled to maintain this action. As to the argument, that here was a part performance, by a payment of the money on one side, and the delivery of the certificate on the other, these acts took place after this action was brought, and cannot therefore be relied upon to show a cause of action when the action was commenced.

Verdict set aside, and plaintiff nonsuit.

JOHNSON v. LAFLIN.

(5 Dillon, 65. 1878.)

DILLON, CIRCUIT JUDGE:—

The plaintiff is the receiver of the National Bank of the State of Missouri, appointed by the comptroller of the currency, June 23, 1877, the bank having suspended payment three days before (Rev. Stats. sec. 5234). The defendant Laflin had for some years prior to May 16, 1877, been the holder of eighty-five full-paid shares in that bank. At the date of the suspension of the bank, the defendant, James H. Britton, was its president, and had been such for years prior to that event. On the 16th day of May, 1877, Laflin sold, through one Keleher, a broker, the eighty-five shares of stock to Britton, and delivered to him the share certificates, duly signed in blank, with powers of attorney in blank, thereon indorsed to transfer the shares on the books of the bank. Laflin's broker, who effected the sale, understood that he sold to Britton individually, or to some unknown person for whom Britton acted, and he received in payment for the shares the personal check of Mr. Britton on the bank for \$5,037.50, which was immediately presented and paid. Laflin did not know until some time after the transaction who had

become the purchaser of his shares. After the shares had been thus delivered and paid for by Britton's check, and the money received, but on the same day, they were transferred, in pursuance of Mr. Britton's directions, by Mr. Girault, the book-keeper of the bank (by virtue of the powers of attorney from Laflin), to "James H. Britton, trustee," and at the same time the book-keeper credited Britton's individual account at the bank with the amount of his check given in payment for the shares, and charged the same amount to the "sundry stocks account" on the books of the bank. On the official stock register the shares were thus made to stand in the name of "James H. Britton, trustee," without stating for whom he was trustee. On the stock ledger of the bank the transaction was entered in an account entitled "James H. Britton, trustee for the bank." Neither Laflin's agent who negotiated the sale of the shares nor Laflin himself had any actual notice of the manner in which the transfer of the stock had been registered, nor that the funds of the bank had been thus used to pay for it, nor of the entries in respect thereto on the books of the bank. But of all these facts Mr. Girault the book-keeper of the bank, who made the entries, and who had inserted his name in Laflin's blank powers of attorney to transfer the stock, had actual knowledge at the time.

This is a bill in equity by the plaintiff, as the receiver of the bank, against Laflin and Britton, to compel Laflin to repay the \$5,037.50 (the amount of Britton's check for the shares paid by the bank), and to set aside the registered transfer of the eighty-five shares on the stock transfer book of the bank.

The case presents questions of grave moment concerning the rights of stockholders and creditors in national banking associations. And if the insolvency of the bank here in question is such as shall make it necessary to enforce the individual liability of the shareholders (Rev. Stats. sec. 5151), it is important to those shareholders who made no sale of their stock to know who are shareholders with them, liable to contribute to meet "the contracts, debts, and engagements of the association." These questions principally depend upon the true construction of certain provisions in the national banking act, to which we shall refer as we proceed.

Inasmuch as this act in express terms prohibits a national bank from thus becoming a "purchaser of the shares of its own capital stock" (Rev. Stats. sec. 5201), if Laflin had made a contract to sell his shares to the bank, or to its president for the bank, it is plain that such a contract would have been *ultra vires* and illegal, both as respects creditors and other shareholders, and the transaction could have been impeached by the bank in its corporate capacity, or by its other shareholders, even if the bank were still solvent and going on, or by the receiver as the officer appointed to wind up its affairs. *Re London, etc. Exchange Bank* (Law Rep. 5 Ch. 444, 452); *Great Eastern Railway Co. v. Turner* (Ib. 8 Ch. 149); *Currier v. Lebanon*

Slate Co. (56 N. H. 262). And although Laflin did not contract to sell his shares directly to the bank, or to the president for the bank, still, if, before the transaction was completed as to him, he had notice, actual or constructive, that the purchase was, in fact, a purchase for the bank, and paid for by the money of the bank, the transaction cannot stand, and the receiver may compel him to pay back the money thus received, and have him declared still to be a shareholder.

It would be easy to support these propositions by argument and by the authority of adjudged cases, but they are so plain that it is not necessary to do so. But Laflin or his agent, Keleher, did not deal with the bank, or with the president, with knowledge that the latter in fact intended to pay for the shares out of the moneys of the bank. Laflin was acting in good faith. Neither he nor his agent, Keleher, had any actual knowledge of Britton's purpose to turn these shares over to the bank, and to pay for them out of the funds of the bank. If Laflin can be charged with notice, it must be constructive notice, arising either, first, from the mere fact that he was a shareholder in the bank, or, second, from the law imputing to him all the knowledge in this behalf which was possessed at the time by Mr. Girault, the book-keeper, who made the transfer of the shares on the transfer book of the bank under Laflin's blank powers of attorney, and who contemporaneously made the entries on the private books of the bank, which showed that Britton had been paid for the shares out of the general funds of the bank, and had acknowledged that he held the shares as the trustee of the bank.

The controlling question in the case is whether Mr. Laflin is affected with constructive notice in one or the other of these modes. The solution of this question, in its turn, depends upon the nature and extent of the right of a shareholder in a national banking association to transfer his shares, and also upon the elements or requisites of a completed transfer, by which is meant such a transfer as shall release the transferrer from liability to the bank, its stockholders, and creditors.

In considering these questions, our first proposition is that, under the national banking act, a shareholder has the unrestricted right to make an out-and-out *bona fide* and valid sale and transfer of his shares to any person or corporation capable in law of taking and holding the same, and of assuming the transferrer's liability in respect thereto.

The right to transfer shares in a corporation is usually recognized or given in express terms in the charter or constituent act, which also, not unfrequently, prescribes the manner in which the transfer shall be made. The capital stock of a corporation is invariably divided into shares of a fixed amount, for the purpose, among others, of allowing it to be readily transferred. In an ordinary partnership the consent of all the partners to the admission or retirement of a member is necessary, and every such change involves the dissolution

of the old and the formation of a new partnership. But in incorporated companies this is different. Indeed, it is one of the leading objects of an incorporated body to avoid the operation and effect of this doctrine of the law of partnership. Accordingly, in this country shares in corporations are universally bought and sold without reference to the consent of the other shareholders.

The restrictions on the right *bona fide* to sell and transfer shares must be found in express legislative enactments or in authorized by-laws. The national banking act (Rev. Stats. sec. 5139), by providing that shares shall "be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association," recognizes the right of the shareholder to transfer his shares. There is nothing peculiar in this provision. A similar provision is found in nearly all the incorporating acts and charters in this country. The right to transfer is given or implied in the section just referred to (Rev. Stats. sec. 5139), and that right the association cannot take away or defeat. It contemplates a transfer on the books of the association, and all that the association is authorized to do is to prescribe the manner in which the transfers shall be made on its books. There is here no limitation whatever upon the right of transfer, and none exists except such as is implied from the nature of the transaction or from other provisions of the act. Another section (Rev. Stats. sec. 5201) prohibits the bank from dealing in its own shares. This implies a restriction on the shareholder in selling his shares to the bank itself, or to a known trustee for the bank. And a shareholder cannot transfer his shares colorably, and thereby cease to be a shareholder as respects creditors and other shareholders who would be injured by the transfer. There may also be an implied prohibition against the right to transfer shares to an infant or person not capable in law of assuming the liabilities, as well as enjoying the rights, of the transferrer of the shares in respect thereto, but we have no occasion to determine this point. Rev. Stats. sec. 5139; compare *Ib.* sec. 5152; *Weston's Case* (Law Rep. 5 Ch. 614, 620). And, on general principles, there may also be an implied prohibition against the transfer of shares to a pauper or man of straw or insolvent person, for the fraudulent purpose of escaping liability, — but this is a matter that need not now be considered.

Subject, however, to such prohibitions and limitations, the right of the shareowner to make an actual and *bona fide* sale and transfer of his shares to any person capable in law of taking and holding the same and of assuming the liabilities of the transferrer in respect thereto, is plainly deducible from the national banking act itself. But if any doubt could exist on this subject, it would be removed by the judicial decisions construing the provisions of the banking act in this regard and similar provisions in other legislative enactments.

In *The Bank v. Lanier* (11 Wall. 369), arising under the national banking act, it was expressly held by the Supreme Court of the United

States that the owner of shares in a national bank may transfer the same by an assignment and delivery of the certificates, and the transferee may compel the bank to register the transfer on its books. The learned justice who delivered the opinion of the court in that case, after speaking of the additional value given to this species of property by reason of its transferable quality, says; "Whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred," even if the transferrer is the debtor of the bank. The duty of the bank to make the transfer in such a case is held to be a corporate duty, in respect of which the bank is liable for the wrongful acts and omissions of its officers.

It was urged in the argument at the bar in the present case that the provision that the shares should "be transferable on the books of the bank" gave the directors of the bank the power to approve or disapprove of any given transfer of shares, and to register or refuse to register the same, as in their judgment the interests of the bank or of the other stockholders might require. Such, however, is not the object of this very common provision in charters and acts of incorporation. The purpose of requiring a transfer on the books of the bank is that the bank may know who are the shareholders, and as such entitled to vote, receive dividends, etc., and for the protection of *bona fide* purchasers of the shares, and of creditors and persons dealing with the bank. That such is the meaning of the provision in question, and that it does not restrict the right of the owner to transfer his stock or clothe the corporation with the power to refuse to register *bona fide* transfers, is settled beyond all question by numerous decisions in the English and the Federal and State Courts. *Black v. Zacharie* (3 How. 483); *Union Bank v. Laird* (2 Wheat. 390); *Webster v. Upton* (1 Otto, 65, 71); *Bank v. Lanier* (11 Wall. 369); *St. Louis, etc. Insurance Co. v. Goodfellow* (9 Mo. 149); *Chouteau Spring Co. v. Harris* (20 Mo. 382); *Moore v. Bank* (52 Mo. 377); *Hill v. Pine River Bank* (45 N. H. 300); *Re London, etc. Telegraph Co.* (Law Rep. 9 Eq. 653).

The general subject of the right to transfer shares has been much discussed in the cases in England arising under the various companies acts. Some of these acts give the directors express power to refuse to assent to or register transfers of shares, and some do not. The result of the English cases is that the directors cannot refuse to register a *bona fide* transfer of stock unless the power to do so is expressly given in the act of Parliament or the articles of association. The leading authority on this point is *Weston's Case* (Law Rep. 4 Ch. 20). See, also, *Gilbert's Case* (Ib. 5 Ch. 559). In *Weston's Case*, Lord Justice Page Wood, in considering this subject, said:—

"I have always understood that many persons enter these companies for the very reason that they are not like ordinary partnerships from which members can retire at once, and free themselves from respon-

sibility at any time they please, by going into the market and disposing of and transferring their shares, without the consent of directors or shareholders, or anybody, provided only it is a *bona fide* transaction; by which I mean an out-and-out disposal of the property, without retaining any interest in them. But if it is desired by a company that such unlimited power of assignment shall not exist, then a clause is inserted in the articles, by which the directors have powers of rejection of members. *Shortridge v. Bosanquet* (16 Beav. 84), which went to the House of Lords, was a case of that kind. In the absence of any such restriction I think it is perfectly plain that the Companies Act of 1862, in the 22d section, gives a power of transferring shares. I think there is no such power given to the shareholders, and that the shares are at once transferable under the statute, unless something is found to the contrary in the articles of association. . . . It would be a very serious thing for the shareholders in one of these companies to be told that their shares, the whole value of which consists in their being marketable and passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles. And, I may add, that if we were to hold that such powers were vested in the directors, it would be a very serious thing for them, and would impose upon them much more onerous duties than any which are really imposed upon them by this clause."

In *Gilbert's Case* (Law Rep. 5 Ch. 559), Lord Justice Giffard said: "I agree that, according to *Weston's Case*, and according to what I have already considered to be the law, there is no inherent power in the directors, apart from the provisions of the articles of association, to refuse to register a proper and valid transfer, if that proper and valid transfer is submitted to them."

And although there is express power to the directors to refuse to assent to or register a transfer, this power must be exercised in a reasonable manner and *bona fide*, and they must have some valid and lawful reason for refusing to register. *Ex parte Penny* (Law Rep. 8 Ch. 446); *Nation's Case* (Ib. 3 Eq. 77); *Fyfe's Case* (Ib. 9 Eq. 589); *Allen's Case* (Ib. 16 Eq. 449; Ib. 559); *Weston's Case* (Ib. 5 Ch. 614, 620); *Ex parte Elliott* (Ib. 2 Ch. 104). In a case where the directors had power to approve or reject the transfer of shares, one of the vice-chancellors, speaking of the right of a shareowner to dispose of his shares, said: "One of the incidents [of this class of property] is the right to transfer it, — a right to make a present and complete transfer of it. It is the duty of the directors to receive and register the transfer, or to furnish some [valid and sufficient] reason for refusing to transfer." *Re Stranton, etc.* (Law Rep. 16 Eq. 559, per Bacon, Vice-Chancellor). Similar observations are made by the Supreme Court of the United States in *The Bank v. Lanier* (*supra*). Mr. Justice Davis there said: "The power to transfer their stock is one of the most valuable franchises conferred by

Congress. . . . It enhances the value of the stock. Although neither in form nor character negotiable paper, they [the share certificates] approximate to it as nearly as possible."

It would be a new, and, I apprehend, a startling, doctrine to proclaim that the holder of shares in a corporation, where the only provision on the subject of transfers was one requiring them to be made on its books, had no right to make a complete and effectual disposition of them without the consent of the directors or other shareholders. No such power over the right of transfer has been given in the national banking act. Such a power is so capable of abuse, and so foreign to all received notions and the universal practice and mode of dealing in these stocks, that it cannot, in the absence of the legislative expression, be held to exist.

For these reasons, and upon these authorities, the proposition must be considered as established that a shareowner in a national bank, while it is a going concern, has the absolute right, in the absence of fraud, to make a *bona fide* and actual sale and transfer of his shares at any time to any person capable in law of purchasing and holding the same, and of assuming the transferer's liabilities in respect thereto, and that this right is not, in such cases, subject to the control of the directors or other stockholders.

Our second proposition is that Laflin did make a complete and effectual sale and transfer of his shares to James H. Britton individually, and that, as to Laflin, it was not a sale and transfer of the stock to the bank. Laflin sold through the broker or agent, Keleher, and the latter dealt with Britton as an individual, without knowledge that Britton intended to turn over the shares to the bank, and he received in payment for the shares the personal check of Mr. Britton, and delivered to him at the same time the certificates of stock assigned in blank, with powers of attorney in blank thereon indorsed, authorizing the transfer of the shares on the books of the bank.

As between Laflin and Britton, the transfer was complete by the sale, assignment, delivery, and payment, without registration, and this, whether it gave Britton before the registration the legal title to the shares as against Laflin, or only a complete equitable title. *Union Bank v. Laird* (2 Wheat. 390); *Webster v. Upton* (1 Otto, 65, 71); *Black v. Zacharie* (3 How. 483); *Bank v. Lanier* (11 Wall. 369, 377); *Chouteau Spring Co. v. Harris* (20 Mo. 382); *Moore v. Bank* (52 Mo. 377); *New York, etc. Railroad Co. v. Schuyler* (34 N. Y. 80); *McNeill v. Bank* (46 Ib. 325); *Grimes v. Howe* (49 Ib. 17, 22); *Bank of Utica v. Smalley* (2 Cow. 778); *Bank of Commerce's Appeal* (73 Pa. St. 59); *Ross v. Southwestern Railroad Co.* (53 Ga. 514); *Hoppin v. Buffum* (9 R. I. 513); *Bank of America v. McNeil* (10 Bush (Ky.), 54); *Davis v. Lee* (26 Miss. 505); *German Union Assn. v. Sendemeyer* (50 Pa. St. 67); *Leavitt v. Fisher* (4 Duer, 1).

That the transaction is complete as between seller and purchaser

of stock by the assignment and delivery of the certificate assigned, with the power to transfer and the receipt of payment, is fully shown by these cases, and is also evident from the fact that thereupon the each of them has the legal right to have a transfer of the shares made on the books of the bank. The seller of the shares, for his protection against creditors of the bank in case of insolvency, may transfer the same on the books to the vendee, the purchase being the authority to the seller to do this. *Webster v. Upton* (1 Otto, 65, 71). And, for the like reason, the seller of shares who has done all that is necessary to enable the purchaser to transfer the shares on the books, may file a bill to compel the vendee to record the transfer. *Shaw v. Fisher* (2 De G. & S. 11); *Cheale v. Kenward* (3 De G. & J. 27); *Wynne v. Price* (3 De G. & S. 310); *Webster v. Upton* (1 Otto, 65, 71). So, also, the vendee of the shares, where the vendor has done all that is necessary to enable the transfer to be registered, may for his own protection compel the bank to register the transfer, or hold it liable in damages for a wrongful refusal. *Bank v. Lanier* (11 Wall. 369); *Hill v. Pine River Bank* (45 N. H. 300); *Bank of Utica v. Smalley* (2 Cow. 778); *Commercial Bank v. Kortright* (22 Wend. 348).

The delivery of the share certificates assigned in blank and blank transfers will entitle the *bona fide* vendee to have the transfer registered. "Whoever in good faith buys the stock and produces to the corporation the certificates regularly assigned, with power to transfer, is entitled to have the stock transferred," *Bank v. Lanier* (11 Wall. 369, per Davis, J.), unless there exists some valid and legal reason in favor of the bank for refusing to register the transfer, as in the case of the *Union Bank v. Laird* (2 Wheat. 390). In that case the charter gave the bank a lien for the shareholder's debt to it, and provided that "stock shall be transferable only on the books of the bank." Under these circumstances the bank was held to have a lien on the shares to secure the shareowner's indebtedness to it, which was superior to the right of the unregistered transferee of the stock. *Black v. Zacharie* (3 How. 483). If the foregoing propositions are sound, Britton, as against Laflin, had the right immediately on delivery and payment to register the transfer of the shares, and had the power to fill up the blank transfers and have the transfer registered. *Re Tahite Cotton Co.* (Law Rep. 17 Eq. 273); *German Union Assn. v. Sendemeyer* (50 Pa. St. 67); *Leavitt v. Fisher* (4 Duer, 1); *Commercial Bank v. Kortright* (22 Wend. 348). Nothing more was required to be done by Laflin or needed to enable Britton to make his title complete. And Laflin could have compelled Britton to register the transfer. If Laflin had proceeded against Britton, he could have forced him to have accepted a transfer of the stock in his own name or in the name of some person capable of taking and holding the same. *Maxted v. Payne* (Law Rep. 6 Ex. 132). It would have been no answer to Laflin for Britton to have said, "I bought this stock, not for myself, but for the bank." Laflin could

have rejoined, "You purported to act for yourself; I supposed you were so acting, and you had no authority, and could have had none, to act for the bank."

It is held in England, under the Companies Act, that the transferrer of shares is liable to be treated as a stockholder until he transfers to one who is in law capable of holding and liable in respect of the shares, and whose purchase is registered, unless, perhaps, where the neglect to register is entirely the fault of the corporation or its officers. *Fyfe's Case* (Law Rep. 4 Ch. 768); *Lowe's Case* (Ib. 9 Eq. 589); *Shropshire, etc. Railway and Canal Co. v. The Queen* (Ib. 7 H. L. 496, 513); *McEwen v. West London Wharves, etc. Co.* (Ib. 6 Ch. 655); *Weston's Case* (Ib. 5 Ch. 614, 620); *Gooch's Case* (Ib. 8 Ch. 266); *Gilbert's Case* (Ib. 5 Ch. 559); *Master's Case* (Ib. 7 Ch. 292); *Nickalls v. Merry* (Ib. 7 H. L. 530); *Symonds Case* (Ib. 5 Ch. 298); *Heritage's Case* (Ib. 9 Eq. 5).

Assuming, without deciding, that this principle applies in all its force under the national banking act, if Laflin had sold to an infant, his liability would remain, notwithstanding the transfer was registered. *Nickalls v. Merry* (Law Rep. 7 H. L. 530); *Symonds' Case* (Ib. 5 Ch. 298). If he had sold to the bank, he would remain *prima facie*, if not actually, liable, if the bank should so elect. And if the seller of shares remains liable under the national banking act until there is a registered valid transfer, — that is, until some person succeeds to the stock who is capable of holding it and liable in respect to it, — this principle will not make Laflin liable under the facts of the present case. Here the transfer was registered, but Britton, instead of registering it in his own name, as it was his duty towards Laflin to do, registered it in his name as "trustee," without Laflin's knowledge. But the act (Rev. Stats. sec. 5152) authorizes the holding of stock by a trustee. If Laflin, in order to relieve himself of liability, is bound to see the transfer of the stock registered, the registry actually made would not charge him with constructive notice that the bank was in reality the *cestui que trust*.

Britton is responsible personally, inasmuch as he had no authority to act for the bank, and as there is no *cestui que trust* who is liable. He is liable for the unauthorized investment and use of the trust moneys of the bank, and can be compelled to refund it. *Great Eastern Railway Co. v. Turner* (Law Rep. 8 Ch. 149). If it becomes necessary to assess the stockholders, he will be estopped to say that he is not individually responsible, since he was not acting by authority of any *cestui que trust* capable of taking and holding the shares. If the sale of this stock had been registered to Britton individually, it is clear that Laflin would not have been liable to the bank or its creditors; and, as the matter now stands, the bank and its creditors have every right and remedy against Britton which they would have had if the shares had been transferred to him individually instead of to him as "trustee."

Our third proposition is that Laflin is not liable because the money received for the stock was unlawfully taken by Britton from the bank. The reason for this conclusion is that Laflin parted with value, — with his shares, with his power of control over them, and the right to sell them to others, — and had no notice at or prior to the consummation of the transaction that Britton was acting *ultra vires*, and intended to misappropriate the funds of the bank. If he had dealt directly with the bank, or if he or his agent had known what took place inside the counter before the transaction with Britton had been completed, he would have been liable.

It is urged by the receiver's counsel that Laflin had constructive notice. Mr. Shields, in his argument, bases Laflin's liability on the proposition that, being a shareholder in the bank, he is charged with constructive notice of the condition of the bank, and of what was done by the president in violation of law and of his official duty in respect of these shares. I admit that if, in a transaction directly with the bank, he had received moneys to which he was not entitled, he could be made to pay back the same, irrespective of the question of knowledge on his part. *Curran v. Arkansas* (15 How. 304); *Railroad Co. v. Howard* (7 Wall. 392). But it is to be remembered in this case that Laflin is sought to be made liable in respect of the sale and transfer of his shares, which sale and transfer he had the perfect right to make, if he acted *bona fide*; and he has the same right to sell his shares to another shareholder that he would have to sell them to a person not a shareholder. Even directors have the right to make a *bona fide* sale of their shares, and thus get rid of liability, if they pursue the articles or charter, and take no advantage of their position and commit no fraud. *Gilbert's Case* (Law Rep. 5 Ch. 559); *Ex parte Littledale* (Ib. 9 Ch. 257). And shareholders, in the exercise of their right to transfer shares, are not bound, it seems, to take notice of irregularities on the part of the directors in respect to the transfer of shares. *Bargate v. Shortridge* (Law Rep. 5 H. L. 297, 323); *Taylor v. Hughes* (2 Jo. & Lat. 24); *Ex parte Bagge v. North Coal Co.* (13 Beav. 162). Nor are the directors, it seems, much less shareholders, in the transfer of their stock, bound to take notice of the books of account of the company. *Cartmell's Case* (Law Rep. 9 Ch. 691); *Hill v. Manchester, etc. Co.* (2 Nev. & M. 573; 5 Barn. & Ad. 874); *Haynes v. Brown* (36 N. H. 568).

We are of opinion, therefore, that the sale and transfer of the stock, as between Laflin and Britton, was complete as soon as the stock was delivered, assigned in blank, with the power to transfer, and payment received; and that what Britton, without Laflin's knowledge, afterwards did, although on the same day, in transferring the shares to himself as trustee for the bank, and in reimbursing himself out of the funds of the bank, could not retroact upon Laflin, whose status had already been fixed, and whose rights had already been acquired. *Bank of America v. McNeil* (10 Bush, 54, 58).

Mr. Henderson's argument for the receiver went mainly upon the ground that Laflin was chargeable, through Mr. Girault, with constructive notice of Britton's wrongful acts in the purchase of these shares, and in the use of the bank's money to reimburse himself therefor.

This argument rests upon these propositions: That the sale was not complete until the transfer was registered; that, in making the transfer, Girault, although acting under Britton's directions, was solely Laflin's agent (by virtue of his inserting his name in the blank power of attorney); and that, inasmuch as Girault knew of Britton's acts in directing the transfer for the benefit of the bank, and in paying himself for the purchase-money out of the general means of the bank, the law imputes this knowledge to Mr. Laflin. The first branch of this proposition is inconsistent with the one which we have above attempted to maintain, viz., that the transaction between Laflin and Britton was complete without registration of the transfer, and that it is equally complete as to the bank, unless the bank had some valid reason for refusing to register the transfer. Britton had the right to register the purchase in his own name. He was in good credit with the bank, and in the community. He was not then known to be insolvent, — indeed, it is not shown by the proofs that he is now insolvent. Laflin could have compelled him to register the transfer in his own name. In the eye of the law, the transfer to Britton as "trustee" is a transfer to Britton individually; for, as above shown, Britton could not set up his *ultra vires* acts to defeat his personal responsibility. *Ashhurst v. Mason* (Law Rep. 20 Eq. 225); *Ex parte Littledale* (Ib. 9 Ch. 25). If Laflin had a completed right, immediately on receiving payment for the shares, to have Britton register the transfer of the shares, and if, immediately on such payment, Britton had the right to register the transfer to himself, and if the bank could not have resisted Laflin's application to compel a registration of the transfer to Britton, it is obvious that notice subsequently received by Laflin personally, or through an agent, would be immaterial.

If this view is sound, it is unnecessary to decide the further question, whether Girault, in consequence of his relations to Britton, and the fact that he acted as his servant, and implicitly obeyed his directions, is to be regarded, in making the formal act of transfer on the books, as the agent of Laflin, in such sense that knowledge acquired by him from Britton is to be imputed to Laflin. It deserves consideration, whether, under the circumstances, Girault was Laflin's agent, so as constructively to affect Laflin with notice of what was being done, not in the necessary or lawful execution of his authority, but in violation of that authority, and in hostility to his rights, as well as those of the bank. These are the positions taken by Mr. Slayback in Mr. Laflin's behalf, and they certainly have great force. For in this view, if the name of some one outside the bank, having no knowl-

edge of what was going on inside the bank, had been filled in by Britton as the attorney to make the transfer, or if Britton had filled in his own name, Laffin would not be liable. It is certainly extremely narrow ground to make Laffin's liability depend upon the accident whose name shall be used to make the formal transfer, and upon what knowledge of the interior working of the bank such person may happen to possess, especially in view of the custom to transfer stock in blank through many hands before any registry is made.

It was strongly urged at the bar by Mr. Henderson, for the receiver, that the foregoing views of the right of the shareholder to transfer his shares will have the effect to permit transfer to persons not able to respond to the double liability imposed on shareholders, and thus work an injury to the solvent shareholders and to creditors. But we must hold to the absolute right of the shareowner to transfer his stock in good faith, or the alternative that the directors may have the right to refuse their assent to such transfer, thus putting a shareholder in their power. Not a syllable can be found in the banking act giving the directors such a power; while, on the other hand, the right to transfer shares is expressly recognized. If it is desirable for the security of the shareholders or creditors that the existing members should through the directors have a veto on the right of a shareholder to transfer his shares, such a power must be plainly conferred. It has not been given, and cannot, therefore, be held to exist.

It is proper to remark, in order to preclude erroneous inferences from the views here maintained, that it is probable that the unrestricted right of transfer has reference to transfers in solvent and going concerns, and is not intended to enable shareholders to escape from liability where the association has committed an act of insolvency, or has ceased to be a going concern. *Allin's Case* (Law Rep. 16 Eq. 449, per Lord Chancellor Selborne); *Chappell's Case* (Ib. 6 Ch. 902). While we maintain the right of a shareholder to dispose of his shares absolutely, by an out-and-out sale and registered transfer, and thus escape liability, provided the sale is made *bona fide*, and the purchaser is in law capable of assuming the liabilities of the transferrer, yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferrer knows will make the transfer, if it is sustained, work a fraud upon the other shareholders, or upon the creditors of the bank.

The result is, that there must be a decree dismissing the bill as to Laffin, and as the bill is not framed for separate relief against Britton, dismissing the same as to him also, but without prejudice.

Bill dismissed.

MCNEIL v. BANK.

(46 N. Y. 325. 1871.)

APPEAL from a judgment of the General Term in the fourth district, affirming a judgment entered in Montgomery County, in favor of the plaintiff on the report of a referee.

The action was brought to compel the surrender to the plaintiff of 134 shares of the capital stock of the First National Bank of St. Johnsville, which had been acquired by the appellant in the following manner:—

In November, 1866, the plaintiff, then being the owner of the shares in question, had an account with Goodyear Brothers & Durant, of the city of New York, stock brokers, relating to other stocks, which they had purchased and were carrying for him. For the purpose of securing any balance which might have become due them on that account, the plaintiff delivered to and left with them, the certificates of the 134 shares in dispute, with a blank assignment, and power of attorney to transfer indorsed thereon, signed by the plaintiff, in the following words:—

For value received, the undersigned hereby assigns and transfers unto
shares of the capital stock of the First National Bank of St. Johnsville,
and do hereby constitute and appoint true and lawful attorney, irrevocable for and name and behalf, to make and execute all necessary acts of assignment and transfer required by the regulations and by-laws of said bank.

In witness whereof, I have hereunto set my hand and seal, this
day of

(Signed)

B. MCNEIL.

Sealed and sworn in presence of

On the 18th of June, 1868, at the city of New York, the appellant, at the request of Goodyear Brothers & Durant, paid the sum of \$45,135 to Fred. Butterfield, Jacobs & Co., receiving from them certain securities, including the certificate and power for the 134 shares in question, which had been previously pledged by Goodyear Brothers & Durant to Fred. Butterfield, Jacobs & Co.

Goodyear Brothers & Co. were at that time insolvent, and indebted to the appellant. In pledging the plaintiff's shares, they had acted without actual authority from him, and without his knowledge. He was indebted to them, on the account for which the shares were pledged to them, in the sum of \$3,000, with interest from December 1, 1866; but the account had not been rendered, or any demand made.

The appellant, at the time of receiving the shares, had no knowledge of the plaintiff's interest therein.

The cashier of the appellant, within a few days after receiving the certificate, assignment, and power, filled in the blank in the assignment and power with "I. H. Stout, cashier, Tenth National Bank, New York, one hundred and thirty-four," and dated the same the 19th day of June, 1868, and sent the scrip to the First National Bank of St. Johnsville, for the purpose of having the shares transferred on the books accordingly; but such transfer was prevented by an order of injunction in this action.

The plaintiff demanded of the appellant a surrender of the scrip, on payment of the balance due by him to Goodyear Brothers & Durant; which demand was refused.

The value of the shares was \$17,420. The balance of the advance made by the appellant thereon (\$45,135, less the proceeds of the other securities received therewith, \$29,915.19) was \$15,219.81, besides interest.

When the certificate and power came to the possession of the appellant, they bore the proper revenue stamp, duly cancelled with the stamp of Goodyear Brothers & Durant, and the name of Ch. Goodyear as subscribing witness to the power. The referee found, that when the plaintiff delivered them, they were not stamped or witnessed, and that the plaintiff had never authorized those acts.

The referee found in favor of the plaintiff, and, in conformity with his report, a judgment was entered, requiring a surrender of the scrip to the plaintiff, on payment by him of the \$3,000 and interest due by him to Goodyear Brothers & Durant.

This judgment was affirmed at General Term, and an appeal taken to the late Court of Appeals, where after argument that court was divided and a re-argument ordered. The case now comes up on the re-argument.

RAPALLO, J.:—

The pledge of the plaintiff's shares by his brokers, for a larger sum than the amount of their lien thereon, was a clear violation of their duty, and excess of their actual power. And if the effect of the transaction was merely to transfer to the appellant, through Fred. Butterfield, Jacobs & Co., the title or interest of Goodyear Brothers & Durant in the shares, the judgment appealed from was right.

It must be conceded, that as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle, that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposi-

tion over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance. *Pickering v. Busk* (15 East, 38); *Gregg v. Wells* (10 Adol. & El. 90); *Saltus v. Everett* (20 Wend. 268, 284); *Mowrey v. Walsh* (8 Cow. 238); *Root v. French* (13 Wend. 570).

The true point of inquiry in this case is, whether the plaintiff did confer upon his brokers such an apparent title to, or power of disposition over the shares in question, as will thus estop him from asserting his own title, as against parties who took *bona fide* through the brokers.

Simply intrusting the possession of a chattel to another as depositary, pledgee, or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted. *Ballard v. Burgett* (40 N. Y. R. 314). "The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title." Per Denio, J., in *Covill v. Hill* (4 Den. 323).

But if the owner intrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary, or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised, are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle from that of an agent, who receives secret instructions qualifying or restricting an apparently absolute power.

In the present case, the plaintiff delivered to and left with his brokers, the certificate of the shares, having indorsed thereon the form of an assignment, expressed to be made "for value received," and an irrevocable power to make all necessary transfers. The name of the transferee and attorney, and the date, were left blank. This document was signed by the plaintiff, and its effect must be now considered.

It is said in some English cases, that blank assignments of shares in corporations are irregular and invalid, but that opinion is expressed in cases where the shares could only be transferred by deed

under seal, duly attested, and is placed upon the ground that a deed cannot be executed in blank.

Without referring to the American doctrine on that subject, it is sufficient to say that no such formality was requisite in this case. It was only necessary to a valid transfer as between the parties, that the assignment and power should be in writing. The common practice of passing the title to stock by delivery of the certificate with blank assignment and power, has been repeatedly shown and sanctioned in cases which have come before our courts. Such was established to be the common practice in the city of New York, in the case of *The New York and New Haven Railroad Company v. Schuyler* (34 N. Y. 41), and the rights of parties claiming under such instruments were fully recognized in that case. And in the case of *Kortright v. The Commercial Bank of Buffalo* (20 Wend. 91 and 22 Wend. 348), the same usage was established as existing in New York and other States, and it was expressly held that even in the absence of such usage, a blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment; and that a party to whom it is delivered is authorized to fill it up, by writing a transfer and power of attorney over the signature.

It has also been settled, by repeated adjudications, that as between parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections, etc. Angell and Ames on Corporations, 8th ed. § 354; *Bank of Utica v. Smalley* (2 Cow. 770); *Gilbert v. Manchester Co.* (11 Wend. 627); *Kortright v. Com. Bank of Buffalo* (22 Wend. 362); *N. Y. and N. H. R. R. Co. v. Schuyler* (34 N. Y. 80).

In the case of *Kortright v. Com. Bank*, Chancellor Walworth in a dissenting opinion strenuously maintained, in conformity with his previous decision in *Stebbins v. Phoenix Ins. Co.* (3 Paige, 356), that by a transfer not on the books, the transferee acquired only an equitable right to or lien on the shares; and that, having but an equitable right or lien, he took subject to all prior equities which existed in favor of any other person from whom such assignment was obtained (22 Wend. 352, 353, 355). But his view was overruled by the majority of the court. The action was at law in assumpsit, brought by the holder of the certificate and power, for a refusal to permit him to make a transfer on the books, and the question of his

legal title was necessarily involved in the case. The judgment therein must therefore be regarded as a direct adjudication that, as between the parties, the legal title to the shares will pass by delivery of the certificate and power. See 20 Wend. 362.

This was reasserted in this court in the *New Haven Railroad Case* (34 N. Y. 80), notwithstanding what was said in the *Mechanics' Bank Case* (13 id. 625).

By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by a fraudulent transfer on the books of the company, by the registered holder, to a *bona fide* purchaser (34 N. Y. 80); but in this respect he is in a condition analogous to that of the holder of an unrecorded deed of land, and possesses a no less perfect title as against the assignor and others. And he would have an action against the corporation, for allowing such a transfer in violation of his rights (*ibid.*). He also takes the risk of the collection of dividends by his assignor, or of any lien the corporation may have on the shares. But in other respects his title is complete.

The holder of such a certificate and power possesses all the external *indicia* of title to the stock, and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited, concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third parties; but, apparently, the legal title, and the means of transferring such title in the most effectual manner.

Such, then, being the nature and effect of the documents with which the plaintiff intrusted his brokers, what position does he occupy towards persons who, in reliance upon those documents, have in good faith advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title, and claims, as against them, that he could not be deprived of his property without his consent, cannot he be truly answered that by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration, and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock, he in fact "substituted his trust in the honesty of his brokers for the control which the law gave him over his own property," and that the consequences of a betrayal of that trust should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money?

These principles, in substance, were applied in the case of *Kortright v. The Commercial Bank*. But it is sought to distinguish that case from this; and it is argued, that there the certificate was intrusted to an agent, with authority from his principal to borrow money upon it for the benefit of his principal, and that he simply

exceeded his authority by borrowing more than he was authorized to borrow, and absconding with the excess.

The facts were, that the certificate indorsed by Barker, the owner of the shares, was sent by him, together with his note for \$10,000, to Bartow, the cashier of a bank in Albany, to obtain a loan of \$10,000. Bartow, through an agent in New York, negotiated a loan there, upon the certificate, for \$25,000, and absconded. Barker admitted having received the \$10,000.

Whether the \$10,000 were to be, or were, borrowed by Bartow for Barker, or advanced by Bartow or his bank, does not clearly appear; and the opinions delivered in the case differ upon the point whether Bartow received the certificate as agent or pledgee. But, assuming that he received it as agent, the ground which lies at the foundation of the decision is, that the possession of the certificate and blank power gave him an apparent right of control over the stock; that, if the holder of the certificate and power was exhibited to the money-dealing public as having the competent right of pledge, disposal, and transfer vested in him, by means of all the usual and well-known evidences of such right, the private understanding of Barker and Bartow could not affect the rights of those, who, if misled, were misled by Barker's own acts.

It is true that Senator Verplanck, in his prevailing opinion, cites authorities on the subject of a deviation by an agent from secret instructions, and treats the case as belonging to that class; but he also rests upon the more general principles above stated, and cites the well-known case of *Pickering v. Busk* (15 East, 38), where the owner had allowed a broker to be invested with the *indicia* of a legal title to goods, by a transfer of them into his own name on the wharf-inger books.

The principles of agency are, however, applicable to this case. In disposing of a pledge, the pledgee acts under a power from the pledgor. The distinction between a lien and a pledge is said to be, that a mere lien cannot be enforced by sale by the act of the party, but that a pledge is a lien with a power of sale superadded. Story on Bailments, 7th ed., § 311, note 2; *Wasson v. Smith* (2 B. & Ald. 439). The pledgee in selling is bound to protect the interests of the pledgor, and, as to the surplus, represents the pledgor exclusively. Now, for what purpose was the apparent ownership and power of disposition of this stock vested in the brokers? Surely for the purpose of enabling them, effectually and summarily, to execute this power under certain conditions. If the power was absolute on its face, or if the whole legal title was by the instrument apparently vested in the pledgee, and the condition was secret, wherein does the case differ in principle from one of ordinary agency?

I am at a loss to conceive on what principle it can be claimed, that an apparent naked authority is more effectual to bind the party giving it, than an apparent ownership as well as authority.

In the case of *Jarvis v. Rogers* (13 Mass. 105), the shares were transferable by indorsement of the certificates. The shareholder indorsed his certificates and pledged them for a debt. The debtor's friend, by his authority, and with his funds, paid the debt, and took up the certificates, and the debtor allowed them to remain thus indorsed, in his hands, but not for any specific purpose. This friend afterward pledged them for his own debt, to a party who advanced thereon in good faith. It was decided that the latter could hold them against the true owner.

The court, after distinguishing the case from one of mere bailment, says that after the plaintiff had put his name on the back of the certificates, and allowed them to go into the market with that transferable quality about them, it did not lie in the mouth of him who offered them to the world in that shape, to deny the effect of his own words and actions.

This decision was adhered to, and repeated in *Jarvis v. Rogers* (15 Mass. 389), and recognizes substantially the same doctrine as *Kortright v. The Com'l Bank*, omitting the element of excess by an agent of authority actually given, which is supposed to have governed that case.

Fatman v. Loback (1 Duer, 354) is a case precisely in point, and I see no ground upon which the conclusions of the learned court in that case can be successfully assailed. The case of *McCreedy v. Rumsey* (6 Duer, 574), which is cited as overruling *Fatman v. Loback*, has no such effect. The question in 6 Duer was between the assignee of the shares and the corporation, and it was held that the lien of the corporation on the stock for unpaid subscription, was protected where the transfer was not made on the books, — a position fully recognized in this opinion, and in the cases I have cited. Moreover, in the case in 6 Duer, the general act under which the corporation was formed provided that transferees of shares should take subject to the liabilities of prior shareholders.

In the cases of *Ex parte Swan* (7 C. B. N. s. 400); *Swan v. The North British Australasian Co.* (7 Hurl. & Nor. 603), and *Same v. Same* (2 Hurl. & Coltman, 175), some of these questions received a most elaborate discussion, and there was a strong array of judicial opinions sustaining the validity of transfers of stock, unauthorized in point of fact, on the ground that by mere negligence, and unintentionally, the true owner had enabled another to deliver an apparently valid title to the stock, and thus deceive third parties.

In that case, the plaintiff had intrusted to a broker ten deeds of transfer, executed in blank, for the purpose of transferring certain shares. The broker used only eight of them for the purpose intended, and feloniously filled up and used the others as transfers of other shares, belonging to the same party, forged the name of a subscribing witness, and stole the certificates of the shares from the plaintiff's box, of which the plaintiff kept the key. He then sold the shares to *bona fide* purchasers. He was convicted of the larceny.

In a contest by the owner to get back the shares, the Common Bench was, after two arguments, equally divided upon the question, whether the owner was not estopped from reclaiming the shares, by reason of his negligence in intrusting the blank transfers to the broker, though they were intended for other shares. The case was taken to the Court of Exchequer, and that court was equally divided upon the same question. It was then taken to the Exchequer Chamber, where it was finally disposed of, principally on the ground, that to estop the owner, his negligence must be the proximate cause of the deceit; that here it was too remote, as the blank deeds of transfer were intended for other shares, and the broker had to commit forgery to make them available, and a separate felony to obtain possession of the certificates.

In the case at bar none of these difficulties exist. The assignment and power were intended for these identical shares; they, as well as the certificate, were voluntarily intrusted by the plaintiff to the brokers, and the latter were thus invested with the apparent ownership and right of disposal, not merely by the negligence of the true owner, but by his voluntary act, and for the very purpose of attesting to the world their title and power, in case the contingency should arise in which, according to the understanding between them and the plaintiff, they would be justified in resorting to the stock for their own indemnity.

Two cases have been cited on the part of the respondent which require notice, viz.: *Covell v. The Tradesmen's Bank* (1 Paige, 131), and *Bush, Administrator v. Lathrop* (22 N. Y. 535).

In *Covell v. The Tradesmen's Bank*, the complainant, being the owner of a sealed note for \$2,425 payable to himself, indorsed it and pledged it to M. for a loan of \$1,000. M. indorsed it and pledged it to the bank, defendant, as security for an antecedent debt of \$1,000 and a fresh advance of \$1,425. The complainant's debt to M. having been paid, he filed his bill against the bank and M. to obtain a surrender of the note.

The Chancellor disposed of the case on the ground that the sealed note, being a mere chose in action, was not assignable in law, — that the assignee of a chose in action, which must be sued in the name of the assignor, obtains only an equitable interest, the legal title remaining in the assignor; and that the interest of such assignee, being only equitable, was not protected against the prior equity and legal right of the original owner. Thus applying to the assignee of a chose in action the doctrine which he afterward, in the case of *Kortright v. The Commercial Bank*, unsuccessfully sought to apply to the transferee, by assignment and power, of shares of stock in a corporation.

He refers to the decision of Chancellor Kent, in *Murray v. Lyburn* (2 Johns. Ch. 443), to the effect that the assignee of a chose in action takes subject only to the equities of the debtor, and not

subject to latent equities of a third person against the assignor, and points out that the case of *Redfearn v. Ferrier* (1 Dow's Par. R. 50), cited by Chancellor Kent, was decided, not on the ground that the assignee of a chose in action was protected against a latent equity in a third person, but that a share in a joint-stock company was not a chose in action; that the assignee had, according to the law of Scotland, the legal title to the shares, and that the equities of the parties being equal, the court would not divest him of his legal right.

In *Bush, Administrator v. Lathrop* (22 N. Y. 535), the plaintiff's intestate, being the assignee of a bond and mortgage for \$1,400, pledged them to Preston to secure \$268.20, and delivered them to the pledgee with a note for the amount and an assignment of the bond and mortgage, absolute on its face, but expressing a consideration of only \$268.20, the mortgage being good for its full amount. Preston gave back a receipt, agreeing to redeem the bond and mortgage on payment of the note.

Preston afterward assigned the bond and mortgage to Smith & Norton, who in turn assigned to the defendant for \$1,488, advanced by him in good faith. The plaintiff brought his action to obtain a retransfer of the bond and mortgage on payment of the \$268.20, with interest.

Denio, J., in delivering the opinion of the court, reviews the decision of Chancellor Kent, in *Murray v. Lylburn*, and other cases, on the subject of latent equities, disapproving of the doctrine of Chancellor Kent, and coming to the conclusion, that an assignment of a chose in action takes but an equitable interest, notwithstanding the provisions of the Code which authorize him to sue in his own name; that all the assignees of the bond and mortgage in question, subsequent to the original obligee, must be regarded as holding merely equitable interests, and that, as between parties so circumstanced, priority of time confers a preferable right (22 N. Y. R. 547, 548); following, substantially, the opinion of Chancellor Walworth, in *Covell v. The Tradesmen's Bank*, which he cites.

He concedes that this doctrine forms a serious impediment to his negotiation of choses in action, and alludes to the difference of opinion which may exist as to the policy of encouraging their negotiation, and to the period when it was thought so impolitic, that courts of law would not recognize the rights of assignees. But in no part of his learned and exhaustive opinion does he seek to apply its doctrine to shares in corporations, or other personal property, the legal title to which is capable of being transferred by assignment, and the free transmission of which, from hand to hand, is essential to the prosperity of a commercial people.

The question of estoppel does not seem to have been considered in that case; and perhaps it would have been inappropriate, inasmuch as the assignment upon which the estoppel could have been predicated, if at all, expressed a consideration of only \$268.20 for a good

mortgage of \$1,400; a circumstance calculated to excite inquiry. But it is sufficient for all present purposes to say, that the reasoning upon which the decision in that case is founded is totally inapplicable to this.

I have reviewed the authorities at much more length than usual, by reason of the difference of opinion expressed in the late Court of Appeals in this case, and for the purpose of meeting the positions so ably maintained in the opinions, in favor of the respondent, delivered in the court below, and in the late court, on the former hearing.

My conclusion is, that the Tenth National Bank must, on the facts found, be deemed to have advanced *bona fide* on the credit of the shares, and of the assignment and power executed by the plaintiff, and is entitled to hold the stock for the full amount so advanced and remaining unpaid after exhausting the other securities received for the same advance.

The points relative to the stamp and subscribing witness were fully answered in the opinions delivered on the first argument, and do not appear to have been the subject of dissent. I do not deem it necessary again to discuss them here.

The judgment of the General Term, and that entered on the report of the referee, should be modified, so as to allow the plaintiff to redeem, on payment of the balance due to the Tenth National Bank, on its advance of June 19, 1868, and the costs of the action.

All concur, except ALLEN and FOLGER, JJ., not voting.

Judgment modified.

COLONIAL BANK v. CADY.

BANK OF AUSTRALIA v. SAME.

(*L. R. 15 App. Cas. 267. 1890.*)

THESE appeals from two orders of the Court of Appeal were heard together. The facts are set out in the report of that decision, 38 Ch. D. 388, and may be shortly stated thus:—

J. M. Williams was at his death the registered holder of 1210 shares in the New York Central and Hudson River Railroad Company, the certificates for which were in the form set out in the judgment of Lord Herschell. After the death of Williams the respondents, his executors, desired to have the shares transferred to their own names; and for that purpose, in January, 1881, sent the certificates to Thomas, Sons, & Co., their London brokers, having previously signed as executors the blank transfer on the back of each certificate. In February and April, 1881, Blakeway, one of the partners in Thomas, Sons & Co., in fraud of the executors delivered the certificates, with other property, to the Colonial Bank as security for

advances to his firm. In August, 1883, certificates representing 500 shares were returned to Blakeway, who then pledged them to the London Chartered Bank of Australia with other property as security for a loan. In February, 1884, Thomas, Sons & Co. were adjudicated bankrupt. The respondents, having discovered the frauds, brought actions against the Colonial Bank and the London Chartered Bank of Australia respectively to establish their title to the shares, and to restrain the banks from dealing with the shares held by them respectively. The banks resisted on the ground that, though all the dealings with the shares had been in England, the case must be governed by the law of the State of New York, and by that law delivery of the certificates with the indorsed transfer signed passed to the banks the legal and equitable title to the shares. At the trial before Kekewich, J., evidence was given as to the law of the State of New York and as to the usage in New York and London, the effect of which is stated in the judgments of Lords Watson and Herschell.

The Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.), reversing an order of Kekewich, J. (36 Ch. D. 659), made an order in each action declaring that the plaintiffs were entitled to the certificates and the shares; and ordered that the defendants concur in all acts necessary to enable the plaintiffs to be registered in the books of the company as owners of the shares, and that the defendants deliver the certificates and pay the dividends received in respect of the shares to the plaintiffs (38 Ch. D. 388). Against these orders the present appeals were brought.

LORD HALSBURY, L. C. :—

My Lords, the executors of John Michael Williams had vested in them by law the shares which are the subject-matter of this controversy. The facts which gave rise to the controversy are simply that the executors, in order to get themselves registered in the books of the company, intrusted the possession of the share certificates to a person named Blakeway, who in fraud of the trust reposed in him pledged the certificates to raise money for himself with the appellant banks. The share certificates were in a form which contemplated the holder of them being entitled, when so disposed, to transfer the shares of which he was on the face of the document itself the owner, by a form which, though on the same piece of paper as the share certificates themselves, was a separate instrument, and when signed by the person who on the face of the instrument was stated to be the owner, purported to transfer to some one else by the execution of this form of assignment his property in the shares.

It is admitted that the shares (or to speak more accurately the share certificates) are not negotiable instruments, and the executors being informed that in order to get themselves registered in the books of the company they must sign their names at the end of the document, acted upon that assurance, and, as I have said, intrusted

the possession of the share certificates (never intending to part with the property in them) to Blakeway. Blakeway was a stockbroker in London, and the transaction of loan took place in London; but the shares in question are shares in a corporation established in New York and subject to the laws of that State.

My Lords, if it were necessary to consider what law must govern, as between these parties, the right to these certificates on the one hand, and the right to detain them as pledged for the money advanced on them on the other, though the certificates themselves were the certificates of shares in a foreign corporation, I should not doubt that it is to the law of England you must look, and not to the law of the United States. But in the view which I take of the transaction in question it does not appear to me that there is any such conflict as has been suggested at the bar.

It is not denied that Mr. Williams's executors never intended to part with the property in these shares. They simply parted with the custody of them, and I am unable to follow the observation made by Kekewich, J., in his judgment, when he says that "it cannot be suggested for a moment that the executors are precluded from asserting the truth." "On the contrary," he said, "my judgment goes on an examination of the real facts." Blakeway's authority was simply to obtain the registration of the executors, and if the real facts are examined the executors never intended to part with the property, and did no act which to them at least suggested that they were giving an authority other than what I have described; and how it can be said that, apart from what Kekewich, J., describes as "a familiar use of the word estoppel," they have parted with the property to some one else, I am wholly unable to understand. But the doctrine that a person shall not be permitted to represent or permit to be represented a state of facts at one time, and afterwards, when such representation has induced another person to change his position, seek to show that such his representation was erroneous, is a doctrine too well established now to be shaken, and whether it is accurately called "estoppel" or not, the principle is perfectly intelligible. But Kekewich, J., then goes on to say that "the executors are precluded from asserting that Messrs. Thomas were not by the custody of these documents authorized to deal with them, as they from time to time considered desirable." If this means the mere custody apart from what the instrument upon the face of it represented to any person to whom it might be exhibited, I am wholly unable to assent to any such proposition. But if it means that the document itself in the condition in which it was intrusted to Blakeway represented by its being in that condition that Blakeway was entitled to deal with it, then the decision of the learned judge becomes intelligible, but only upon the ground (which he nevertheless himself disclaims) that the executors made or permitted to be made a representation that Blakeway had full dominion over the certifi-

cates to do what he pleased with them, and which representation having been made, the executors are estopped from denying. Now the question is, have they made or permitted to be made on their behalf any such representation? With the greatest respect for the gentlemen who have given evidence on the subject of the law of New York so far as it is relevant to the matter in hand, it seems to me that the law is the same in both countries, and, as I say, the question is whether expressly or impliedly the executors permitted a representation to be made by Blakeway that he was entitled to deal with the certificates as he pleased.

Now the form of the certificates, and of that which is intended to be used as a transfer when a registered owner makes the transfer, appears to me to be all-important. I have intentionally in what I have said before refused to adopt the phrase used at the bar, "that the executors executed the transfer." The document, such as it is, with the names of the two executors subscribed, will not read so as to be a perfect and intelligible document. The person who begins by describing himself as the owner of the shares is not the person who signs; and as Lindley, L. J., very pertinently inquires, "What is it that the executors have done? What representation have they made which they are precluded from denying or explaining away?" The mere form of the document which they have signed certainly does not in itself purport to show that they are intending to give a complete title to anybody. But undoubtedly a document may by usage become so well understood in a particular sense that a person may be well estopped from denying that when he issues it to the world it must bear the sense which usage has attached to it.

And that brings one to inquire whether it is true that the issue of this document to the world in this form would show that the person signing had intended to give a complete title to anyone into whose hands it should come. To my mind the evidence shows beyond doubt that the document might mean at least one of two things, — either that the executors were going to sell these shares and transfer them to some one else, or that they were signing in order that they might be themselves registered in the books of the company as the legal representatives of the deceased holder, John Michael Williams.

Now, if that is all that the document upon the face of it represents, and I cannot doubt that when all the evidence is looked to, that is not an unfavorable mode of representing it towards the appellants, let us see what would have been the result if Blakeway, instead of simply tendering the document as security for a loan to himself, had said in plain terms to the bank what I have described as being the representation made by the document itself: "I tell you" — the bank — "I have been intrusted with these certificates for only one of two purposes, but I will not explain which, either to sell, or to get the names of the owners of them registered in the books of

the company." Can there be any difference between that which is stated in plain terms and that which as a matter of business ought to have been inferred from the nature of the document itself? I think none.

I am therefore of opinion that the judgments of the Court of Appeal ought to be affirmed, and these appeals dismissed with costs, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, these appeals involve the right of the appellant banks to retain, in a question with the respondents, certain documents of title representing 1210 hundred-dollar shares of the capital stock of the New York Central and Hudson River Railroad Company. The Company and its undertaking are American, and the rights of its shareholders, as well as the effect of its stock certificates, are admittedly governed by the law of the State of New York.

The certificates issued by the company to its registered shareholders are for ten shares each, and bear *in gremio* that the shares are "transferable in person or by attorney on the books of the company only on the surrender and cancellation of this certificate, by an indorsement thereof hereon, and in the form and manner which may at the time be required by the transfer regulations of the company." The indorsement on the certificate is in the form of a transfer for value received, blank in the names of the transferor and transferee, which is obviously meant to be executed by the person who is entered in the register of the company, and in the body of the certificate, as the owner of the shares. The system thus adopted has the merit of inseparably connecting the certificate with the transfer, and so preventing the dishonest creation of a legal right by transfer to one person, and a competing equitable right by deposit of the certificate with another.

The late John Michael Williams was the registered owner of these 1210 shares, for which he held certificates in the usual form. The respondents, who are executors of the deceased, were desirous of having the shares transferred to their own names; and for that purpose they, on the 29th of January, 1881, sent the certificates to Thomas, Sons & Co., their London brokers, having previously, as directed by that firm, signed as executors the blank transfer on the back of each certificate. Instead of using the certificates for the purpose for which they were sent, William Evan Blakeway, one of the partners of Thomas, Sons & Co., on the 10th of February and the 20th of April, 1881, delivered them to the appellants, the Colonial Bank, along with a mass of other securities, in order to cover advances made and to be made to his firm.

On the 15th of August, 1883, certificates representing 500 of these shares were returned to Blakeway, who on the same day obtained an advance of £20,000 from the appellants, the London Chartered Bank of Australia, on the security (*inter alia*) of the certificates for these 500 shares, which he authorized the bank to sell or otherwise

dispose of at their discretion, in the event of the advance not being repaid by the end of the month.

Thomas, Sons & Co., were adjudicated bankrupts on the 4th of February, 1884, when it appears that the securities held by the appellants were not sufficient to cover their advances. As soon as the frauds practised by Blakeway came to their knowledge, the respondents applied to the appellants for the certificates then held by them for 710 and 500 shares respectively. Neither of the appellants had obtained registration in respect of these shares, which still stood in the books of the company in name of the deceased John Michael Williams; but they declined to comply with the respondents' demand, on the ground that, according to the law of New York, delivery of the certificates with the indorsed transfer signed by the respondents was *per se* sufficient to pass to recipients for value and without notice the full legal and equitable right to the shares. That is their main defence to these actions, which pray for a declaration that the several deposits of the respondents' certificates were fraudulent, and conferred no title on the appellants, and for delivery of the certificates.

That the interest in the railway company's stock, which possession of these certificates confers upon a holder who has lawfully acquired them, must depend upon the law of the company's domicile, seems clear enough, and has not been disputed by the respondents. But the parties to the various transactions, by means of which the certificates passed from the possession of the respondents into the hands of the appellants, are all domiciled in England; and it is in my opinion equally clear that the validity of the contracts of pledge between Blakeway and the appellants, and the right of the latter to retain and use the documents as their own, must be governed by the rules of English law. In the application of these rules the appellants are, of course, entitled to the benefit of any privilege which the law of America attaches to possession of these documents, as conferring right or title to the property of the shares.

In so far as the law of America is concerned, your Lordships have the aid of three experts. two of whom were examined by the appellants and one by the respondents. As I understand their evidence, the principles of American law do not differ in any way, or at least in any material respect, from those by which an English court would be guided in similar circumstances. When the indorsed transfer has been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him, or by his authority, transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing his certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to

the company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his own favor.

The appellants' witnesses say that delivery of the certificate, with the transfer executed in blank, "passes the property" of the shares; but that statement must be accepted subject to the explanations by which it is qualified. The right of the holder appears from these explanations to be in the nature of a *jus ad rem* and not of a *jus in re*. Delivery does not invest him with the ownership of the shares in the sense that no further act is required in order to perfect his right. Notwithstanding his having parted with the certificate and transfer, the original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognized by the company as entitled to vote and draw dividends in respect of the shares, until the transferee or holder for the time being obtains registration in his own name. It would, therefore, be more accurate to say that such delivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner.

According to the custom of bankers and stockbrokers, both in this country and America, a certificate, with the indorsed transfer executed in the manner already described, is regarded as being "in order;" and its delivery, in exchange for value received, is understood to be sufficient to pass the full title of the registered owner. Even when the delivery has been fraudulent, as in the present case, the Supreme Court of New York has held that the registered owner cannot reclaim the document from a holder who has given valuable consideration, in good faith and without notice of the fraud. But it is necessary to observe that the decision of the court did not attribute to the instrument any privilege or negotiability in the legal sense of that term. It was based (to use the language of Mr. Carter, one of the appellants' witnesses) "upon the circumstance that the registered owner has so dealt with that certificate as to lead the purchaser for value to believe that he was taking a good title to it. In other words, the foundation rests in the principle of estoppel." Thus far the principles of American appear to me to be in harmony with the principles of English law. According to the latter, the true owner of such documents of title is not held to have parted with his interest in them except where he intended to pass such interest, or where, by reason of some act or omission, he has estopped himself from saying that he did not intend to pass it.

The cases cited in the course of the argument which relate to competition between equitable and legal rights to stock or shares have really no bearing here. Whether the respondents are estopped from saying that Blakeway had not their authority to dispose of the certificates in question is, in my opinion, the sole question presented for decision in these appeals. Had the transfers been executed by

John Michael Williams, and the certificates thereafter sent by him to Thomas, Sons & Co. for safe custody, I should not have hesitated to hold that Blakeway, though acting fraudulently, was nevertheless placed by his act in a position to give a title to an honest purchaser which his employer could not dispute. But that is not the case with which we have to deal. The transfer was signed by the respondents, who were not the registered owners of the shares and were not named in the certificate. Whatever may be the effect of an instrument so executed, one thing is clear, that it cannot be regarded as, either in law or by custom, equivalent to a certificate and transfer executed by the registered owner himself.

When the executors of a registered owner find it necessary to dispose of his shares, they may for that purpose sign either the indorsed transfer or a separate transfer. But these documents themselves are insufficient to enable a person to whom the executors intend to pass the shares to obtain registration and a new certificate in his own name. In order to effect that object it must be proved to the satisfaction of the company that the persons signing the transfer as executors really possess that character, and also that their signatures to the transfer are genuine. Although registration may be obtained upon the production of such evidence, the documents are not "in order," or, in other words, are not accepted in commercial circles as sufficient vouchers of title, unless they are accompanied by an extract of the probate, and an attestation of the genuineness of the executors' signatures by the United States counsel or other competent officer. The evidence on this point, with reference to Stock Exchange transactions, is all one way; and it is a remarkable fact, that of five officials of London banks examined for the appellants, not one was able to speak to an instance of a transfer signed by executors having been taken as a security, except in the transactions which have given rise to the present litigation.

In these circumstances, the appellants cannot successfully maintain that they got the respondents' certificates from Blakeway in the usual course of business. They contend, however, with some degree of plausibility, that the title which they did get was in law sufficient, inasmuch as the respondents had obtained probate and had signed the transfers, and registration could have been obtained on proving these undoubted facts to the satisfaction of the company. On the other hand, the respondents argue that any attempt to put the transfers in order by procuring an attestation of their signatures would naturally have led to the detection of Blakeway's fraud, and that an honest endeavor to obtain evidence of genuineness would probably have led to the same result. Beyond the fact that these transactions were not in the usual course of business, I do not find it necessary to derive any inference from these considerations, because there is another aspect of the case which appears to me to be conclusive against the appellants.

When the registered shareholder executes the transfer indorsed on his certificate, he can have only one intelligible purpose in view, that of passing on his right to a transferee. It is not so in the case of an executor, whose only title to the shares is by legal assignment to the interest of the defunct. The evidence establishes that whether his intention be to dispose of the shares, or to vest himself with them, and to hold them as part of the executory estate, the usual practice is for him to sign the indorsed transfer as executor, without inserting the name of a transferee. His signature in his executorial capacity does not disclose whether he intended the one or the other of these two things; and the document, when placed by him in the hands of a broker, does not speak in terms less ambiguous. It conveys no representation to persons transacting business with the broker that he has authority to sell or pledge, or to do more than effect the substitution of the executor's name for that of the defunct in the register of shareholders. I am of opinion that an ambiguous document of that kind cannot raise an estoppel which will prevent the respondents from pleading that Blakeway had no mandate to pledge their certificates. I think the signature of the respondents, in their executorial capacity, was in itself sufficient notice to cast upon the appellants the duty of inquiring into the extent of his authority, and on that ground I concur in the judgments which have been moved by the Lord Chancellor.

LORD BRAMWELL:—

My Lords, J. M. Williams at his death was the owner, registered in the books of the company, of 1210 shares of the New York Central and Hudson River Railroad Company. On his death these shares, and his right and title thereto, devolved on his executors, the respondents. But to give them these full rights, power of acting as shareholders and receiving dividends, it was necessary they should be registered as shareholders. They could, perhaps, without registration of themselves, though I do not think it clearly appears, nor is it material, transfer those rights by a proper instrument to others, who would then be entitled to registration. The respondents were possessed of the certificates of the testator's ownership of the shares. On these certificates was a form indorsed, which is clearly applicable to a transfer from the person or persons named in the certificates to a purchaser, and not to a transfer from a testator by his executors to themselves. However, the executors, being desirous of having the shares transferred into their names that they might receive the dividends and sell the shares if they wished, and being told it was right to do so, signed these indorsements. They sent these to the testator's brokers to get them, the executors, registered as the shareholders. Instead of this being done, one of the firm of brokers pledged these certificates, part to one of the appellants, part to the other, fraudulently and in breach of his duty to the respondents. Now, as has been said, the shares being of an American company

domiciled in one of the United States of America, an act effectual by the law of that State to transfer the property, and no other, would transfer it. Now, the respondents have not, in fact or intention, transferred the shares to the appellants. But it is said they are estopped to say they are not, for they have signed the indorsed form on the certificates in blank, which, it is contended, means that any person giving value may fill up the blanks and become the owner. I cannot agree. It seems to me plainly wrong. I think any one seeing that the shares were in the name of John Michael Williams, that the indorsements were not by him, but by two others, must have known that it might be intended, rightly or wrongly, that the shares should be sold, or that money should be borrowed on them, or that the signatures were those of persons representing Williams, and intending that the shares should be transferred into the names of the persons so signing; any one of these three intentions is possible, in fact. If so, there can be no estoppel to say the last was meant. It is not contrary to what they have said by their indorsement. Further, I think the circumstances are such as to have called on persons lending money on these documents to inquire as to the right of the borrower to pledge.

On these grounds, I think that the judgment should be affirmed. I cannot, with all respect to Lord Cairns, see any ground for applying the doctrine of *Pickard v. Sears* (6 A. & E. 469), in *Goodwin v. Roberts* (1 App. Cas. 490). The plaintiff there was not making a claim inconsistent with anything he had theretofore said or done.

I should be sorry to think we were deciding these cases differently from what would be done in New York State. But I cannot believe we are. Though such cases did not occur at the time when New York became an English possession, yet the principles which should govern were the same then as now. It is not suggested there has been any statutory change in the State of New York, and therefore the law is the same there as here. It is admitted that if these certificates had been stolen from the executors with their names on them no title would be gained by a purchase for value. But it is said to be different because the respondents voluntarily parted with the certificates indorsed. I think that makes no difference. It could only do so by estoppel, and I think for the reasons I have given that there is none.

One word on the alleged hardship on the defendants. I think there is none. I think they ought to have inquired as to these instruments. It is said business could not be transacted if that were necessary. The same thing was said when Lord Sheffield's case was decided. But, as has been shrewdly observed, such business is as lively as ever. I repeat my remark during the argument. Shopkeepers have said, when suing a husband, that they could not possibly ask the wife if she had his authority to pledge his credit, — she

would be offended. An excellent reason for not asking her, but not for making him pay.

I think the judgment should be affirmed.

LORD HERSCHELL:—

My Lords, the question for determination in these appeals is, whether the appellants are entitled to certain shares in the New York Central and Hudson River Railway as against the respondents. There is no doubt that the respondents, as the executors of the late John Michael Willaims, were the owners of these shares in January, 1881, and it is equally free from doubt that they have never done any act with the intent to sell or pledge them, or otherwise part with the property in them. If, therefore, they are no longer the owners of them, the property has passed in spite of their intention.

There are only two ways in which according to the law of England a good title can be acquired under such circumstances. If the instruments of title be negotiable instruments, a person taking them for value without notice of any infirmity in the title would have a right to hold them, even as against a prior owner who had never intended to part with the property in them. Or, again, such an owner may have so acted as to be estopped from setting up a claim as against a person who has *bona fide* and for value taken the instruments by way of sale or pledge. I do not understand these general propositions to be disputed by the appellants. But they contend that the question is not to be determined by the law of England. They insist that although all the transactions between the parties took place in this country, inasmuch as the company, the title to the shares in which is in question, is a corporation existing under and governed by the laws of the State of New York, recourse must be had to the law of that State to determine what is necessary to pass the property in such shares, and whether under given circumstances the property in them passed, without regard to the place where the transaction took place, which is alleged to have had that result.

I agree that the question, what is necessary or effectual to transfer the shares in such a company, or to perfect the title to them, where there is or must be held to have been an intention to transfer them, must be answered by a reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here.

The facts in the present case lie in a narrow compass and are not in dispute. The certificates of the shares were all in the same form. Each of them certified that John Michael Williams was entitled to ten shares in the capital stock of the company, transferable in person or by attorney on the books of the company only on the surrender and cancellation of the certificate by an indorsement thereon and in the form and manner required by the transfer regulations of the

company. The certificates were handed to Thomas & Co., a firm of stockbrokers, in order that they might procure the executors to be registered in the books of the company and thus complete their title. On the back of each of the certificates was a printed form in the following terms:—

For value received, do hereby sell, assign, and transfer to
shares of the capital stock of the New York Central and Hudson River Rail-
road Company of 100 dollars each standing in name on the
books of the company and represented by the within certificate , and do
hereby irrevocably constitute and appoint attorney to execute a sur-
render and cancellation of the within certificate and also to do all things requi-
site to transfer the said stock on the books of the said company in such form
and manner as may be necessary or may be required by the regulations of the
said company in that behalf, with full powers of substitution in the premises.

This form was signed by the executors before the certificates were placed in the hands of Thomas & Co.; but the blanks were not filled up. A partner in the firm of Thomas & Co. afterwards delivered the certificates in the same condition to the appellant banks, as security for advances made by them. This was done without the knowledge or authority of the executors.

The evidence of eminent lawyers, well acquainted with the law of the State of New York, was adduced on behalf of the appellants. They proved that the delivery of a certificate with a transfer and power of attorney, signed in blank by the registered owner, is a good assignment of the shares, and passes a title to them both legal and equitable. The corporate body, indeed, recognizes no one as a stockholder except those who appear to be such on the books of the company. The rights to vote and to receive dividends are determinable only by reference to those books, and where the registered owner is indebted to the company for unpaid calls or otherwise, the company would be justified in refusing to make a transfer in their books until this indebtedness was discharged. But as between the parties to the transaction the transfer is entirely completed by the delivery of the certificates in the manner mentioned. The evidence of the American lawyers, however, makes it equally clear that such certificates of shares are not in the United States, any more than in England, negotiable instruments. The mere delivery of them with the endorsed blank transfer and power of attorney signed, irrespective of any act or intent on the part of the owner of the shares, is not of itself sufficient to pass the title to them. If delivered by or with the authority of the owner with intent to transfer them, such delivery will suffice for the purpose. But if there has been no intent on the part of the owner to transfer them, a good title can only be obtained as against him if he has so acted as to preclude himself from setting up a claim to them. If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition

of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value. And this doctrine has been held by the Court of Appeals of the State of New York to be applicable to the case of certificates of shares, with the blank transfer and power of attorney signed by the registered owner, handed by him to a broker who fraudulently or in excess of his authority sells or pledges them. The banks or other persons taking them for value, without notice, have been declared entitled to hold them as against the owner.

As at present advised I do not see any difference between the law of the State of New York and the law of England in this respect. If in the present case the transfer had been signed by the registered owner and delivered by him to the brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them. But this is not the case with which your Lordships have to deal. The transfers in this case were not signed by the registered owner, John Michael Williams, but by his executors. If they had been so signed and delivered by the executors for the purpose of effecting a transfer, I see no reason to doubt that such a delivery would have been effectual for that purpose. But they were not. As I have already said, the only object they had in handing them thus signed to the brokers was to complete their title by obtaining registration in their own names. And the question to be determined is whether parting with the possession of the certificates so signed was an act which estops them from setting up their title as against a person who has taken the certificates, *bona fide* and for value, from the brokers intrusted with them.

A most important piece of evidence was adduced at the trial bearing upon this point. It was proved that it was the usual course where executors desire registration in their own name to forward the certificates, with the endorsement signed by them, and acknowledged with a duly authenticated copy of the will, to the New York Office, and that on such certificates and copy will being filed new certificates in the names of the executors are returned to them. It thus appears that certificates, signed as those now in controversy were, may be in the hands of brokers for either of two purposes, to effect a transfer or to complete the title of the executors. Their possession is just as consistent with the one purpose as the other.

The case seems to me to differ essentially from that of a transfer signed by the registered owner. He must, presumably, have signed it with the intention at some time or other of effecting a transfer. No other reasonable construction can be put on his act. And if he intrusts it in that condition to a third party, I think those dealing with such third party have a right to assume that he has authority to complete a transfer. But when the indorsement is signed by executors who are not the registered owners, there can be no such pre-

sumption. They may well have signed it merely to complete their title without the intention of ever parting with the shares.

Under such circumstances, I do not think any one dealing with a broker in possession of such certificates has a right to assume that he has authority to complete a transfer of them; his possession is equally consistent with the absence of any such authority and with his holding them merely for the purpose of procuring registration in the name of the executors. Indeed, I think the evidence shows that the latter would be the more probable explanation of the signature by the executors. For, though an attempt was made to prove that it was a common practice for executors to sign indorsed transfers for the purposes of transferring the shares on a sale or pledge, the attempt has signally failed.

Under the rules of the New York Stock Exchange the delivery of certificates with the indorsement signed by the executors of the registered owner is not a good delivery. And in the New York financial market, amongst bankers and brokers it is not usual to lend upon the security of share certificates thus signed by executors; they are not regarded as being in order. Any such transaction would be exceptional only, and depend upon confidence in, or some special arrangement with, the borrower. Nor would a transfer signed by executors be a good transfer on the London Stock Exchange. A certificate and transfer would not be accepted unless it was clear on the face of it. And it is a remarkable fact that the representatives of several of the most important banking establishments in this country who were called as witnesses were unable to point to a single instance in which certificates with indorsed transfers, signed by the executors of the registered owner, had been taken in the course of their business as security for an advance.

I have come without hesitation to the conclusion that there is no estoppel in this case as against the respondents which prevents their setting up their title to the shares and the certificates which represent them—a title which they have never intended to part with, and of which they can have been deprived, if at all, only by estoppel.

For these reasons I think the judgment appealed from should be affirmed.

LORD MORRIS:—

My Lords, I do not think it necessary to consider some nice questions which might arise under certain circumstances on the transfer by delivery and indorsement of certificates which are admittedly not negotiable instruments. In this case did the transfer and indorsement made by the executors of John Michael Williams transmit title to the shares to the appellants? On the facts (which it is not necessary to recapitulate) if the transfer and executorial indorsement did so vest the property it must have done so by estoppel, as well by the law of the State of New York as by the law of England.

Mr. Carter, a member of the American bar, examined on behalf of

the appellants, thus states the law of New York: "The foundation of a title of a *bona fide* purchaser for value of a certificate of stock which has been delivered to him in fraud of the rights of the registered owner rests upon the circumstance that the registered owner has so dealt with that certificate as to lead the purchaser for value to believe honestly that he was taking a good title to it—in other words, the foundation rests on the principle of estoppel."

Applying that principle to this case, the appellants in taking delivery of the certificates from Blakeway should have acted in such a manner as reasonable men would in dealing with such an important matter of business. They did not so act. According to the American evidence the certificates were not "in order," and would not, according to the rules of the New York Stock Exchange, pass from hand to hand. The documents were imperfect, and though in a proper case the imperfections might be remedied, that is not a sufficient answer when the appellants have to rely on title by estoppel. According to the English evidence, the certificates as indorsed would not be accepted in delivery on the London Stock Exchange. Consequently whether considered from American usage and law or English, the documents were imperfect; the appellants were thereby put on inquiry, and being so put, can have no better title than their transferor Blakeway.

In my opinion the judgments should be affirmed.

Orders appealed from affirmed; and appeals dismissed with costs.

TELEGRAPH COMPANY v. DAVENPORT.

(97 U. S. 369. 1878.)

APPEALS from the Circuit Court of the United States for the Southern District of Ohio.

These are suits in equity to compel the defendant, a corporation created under the laws of New York, to replace, in the name of the complainants, certain shares of its capital stock alleged to have belonged to them, and to have been transferred without their authority on its books to other parties; and to issue to them proper certificates for the same; and also to pay to them the dividends received on the shares since such unauthorized transfer. In case the company fail to replace the stock, the complainants ask for alternative judgments for the value of their respective shares.

The facts upon which the suits rest are these: In March, 1865, Charles Davenport, a citizen of Ohio, died, leaving a widow and two minor children, the complainants here, his heirs. He was possessed at the time, besides other property, of eleven hundred and seventy shares of the capital stock of the Western Union Telegraph Com-

pany, which, upon the settlement of his estate, were distributed equally between the widow and children, in whose names, respectively, they were entered on the books of the company, and to whom separate certificates were issued. She was appointed guardian of the children. To her, as such, the certificates were delivered, declaring on their face that only upon their surrender and cancellation they were transferable in person or by attorney on the books of the company. On the back of each one was printed a blank form of transfer and power of attorney. She put those belonging to the children, with the one issued to her, and some government bonds in a tin box, which was locked and deposited in the Fourth National Bank of Cincinnati for safe keeping. Her brother, Robert W. Richey, at that time and for some years afterwards an officer in the bank, had access to the box. He kept the key to it during her absence from Cincinnati, in order to get for collection the coupons attached to the bonds when they became due.

In February, 1871, he took from this box the certificate of three hundred and ninety shares belonging to the complainant, Henry Davenport, and forged his name to the transfer and power of attorney on its back, adding his own signature as that of an attesting witness. In this form he sold the certificate; and the purchasers, using the forged power of attorney, obtained a transfer of the shares on the books of the company. Subsequently, Mrs. Davenport was in Cincinnati, and on one occasion sent for the box, but returned it to the bank without opening it or examining its contents, and being about to depart for Europe, she left the key with her brother. Soon afterwards, he took from the box the certificate of shares belonging to the other complainant, Katharine Davenport, and forged her name to a like transfer and power of attorney, adding, as in the former case, his own signature as that of an attesting witness. In this form her certificate was also sold, and by the purchaser a transfer was obtained under the forged power of attorney on the books of the company. When these forgeries were committed, both children were minors, Henry being seventeen, and Katherine fifteen years of age. Henry was at the time at school in Switzerland, and in the summer of 1871 Mrs. Davenport and Katherine went to Europe. None of them were informed of the pretended transfers of the stock until the spring of 1873, and in 1874 these suits were brought. They were originally commenced in one of the courts of the State of Ohio, and were removed to the Circuit Court of the United States upon application of the defendant. That court rendered a decree for each complainant, and the company appealed to this court.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court:—

Upon the facts stated there ought to be no question as to the right of the plaintiffs to have their shares replaced on the books of the company and proper certificates issued to them, and to recover the

dividends accrued on the shares after the unauthorized transfer; or to have alternative judgments for the value of the shares and the dividends. Forgery can confer no power nor transfer any rights. The officers of the company are the custodians of its stock-books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. In many instances they may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title, and who may perhaps have acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the processes of the law, requires in the cases mentioned that the property wrongfully transferred or stolen should be restored to its rightful owner. The maintenance of that principle is essential to the peace and safety of society, and the insecurity which would follow any departure from it would cause far greater injury than any which can fall, in cases of unlawful appropriation of property, upon those who have been misled and defrauded.

We do not understand that the counsel of the appellant controvert these views, but they contend that the mother of the plaintiffs, as their guardian, was chargeable with culpable negligence in the keeping of the certificates, and, therefore, that the plaintiffs are estopped from claiming them or their value from the company. The negligence alleged consisted in the fact that she intrusted her brother with the key to the box in which they were deposited when she knew that he was insolvent, and that he had used, without her authority, funds received by him on a previous sale of a portion of her property; and the further fact, that when, in the summer of 1871, before leaving for Europe, she sent for the box, she returned it to the bank without examining its contents. To have allowed her brother, when known to be insolvent, to have access to the box after he had, without her authority, appropriated to his own use her funds, and to have returned the box to the bank in 1871 without examining its contents, were, according to the contention of counsel, offences of such gravity as to estop her wards, the minor children, from complaining of the company for allowing their stock to be transferred

on its books under a power of attorney which he had forged. We do not think it at all necessary to comment at any length upon this singular position; for even if it were possible, as it is not, to preclude the minor heirs from asserting their rights to property received from their father, by reason of any negligence of their guardian, we are unable to perceive any necessary connection between her brother's insolvency and misappropriation of her funds, and the forgery of the children's names, or between such forgery and her omission to open her box in 1871 and examine its contents. There is no circumstance here upon which an estoppel against the plaintiffs can be raised. To create an estoppel against them there must have been some act or declaration indicating an authorization of the use of their names by which the company was misled, or a subsequent approval of their use by acceptance of the moneys received with knowledge of the transfer. No act or declaration is mentioned, either of the guardian or her children, which tends in the slightest degree to show that any assent was given to the use of their names. But moreover, neither the guardian nor the children whilst they were minors were competent, even by the most formal act, to authorize a transfer and sale of the property. Under the statute of Ohio, the intervention of the Probate Court was essential to any such proceeding. No inference could, therefore, be drawn from any negligence of theirs in support of a transfer of the property, where no order of that court authorizing a transfer had been made.

There are numerous decisions of the English and American courts in accordance with the views stated. They are cited by counsel in their briefs, and are given in a note to this opinion.¹ We do not think it important to refer to them specially, for no number of adjudications can add to the force of a simple statement of the facts.

The decree of the court below in each case must be affirmed; and it is

So ordered.

¹ *Davis v. Bank of England* (2 Bing. 393); *Hilgard v. South Sea Co. et al.* (2 P. Wms. 76); *Stoman v. Bank of England* (14 Sim. 475); *Taylor v. Midland Railway Co.* (28 Beav. 287); *Ashby v. Blackwell* (2 Eden, 299); *Lowry v. Commercial and Farmers' Bank of Baltimore* (Taney, C. C. Dec. 310); *Sewall v. Boston Water Power Co.* (4 Allen, 277); *Pratt v. Taunton Copper Co.* (123 Mass. 110); *Chew v. Bank of Baltimore* (14 Md. 299); *Pollock v. The National Bank* (7 N. Y. 274); *Weaver v. Barden* (49 id. 286); *Cohen v. Gwynn* (4 Md. Ch. Dec. 357); *Dalton v. Midland Railway Co.* (22 Eng. L. & Eq. 452); *Swan v. North British Australian Co.* (7 Hurl. & Nor. 603).

EAST BIRMINGHAM LAND COMPANY v. DENNIS.

(85 Ala. 565. 1888.)

APPEAL from the City Court of Birmingham, in equity.

The bill in this case was filed on the 13th April, 1888, by J. F. Dennis, against J. P. Mudd, and the East Birmingham Land Company, a private corporation; and sought to compel the transfer on the books of the corporation, of a certificate for ten shares of stock, of which the complainant claimed to be the owner, and to compel the delivery of the certificate to him by said Mudd, who had possession of it under claim of ownership. The certificate was issued in the name of A. R. Dearborn, and was indorsed by him in blank. The complainant claimed that he had bought the certificate, with the blank indorsement thereon, from a holder who had acquired it by purchase from said Dearborn; and that it was lost by him, or stolen from him, without fault on his part. Mudd purchased the certificate, for full value, from Wilson, Sage & Clark, stockbrokers in Birmingham; and while denying complainant's ownership, claimed that he acquired a good title by the custom and usage of brokers and merchants in Birmingham. A decree *pro confesso* was taken against the corporation. On final hearing, on pleadings and proof, the court rendered a decree for the complainant; and this decree is now assigned as error, by each of the defendants separately.

SOMERVILLE, J. :—

We concur in the conclusion reached by the judge of the City Court, that the appellee, Dennis, complainant in the bill, is the owner of the ten shares of stock which are the subject of litigation in the present suit. The testimony satisfactorily proves that the certificate of stock, indorsed in blank by Dearborn, who was the owner on the books of the defendant corporation, was the property of the appellee, and was taken or stolen from his possession, without any negligence on his part whatever, several months before it was purchased by the defendant Mudd, who innocently bought and paid value for it, some time in March, 1888.

The only question is, whether Mudd, who paid full value for this stock, without notice of the complainant's claim to it, acquired a title superior to that of complainant.

The established rule is, that no person can ordinarily be deprived of his ownership of property save by his own consent, or his negligence. The only exception to this rule is the case of a *bona fide* purchaser for value, of negotiable paper. We have no reference of course to the taking of property for public uses by judicial condemnation, which may be done without the owner's consent.

It cannot be contended, with any degree of plausibility, that, under the facts of this case, the complainant was guilty of negligence, or the want of ordinary care in the custody of the certificate. He kept it in a box in the vault of a banking house, whence it was abstracted by some unknown person, apparently without any fault on his part.

Nor does any question arise involving the rights of a subsequent *bona fide* purchaser of stock, from one shown to be owner on the corporate books, who has already made a prior unregistered transfer of it to another purchaser. All such transfers made by the true owner, and not registered on the books of the corporation within fifteen days, are declared by statute to be "void as to *bona fide* creditors, or purchasers without notice." Code, 1886, 1671; *Fisher v. Jones* (82 Ala. 117). If the defendant Mudd had claimed by a subsequent purchase from Dearborn, the owner of the stock on the corporate books, this question would arise. But he does not so claim, his title being derived through the complainant Dennis himself, by two or more intermediate transferees, the first of whom was a fraudulent holder without title. Whether Mudd's title to the stock, therefore, is superior to that of Dennis, depends on whether a certificate of stock, indorsed in blank by the owner, is to be treated as negotiable paper.

The rule is well settled, that a *bona fide* purchaser of a negotiable bill, bond, or note, although he buys from a thief, acquires a good title, if he pays value for it without notice of the infirmity of his vendor's title. The authorities are clear in support of the view, that a certificate of corporate shares of stock, in the ordinary form, is not negotiable paper, and that a purchaser of such certificate, although indorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had, in the absence of all negligence on the part of the owner, or his authority to make the sale. This question arose, and was decided by the New York Court of Appeals, in *Mechanics' Bank v. New York & New Haven R. R. Co.* (13 N. Y. 599, 1856). It was there held, that such a certificate does not partake of the character of a negotiable instrument, and that a *bona fide* assignee, with full power to transfer the stock, takes the certificate subject to the equities which existed against his assignor. Such certificates, said Comstock, J., "contain no word of negotiability. They declare simply that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer, or order of the party to whom they are given." They were said to be, in some respects, like a bill of lading, or warehouse receipt, being "the representative of property, existing under certain conditions, and the documentary evidence of title thereto." The most that can be said is, that all such instruments possess a sort of *quasi* negotiability, dependent on the custom of merchants and the convenience of trade. They are not, in the matter of transferability, protected strictly as negotiable paper.

In *Shaw v. Spencer* (100 Mass. 382; s. c. 97 Amer. Dec. 1 Amer. Rep. 115 (1868)), it was also decided that a certificate of corporate stock, transferred in blank on its back, was clearly not a negotiable instrument. "No commercial usage," it was said, "could give to such an instrument the attribute of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name must fill out the blanks, . . . so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares." The case of *Sewall v. Boston Water Power Co.* (4 Allen, 282; s. c. 81 Amer. Dec. 701), decided by the same court a few years before, is referred to as a precedent in support of this conclusion.

The precise point in the present case was also decided in *Barstow v. Savage Mining Co.* (64 Cal. 388; s. c. 49 Amer. Rep. 705), where it was expressly held, that a *bona fide* purchaser of stock standing on the company's books, in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title. The decision was based on the fact, that such certificates are not negotiable instruments, but simply muniments of title, and evidences of the holder's right to a given share in the property and franchises of the corporation. It was observed, in regard to the matter of negligence, as follows: "But, if the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit."

The same principle was applied to bills of lading, in *Gurney v. Behrend* (3 Ellis & Bl. 622), decided by the English Queen's Bench, where an instrument of that kind, indorsed in blank by the consignor, and sent by him to his correspondent, had been misappropriated. The correspondent, without authority, fraudulently transferred the bill for value; and it was held by Lord Campbell, that for the want of the element of negotiability in the paper, the title to the goods was unaffected by the transaction.

The doctrine of *Barstow v. Savage Mining Co.* (*supra*) is well supported by authority, and, in our judgment, announces a correct principle of law, and we fully approve it. *Woolley v. Sargeant* (14 Amer. Dec., Note on Page 427, and cases there cited); Cook on Stock and Stockholders, §§ 368, 437, 192, 7, 10; 2 Daniel's Neg. Instr. (3d Ed.), § 1708 g. It harmonizes entirely with the declaration of our statute, that shares of stock in private corporations "are personal property, transferable on the books of the corporation" in accordance with the rules and regulation of the corporation. Code, 1886, § 1669; *Campbell v. Woodstock Iron Co.* (83 Ala. 451).

There is a class of cases, not to be confounded with the one in hand, where the holder of such a certificate of stock, indorsed in blank, is clothed with power, as agent or trustee, to deal with such stock to a limited extent, and transfers it by exceeding his powers,

or in breach of his trust. In such cases, it has often been held, that the true owner, having conferred on the holder, by contract, all the external *indicia* of title, and an apparently unlimited power of disposition over the stock, "is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner." 2 Dan. Neg. Inst. (3d Ed.) § 1708 g; *McNeil v. Tenth Nat. Bank* (46 N. Y. 325); *Mount Holly Turnpike Co. v. Ferree* (17 N. J. Eq. 117); *Prall v. Tilt* (28 id. 479); *Merchants' Nat. Bank v. Livingston* (74 N. Y. 223). These cases rest on the principle that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the deceiver, than a stranger who has been negligent in trusting no one. *Allen v. Maury & Co.* (66 Ala. 10).

It being an established principle of law that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stockbrokers to the contrary. No usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulations of a contract. *Dickinson v. Gay* (83 Amer. Dec. 656, and Note, 664); *E. T. Va. & Ga. R. R. Co. v. Johnston* (75 Ala. 576); *Lehman v. Marshall* (47 Ala. 362).

The decree of the court below is in accordance with these views, and must be affirmed.

BOSTON MUSIC HALL ASSOCIATION v. CORY.

(129 Mass. 435. 1880.)

COLT, J. :—

In 1874, Howard L. Hayford sold five shares in the stock of the Boston Music Hall Association to his brother Nathan H. Hayford, to whom he delivered a stock certificate, and upon which he indorsed and signed a written transfer in the usual form. No transfer was made on the books of the corporation, and there was no provision in the charter or by-laws of the association, requiring it. It was not until after the shares were levied on as the property of Howard L., in May, 1878, that the corporation was notified of the alleged sale and transfer to Nathan H. In the mean time Howard L., with the knowledge of his brother, collected the annual dividends declared on the stock, attended meetings of the stockholders, and served upon committees appointed at such meetings. Under the levy made in 1878, Barney Cory bought the stock as the property of Howard L., and the question presented by this bill of interpleader is, which of the two acquired the title.

The case comes up on an appeal from the decree of a single judge in favor of Nathan H. Hayford, accompanied by a report of the evi-

dence taken at the hearing. In the first place, it is contended that the evidence fails to show that the stock was sold and assigned to Nathan H., in good faith at any time before the levy. Upon this question of fact, the decision of the single judge will not be reversed unless it clearly appears to be erroneous. *Reed v. Reed* (114 Mass. 372); *Montgomery v. Pickering* (116 Mass. 227).

The only evidence of the transaction in 1874 comes from the two Hayfords, who were the parties to it. But we cannot say that the fact that the apparent ownership remained unchanged for such an unusual length of time upon the books of the corporation, and that Howard L. received the dividends and continued to act as the real owner, is sufficient to lead us to believe that the judge erred in not treating it as sufficient to overcome the positive evidence of a valid sale of the property, coming from the two witnesses who were before him, and of whose truthfulness he had the best opportunity to judge.

In the next place, it is strenuously urged that, by force of the various statutes of this Commonwealth relating to the ownership and transfer of stock in corporations, authorizing the attachment of shares, requiring returns to the Secretary of the Commonwealth, and imposing a personal liability on stockholders for the debts of the corporation, there can be no transfer of stock, valid against the claims of an attaching creditor, unless such transfer be recorded in the books of the corporation (Gen. Sts. c. 68, §§ 10, 12; c. 123, §§ 59-61; c. 133, § 46. St. 1864, c. 201). The intention of the Legislature, it is said, must have been to provide for the owners of stock a convenient and uniform method of transferring title on the books of the corporation, which should be the only valid transfer as to creditors, and others interested; and, although the statutes have not provided in express terms, that as to creditors transfers shall not be valid till they are so recorded, yet such, it is contended, is the necessary implication, for otherwise the design of the statutes, requiring registration and making the shares liable to be taken for debts, would be defeated. But this consideration is not sufficient to control the law as long since settled by the decisions of this court. It requires a clear provision of the charter itself, or of some statute, to take from the owner of such property the right to transfer it in accordance with known rules of the common law. And by those rules the delivering of a stock certificate, with a written transfer of the same to a *bona fide* purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor. *Sargent v. Essex Marine Railway* (9 Pick. 201); *Sargent v. Franklin Ins. Co.* (8 Pick. 90); *Fisher v. Essex Bank* (5 Gray, 373); *Dickinson v. Central National Bank* (129 Mass. 279).

It would not be in accordance with sound rules of construction to infer, from the provisions of several different statutes passed for the purpose of obtaining information needed to secure the taxation of

such property, or for the purpose of subjecting stockholders to a liability for the debts of a corporation, or for protecting the corporation itself in its dealings with its own stockholders, that the Legislature intended thereby to take from the stockholder his power to transfer his stock in any recognized and lawful mode. If a change in the mode of transfer be desirable, for the protection of creditors, or for any other reason, it is for the Legislature to make it by clear provisions, enacted for that purpose.

We see nothing in the facts which can be held to deprive Nathan H. Hayford of the stock in question, on the ground that he is chargeable with laches in not causing the transfer to be sooner recorded, or that he is now estopped from setting up his title to the shares in his possession. It must be taken, upon the findings of the judge, that Nathan H. bought these shares in good faith in 1874; and that all which the law required was done to vest a perfect title in him, as against an attaching creditor of Howard L. He was under no legal duty to have the transfer recorded in order to perfect his title as against strangers, and he can be charged with no neglect or laches which would involve the forfeiture of his title.

The evidence in the case does not require us, against the findings of the single judge, to find that Nathan H. is estopped to set up his title against a creditor of Howard L. The acts and declarations of the latter, after the sale, would not affect the title, except so far as they were authorized by Nathan H., and there is nothing to show any act or declaration authorized by the latter, with intent to give a false credit to Howard L., or that any creditor of his was in fact defrauded.

Decree affirmed.

PINKERTON v. RAILROAD COMPANY.

(42 N. H. 424. 1861.)

ASSUMPSIT, for refusing on demand to give the plaintiff, George W. Pinkerton, a certificate of twenty-nine shares of the stock of said road, and to pay him the dividends on the same stock.

On the trial, it appeared that on or before July 8, 1854, one Henry M. Holbrook owned ninety-six shares in the stock of the road, and on that day assigned the ninety-six shares, with other assets, to the Granite Bank, Boston, of which he was the president, as collateral security for his debts to the bank, amounting to over one hundred thousand dollars. The certificates of said stock, held by said Holbrook, being three in number, were transferred, by an indorsement on the back of each, signed by said Holbrook, and dated July 8, 1854, and were to A. Foster, cashier, as collateral. The certificates were delivered to the bank on the eighth or tenth of the

same July, and they remained in the bank, without any entry of a transfer on the books of said road, until the third of August of the same year. On that day, from five to fifteen minutes past two o'clock in the afternoon, Holbrook delivered the certificates at the bank to Moses J. Mandell, to have the transfer aforesaid entered on a book kept by Mandell, as transfer agent, at the office of Brown & Sons, brokers, in Boston, of which firm Mandell was a member; and at that time such entry was made, showing that the shares were transferred, the old certificates surrendered by the bank to said Mandell, and new ones issued by him to the bank for the same stock, he being furnished with blank certificates, signed by the president and treasurer, for such purposes. The old certificates, with a notice of transfer, were sent by Mandell, by the earliest conveyance, to the office of said railroad at Manchester, and were received there at about 8 o'clock that afternoon; and afterward, in September, 1857, a corresponding entry of the transfer made in the proper books at that office, as of the date September, 1857.

It appeared by the records of the corporation that at a meeting duly held on the 30th day of June, 1852, it was voted that Enoch N. Abbott, of Manchester, be chosen treasurer of the corporation, with authority to appoint a transfer agent in Boston; and it appeared that Mandell, on said 3d day of August and for some time before, was acting as such transfer agent, and was furnished by the corporation with books to be used for that purpose, and with blank certificates of stock, signed by the proper officers of the corporation, and to be filled up and used by him in the course of his business as such agent.

It appeared by the deposition of Pinkerton, that Mandell officiated in the capacity of transfer agent, and that he was acting as such on said 3d day of August, and that he performed the duty usually devolving on transfer agents; and it appeared also that what the said Mandell did in relation to the issuing of new certificates, and sending notice to the office at Manchester, and making a record of such transfer on the books so kept by him, was in the regular course of his business as such transfer agent; and that Pinkerton was then aware that Mandell was accustomed to fill out and issue such new certificates of stock, on the old ones being surrendered up to him, and to send the old ones immediately by express to the treasurer's office, at Manchester.

Previous to the 3d of August, 1854, the plaintiff was the holder of a note, on which Holbrook was liable; and being in Boston on that day, and understanding that Holbrook had failed, a little before 12 o'clock at noon, went to Mandell's office, to ascertain whether Holbrook had made any sale or assignment of the stock which he knew Holbrook had owned in the Manchester and Lawrence Railroad, and found that no transfer had been entered there. He then went by the next train to Manchester, procured a writ to be made on his note

against Holbrook in the name of George W. Taylor, and eight minutes after 5 o'clock in the afternoon, before any transfer had been made of the stock on the books at Manchester, and before any notice had been received there of the transfer, caused the ninety-six shares standing in the name of Holbrook on the books of the road, at Manchester, to be attached as his property.

There was no evidence that, at the time when this attachment was made, either Pinkerton or Taylor, or the officer who made the attachment, had any knowledge or notice that the stock had been sold or assigned by Holbrook.

On the third Tuesday of April, 1856, the plaintiff, in *Taylor v. Holbrook*, recovered judgment for the amount due on the note sued, being \$1,661.50, and costs, taxed at \$16.63. The execution issued on the judgment was duly levied, within thirty days, on the stock attached on mesne process, and on the 12th day of July, 1856, twenty-nine of the shares attached were duly sold on the execution to the plaintiff, and due return made thereof.

On December 11, 1856, before this suit was brought, the plaintiff duly demanded of the road certificates of the twenty-nine shares to be issued to him, and also the dividends on the same shares, which the road refused; and he also demanded of the road the aforesaid dividends in August, 1858.

It further appeared that on the 9th day of July, 1856, the said Granite Bank commenced a suit against said railroad, in the Superior Court for the county of Suffolk, Massachusetts, for the dividends that had been declared on said ninety-six shares, and on the 28th day of April, 1857, recovered judgment for the sum of \$301.68 damages, and \$54.21 costs. No defence was made to this suit by the railroad, but judgment was rendered on default after an appearance.

A verdict was taken, by consent, for the plaintiff, for \$5,000, subject to the opinion of the court; to be set aside, reduced, or judgment rendered thereon, as the court should order.

BELLOWS, J. :—

[After stating the facts substantially as above.]

The question now is, whether the assignment to the Granite Bank was good against the attaching creditor. To the regularity of the proceedings upon the attachment and sale upon execution, there is no exception; nor is there any objection to the existence of a *bona fide* debt to the Granite Bank; but the only question is, whether the transfer was so far completed as to be valid against an attaching creditor. There is nothing, either in the charter or by-laws of the corporation, to prescribe or regulate the mode of making a transfer, but it is contended by the plaintiff's counsel that, until it is entered or recorded in the stock books of the corporation kept in this State, the transfer is not valid as against an attaching creditor. And the argument is put upon two grounds:—

1. That, by force of the various statutes upon the subject of the evidence of ownership of stock, and the keeping of the records, and the residence of the officers, and their duties, such entry or record is necessary to a valid transfer.

2. That, to constitute a complete delivery of the stock, such entry and record are necessary, as the natural and recognized *indicia* of ownership; and that, without such entry, the stock must be deemed to be still in possession of the assignor; which implies a secret trust, and is, therefore, in the judgment of the law, fraudulent and void as to creditors.

In regard to the second ground taken by the plaintiff's counsel, namely, that without such entry or record the possession of the stock cannot be deemed to have been changed, it is alleged in answer by the counsel for the defendant, that the entry or record in the books of the transfer agency was sufficient, and the same as if entered in the books at Manchester; and it is also suggested that all the possession was given that the nature of the property was capable of, as in case of the sale of goods, at sea; and it appears that by the earliest conveyance after the old certificates were surrendered the new one was sent to the office at Manchester, with notice of the transfer. Had this been done immediately upon the pledge, and the transfer recorded in the books at Manchester, a question might have arisen whether the possession was not perfected without unreasonable delay, and so as to prevail against an intervening attachment, as in *Ricker v. Cross* (5 N. H. 570); and in the case of the sale of a ship in a distant port, as in *Putnam v. Dutch* (8 Mass. 287); *Portland Bank v. Stacy* (4 Mass. 661); or abroad, or at sea, as in the cases cited in *Ricker v. Cross*; and as in *Conrad v. Atlantic Ins. Co.* (1 Pet. 384-449), and *Joy v. Sears* (9 Pick. 4), and *Buffinton v. Curtis* (15 Mass. 528), and 1 Smith's L. C. 76. In this class of cases it may be said that the want of delivery at the time is explained within the principle of *Coburn v. Pickering* (3 N. H. 415), upon the ground that such delivery was impossible, and therefore the presumption of fraud is repelled. See *Gardner v. Howland* (2 Pick. 599) and *Peters v. Ballister* (3 Pick. 495). On this ground a similar doctrine has been held in the case of the sale of a slave too sick to be removed at the moment.

But, in the case before us, this question does not arise, because the assignment was made on the 8th day of July, and nothing sent to the office until the 3d of August; and this, we think, could not be regarded as using due diligence to perfect the assignment, if such entry and record were necessary. Nor do we think that books of the transfer agent in Boston can be regarded as the records or accounts of the shares or interests of the corporators, contemplated by the several statutes, in providing for the means of taxing the shareholders, enforcing their private liability, or for giving creditors the necessary information to enable them to attach or levy upon the

stock. On the contrary, we think it quite clear that the law contemplates the keeping a record of the ownership of the stock in the State, and by an officer resident here, and competent to certify the same.

The law of 1850 (Laws of 1850, ch. 953, sec. 9; Comp. Stat., ch. 150, sec. 67) provides, that the treasurer and clerk of railroad corporations shall reside in this State, except where the railroad is part of one created by the acts of two or more States; and this provision is not affected by the fact that the payment of dividends to stockholders is provided for at the place of business of the corporation in this State. The section provides "that the clerk and treasurer shall reside within this State, and all the books, papers, and funds of said corporation, with the foregoing exception (that is, in case of a road in two States), shall be kept therein, or shall provide for the payment of all dividends to the stockholders, in this State, at the place of business of the corporation in this State."

This alternative provision, we think, is designed as a substitute for the keeping of funds for the payment of dividends, and the books and papers connected therewith, in this State, and is not to be construed to dispense with the necessity of keeping a record or account of the stock in this State, or of the residence here of the clerk or treasurer.

By the Revised Statutes (ch. 146, sec. 13), prior to the act in question, no person could be eligible to the office of clerk of any corporation, unless he was an inhabitant of the State; and it is quite clear, from the whole course of the legislation prior to this law of 1850, that the keeping of the records or accounts of the shares or interests of the corporators, by the treasurer or other officer in this State, has been steadily contemplated by the Legislature.

This is manifest by the law requiring the clerk of the corporation to return a list of the stockholders to the town-clerk, under a penalty of fifty dollars (Comp. Stat., ch. 147, secs. 8-12); the provisions for the attachment of stock, by leaving a copy of the writ and return with the clerk, treasurer, or cashier; the provision requiring the officer having the care of the records of stock to exhibit, on demand, to the officer making such attachment, a certificate of the number of shares owned by the debtor, and to exhibit to him such records and documents as may be useful to the officer in discharging his duty, and subjecting him to a penalty and damages for neglect (Comp. Stat., ch. 207, secs. 16-21). So, in relation to manufacturing corporations, it is provided that, if the treasurer does not reside within this State, the stock record shall be kept within this State by the clerk.

With these provisions and this policy in view, it will hardly be contended that the alternative provision, in regard to the payment of dividends in this State, is to be regarded as a substitute for the residence of the clerk and treasurer, and the keeping of the stock

record in this State; for it is quite obvious that such provision for the payment of dividends can, in no aspect of the case, be regarded as a substitute for keeping the stock record here, and in the hands of a certifying officer of the corporation. To authorize a construction that would make this alternative provision a substitute for all the rest, would require language much more explicit than we find there. If, then, an entry of the transfer in the books of the corporation be necessary to a valid transfer as against this plaintiff, we hold that it must be done in the books kept in this State.

The question, then, is whether such entry is necessary. In this case both the plaintiff and the Granite Bank were creditors of Holbrook, the former owner of the stock, and both claim under him; one by sale on execution, and the other by voluntary transfer from the debtor. By the law of New Hampshire, as it has existed ever since 1812, stock in all corporations is subject to attachment and execution; and the question is, whether the transfer was so far perfected as to be valid against the plaintiff's attachment. In deciding this question it is not material to determine the precise character of this property, whether such stocks be regarded as choses in action or not; because we are satisfied that it comes within the provisions of the statute of 13 Eliz., ch. 5, even if regarded as choses in action. The terms used in that statute, in respect to personal property, are "goods and chattels," but they are construed to embrace things in action as well as in possession. 2 Bl. Com. 384, note 1; *Ford & Sheldon's Case* (12 Co. 1), applying to an act of Parliament; *Ryal v. Rowles* (1 Atk. 164, 182, and same case in 1 Ves. 348, 363, 366, 367, 369, 371). This case involved the construction of the terms "goods and chattels" in the statute of 21 James 1., relating to conveyances by persons afterward becoming bankrupt, and it was held that they included a conveyance of a share in a trading concern by one of the partners; and it was expressly held that these terms in an act of Parliament would include choses in action. And such, we think, has been the doctrine of the courts in this State, as shown in cases of foreign attachment and otherwise. *Hutchins v. Sprague* (4 N. H. 469); *Giddings v. Coleman* (12 N. H. 153); *Langley v. Berry* (14 N. H. 82); *Newman v. Bagley* (16 Pick. 570); *Richmondville Company v. Pratt* (9 Cow. 487).

The claim of the Granite Bank arises from what must be regarded as a pledge; and to be valid, a delivery is essential, at least as against creditors. To constitute such delivery, the assignee should be clothed with the usual marks and indications of ownership. In the case of things in possession, there should be a manual delivery and change of possession, or its equivalent. In the case of things in action, the usual muniments of title should be conferred upon the assignee. As to the former, it is held that if the articles are bulky, the delivery of the key of the warehouse in which they are deposited will suffice. *Ryal v. Rowles* (1 Ves. 362). See *Patten v. Smith* (5

Conn. 200). So in case of the sale of goods at sea, a transfer of the bill of lading, by indorsement, is, by the commercial law, valid as to creditors. *Caldwell v. Ball* (1 T. R. 205-211); *Conrad v. Atlantic Ins. Co.* (1 Peters, 444), and cases cited. *Lanfear v. Sumner* (17 Mass. 112). A bill of lading is an acknowledgment, under the hand of the captain, that he has received the goods, and will deliver them to the person named therein, and, by the well-settled principles of the commercial law, is assignable by indorsement; and this is equivalent to the actual delivery of the goods. Such transfer is the ordinary and appropriate mode of selling goods at sea; and it was held in *Caldwell v. Ball* (1 T. R. 205-215), that when two bills of lading were signed by the same captain, the person to whom one was first transferred would hold the goods. So where the goods sold are in the custody of another, and an order is given to the depositary to deliver them to the buyer, which is presented to him; there the sale is complete. *Plymouth Bank v. Bank of Norfolk* (10 Pick. 459); *Tuxworth v. Moore* (9 Pick. 348). In the case of real estate mortgaged, where the title-deeds are left with the mortgagor, who makes a second mortgage and delivers the title-deeds, the first will, in equity, be postponed to the second. *Ryal v. Rowles* (1 Ves. 360).

In regard to the assignment of choses in action, as a bond or promissory note, a delivery is essential as against a subsequent assignee, or probably, a creditor. *Ryal v. Rowles* (1 Ves. 348, 362, Burnet, J.; Parker, Baron, 366). As to goods and chattels in possession, a substantial change of possession is, by our law, essential, when it can be had. The want of it, unexplained, is conclusive evidence of a secret trust, and shows the sale to be fraudulent as to creditors. In the case of stocks, the natural and appropriate indication of ownership is the entry upon the stock record. This is indicated by the ordinary course of dealing in such property, and has been assumed in our legislation for many years; and it is manifested in the provisions in regard to returns of stock, by the clerks or treasurers, for the purposes of taxation, private liability, and attachment; all of which assume that the records will show the ownership of the stock, and some of which continue the individual liability so long as the returns borne upon such record remain unchanged. In respect to manufacturing corporations, by express provisions a transfer of stock avails nothing against an attachment until entered upon the corporation records. So, too, such record is expressly recognized as essential in the certificates and in the transfer of the stock in question.

Until, then, the transfer is recorded, or is entered for record, we think there has been no such change of possession as will prevail against an attaching creditor, unless in cases as before suggested, where due diligence has been used to make such record, and the attachment has intervened. We are aware that choses in action may be transferred by a simple delivery of the evidence of indebtedness,

with an indorsement thereon, in certain cases; but it will be observed that, in these cases, all such changes in the indications of ownership as the nature of the case will admit, are required. If, therefore, upon the transfer of a bond or bill of exchange, it be retained by the assignor, a subsequent purchaser, without notice, would acquire a good title. Indeed, it may be laid down as a general principle governing the transfer of every species of personal property, that, to be good against innocent third persons, such transfer must be accompanied with such change of possession and indications of ownership as the nature of the thing is capable of; otherwise the seller is enabled, by means of an apparent ownership, to obtain a fictitious credit, and to deceive both creditors and purchasers. To avoid such consequences the law has always watched such conveyances with extreme solicitude. In this respect we see no distinction between things in action and things in possession; but, for aught that we can see, the same general rules must apply to both.

It is true, that, at common law, choses in action were not the subject of attachment or execution, except by the custom of London, and there only when the garnishee lived in the city, and the debt arose there. Com. Dig., *Attachment*, A. D. Nor did it extend to stocks in the East India Company. But now, by the laws of New Hampshire of no distant date, choses in action are made the subject of foreign attachment; and stock in corporations may now be attached specifically, like things in possession. Under these circumstances, and in view of the rapid increase and the vast amount of such property, it becomes extremely material to make a correct application to this species of property, of the principles which regulate the transfer of other kinds of property.

In the case before us, the stock was pledged to the Granite Bank on the 8th day of July, 1854, as collateral security for the owner's indebtedness, by a delivery of the certificates indorsed by him to the bank of which he was then president; and nothing further was done toward taking possession of the stock until the third day of the following August, when the old certificates were surrendered to the transfer agent, and new ones received by the bank. The act of transfer by Holbrook must be regarded as done on the 8th of July, and whatever was done afterward was the act of the bank; and the question is, whether due diligence was used by the bank in taking possession of the stock. It may be answered that, as the transfer was made at a distance from the place where the stock records were kept, a reasonable time should be allowed, to communicate with the officer; but the case finds nothing, and nothing is suggested, that could justify a jury in finding that the entry was made in a reasonable time after the act of transfer. There is no suggestion that the communication was made at the earliest convenient opportunity after the transfer on the 8th of July; and if there was a daily mail communication with Manchester, there could be no ground to claim that

due diligence was used. Nor could the exchange of certificates, at the transfer agency, be regarded as equivalent to a record, or the entry for that purpose in the office at Manchester. If forwarded by the transfer agent and recorded, it then would be perfected; but we are unable to regard the act of the transfer agent, in respect to the record, as anything more than the act of a mere agent of the bank. To give to the notice and entry at the transfer agency the effect of a record or entry upon the stock book of the corporation, would, as we think, be contrary to the policy of the law, which requires, as the chief evidence of ownership, the record or entry in the books of the corporation kept in this State. Such a rule is simple and easy of application, and is demanded for the convenience of the corporation, and the interests of the stockholders and their creditors. The transfer agent is in no sense the keeper of the stock record, and notice to him is not notice to the keeper of that record.

This case, then, is one where due diligence was not used to take possession of the stock; but, in respect to the creditors of Holbrook, it was, for nearly one month, left in his possession, he retaining, as before, the usual indications of ownership, such as membership of the corporation, and a right to vote on the stock, his private liability for debts, and his liability to be taxed, and being, indeed, for all purposes, the ostensible owner of the stock. Indeed, the retaining these evidences of ownership, in the case of an absolute sale of the stock, or any transfer which implies a delivery, would be no less inconsistent and no less indicative of a trust than the retaining possession of goods, capable of manual delivery, upon an absolute sale. If there be any substantial difference, the inconsistency would be more marked in the case of the stock, inasmuch as in the case of goods and chattels, which are tangible, it is often convenient to disconnect the use from the ownership for a time. And we are inclined to think the retention of the possession of goods which are tangible would be less likely to mislead creditors and purchasers, than the omission to make the proper entry in the stock record on the transfer of stocks. Indeed such a neglect to perfect the transfer of stock as this case discloses, could hardly fail to excite suspicions as to the existence of a fixed intention to perfect the transfer at all, at the time it was made. Whatever the fact may be in this case, it is quite apparent that, if such transfers are held good as against creditors, it would open a wide door for the mischiefs which are denounced by the statute of 13 Eliz.; especially would it be so in these times, when so large a portion of all the property of the country is in corporation stocks. It is to be observed, also, that this transfer affords no information as to the amount for which it is pledged, or for what; and it might deserve very grave consideration whether a transfer, valid as against creditors, of attachable property, can be so made. But it is not necessary to consider this question now, nor do we inquire whether there existed an actual fraudulent intent or not.

We are brought to the conclusion that the possession of the stock was not changed, and that no satisfactory explanation of it is given; and that, therefore, there is shown a secret trust, which avoids the transfer as to this plaintiff. The conclusion we have reached, on this point, renders it unnecessary to consider the other.

The only question remaining is, as to the measure of damages.¹ . . .

In this case, therefore, after reducing the amount to accord with these views, there should be

Judgment on the verdict.

SPRAGUE v. COCHECO MANUFACTURING COMPANY.

(10 Blatchford, 172. 1872.)

WOODRUFF, J.:—

Edward Belknap was trustee, under the will of John Belknap, late of Boston, in Massachusetts, deceased, and, as such trustee, he held five shares of stock in the Cocheco Manufacturing Company, a corporation created by, and doing business in Massachusetts, "to be held in trust and managed," with other property, for the purposes in the will of the deceased specified, which were, the appropriation of the income, as directed, until the death of the testator's widow, and then to divide the principal, as also directed.

On the 26th of May, 1859, a suit was commenced by one of the beneficiaries, in the Supreme Judicial Court of Massachusetts (which court had full power and jurisdiction in the premises), against the said Edward Belknap, to remove him from the trust, for misfeasance therein. In that suit, the said Edward Belknap was represented by counsel, and such proceedings were had therein, that Charles Amory was appointed receiver of the trust estate, pending the suit, and Belknap was enjoined against transferring or assigning the same; and thereafter, on the 23d of February, 1863, a decree was made removing the said Belknap from the office of trustee under the said will, and appointing the said Charles Amory and J. Ingersoll Bowditch trustees in his stead, and directing the said Belknap to assign and transfer the trust estate to the new trustees, and to deliver to them all deeds, mortgages, certificates, &c., relating to the trust estate, and a reference was ordered to a master to take an account of the trust estate, &c. On the coming in of the master's report, and on the 16th of April, 1864, a final decree was made, ascertaining and fixing the amounts of arrears of income due to certain of the beneficiaries, settling the costs and counsel fees to be paid, and directing the application of the moneys in the hands of the receiver, &c., and ordering, that, in case the said Edward Belknap should neglect or

¹ Part of the opinion relating to this question is omitted.

fail to deliver up to the said Amory and Bowditch, the new trustees, the several certificates of corporate stock and mortgages belonging to the trust estate, and assign and transfer the same to them, then the said master in chancery be, and he thereby was, authorized to execute and deliver to the said trustees proper transfers, etc., of said shares and mortgages, so as to vest the property therein in the said trustees. Thereupon, and before the transaction of the 18th of June, 1866, through which the plaintiffs claim to be entitled, the master in chancery executed an assignment of the stock now in question to the new trustees, which was exhibited to the defendant, and a demand was made upon the defendant for the transfer of the stock on the defendant's books, and for a new certificate in the name of such new trustees. Of the pendency of this suit, and of the orders and decrees therein, the defendant had notice, and, during the continuance of the receivership, the dividends declared on the stock were paid to the receiver, and thereafter to the said new trustees.

After all this had taken place, one Raphael, professing to act for the benefit of one Hudson, on the 18th of June, 1866, applied to the plaintiffs in this suit for a loan of two thousand dollars, to be repaid, with interest, in sixty days, proffering, as collateral security, the certificate issued to Edward Belknap, trustee, dated March 9, 1857, for the said five shares of the capital stock of the defendant, the said certificate having annexed thereto a paper in the form of an assignment, but without containing the name of any assignee, and with power of attorney to transfer the stock, but without naming or designating, directly or indirectly, any attorney; dated December 20th, 1858, and signed, "Edward Belknap, trustee," and purporting to be attested by a witness. The plaintiffs, having no notice of the proceedings in Massachusetts, and being assured by Raphael that the stock was "genuine stock," and by a person who was the agent of the defendant in New York, in selling its goods, that the certificate was a genuine certificate, and that stock in the defendant's corporation was worth seven or eight hundred dollars a share, and believing such representations, and having no notice of any breach of trust by Belknap, made the said loan, and received from Raphael the certificate, and the paper annexed, signed by Belknap. The plaintiffs, by the assent of Raphael, then filled up the last-named paper, by inserting their own names as assignees, and as attorneys to transfer the stock therein named, and presented it to the defendant, and demanded a transfer of the said stock, and a new certificate in their own names, when they were informed that the stock was the property of trustees under the said will of John Belknap, and that Edward Belknap had been removed from the trust, and new trustees appointed in his place, and a transfer and new certificate to the plaintiffs was refused. The plaintiffs then, claiming to be so authorized by the said annexed power of attorney, filled up the blank assignment and power printed on the back of the said certificate of

stock, and again demanded that it be received and recorded, and a new certificate be issued to the plaintiffs, and the defendant again refused. Whereupon, this action is brought against the defendant, to recover the value of the stock, as damages.

There are some other details given in the case, as agreed upon by counsel, but the foregoing are all that I deem material to the decision I am called upon to make.

The defendant rests on the title of the new trustees, at whose request and at whose risk the action is defended. The certificate of stock certifies, that "Edward Belknap, trustee," is proprietor of five shares in the corporate property of the Cochecho Manufacturing Company, "which shares are transferable by assignment on the back hereof, and recorded by the treasurer of said corporation, and, upon delivery of such assignment of this certificate, a new certificate or certificates shall be issued, according to the interest of the parties," and is duly attested under the corporate seal, March 9, 1857.

A very important question is at once suggested by the case so made: Is the stock of a corporation in the State of Massachusetts so within the power of its courts (having, so far as the case discloses, all proper parties before them) that their decree will operate upon the title of the stock, and may transfer it to a third person, notwithstanding the certificate therefor, in the form above stated, is outstanding? I say, with proper parties before it, because Belknap, the holder of the legal title, was a party, and the plaintiffs have not shown the title of any other person acquired, or conjectured to have been acquired, prior to the decree removing him from his trust, and awarding the stock to his successors in the trust. If such stock cannot be reached by the courts, and dealt with as right and justice may demand, it would be interesting to inquire how stock can be attached and be subjected to the payment of the debts of the owner. How can it be reached and appropriated to the payment of judgments recovered, either by taking on execution, or by a proceeding in equity in favor of judgment creditors? How, especially, shall the property of an absconding debtor in stock held by him be reached and applied? After all means have been exhausted, through regular judicial proceedings, is the corporation bound to recognize the title of one who, years afterwards, produces the certificate, with the signature of the former owner to a blank assignment, and proves that, since such judicial proceedings, he has advanced money on the faith of the certificate? Has the rule, *caveat emptor*, no application to sales of stock? Have the usages of banks and brokers in New York, (which are certified to me in this case, to advance money upon, and to buy and sell on the faith of, such papers, legal efficiency to make the courts powerless to protect beneficiaries, and to compel payment to creditors, because the holder may succeed in keeping the certificate of stock beyond their reach? I am not prepared to hold that stock in a corporation is not a chattel interest, or that the certificate

of stock gives to the stock itself the character of negotiability which belongs to commercial paper under the law merchant.

I do not think it necessary to discuss the questions thus raised at great length, nor is it important to this case to bring into view, for the purpose of analogy, the various instances in which possession of just such papers may be obtained by fraud or theft, or in which a person may have their possession without the knowledge or consent of the owner, or when, though possession be intrusted to him, he may have no authority in fact to dispose of the stock. Nor, in this case, is it necessary to affirm or deny the other arguments by which the defence herein is sustained. It is sufficient, for the decision of the case, that I should say, that the decree of the court in Massachusetts, and the assignment there made by the master in chancery, is full protection to the defendant against a claim made by the plaintiffs, under a transfer to them after such decree and assignment, unless they show, that, before such decree, the person from whom they claim, and to whom they advanced their money, had acquired from the former trustee a title which was good as against his successors. This they have not shown. Without, therefore, considering whether the paper signed by the former trustee, which assigned to no one, and which authorized no one to transfer the stock, should, under any, and, if so, what circumstances, be deemed to authorize the holder to fill the blanks, I am satisfied that the plaintiffs have failed to show title to the stock, of any efficiency, as against the new trustees, or as against the defendant, having notice of the decree and proceedings under the same, to invest the new trustees with the title.

The judgment is ordered for the defendant, with costs.

FISHER v. ESSEX BANK.

(5 Gray, 373. 1855.)

ACTION of tort to recover damages for the defendants' refusal to transfer to the plaintiffs forty shares of the capital stock of the defendants (who were incorporated and established at Haverhill in this county, by St. 1851, c. 269) alleged to have been purchased by the plaintiffs of Luther G. Bingham.

At the trial before Metcalf, J., the plaintiffs introduced evidence of the following facts: On the 26th of February, 1852, in New York, Bingham, in whose name as holder the shares then stood on the books of the bank, sold the shares for a valuable consideration to the plaintiffs, and delivered to them the certificate thereof, signed by the president and cashier of the bank, and certifying that Bingham "was entitled to forty shares in the capital stock of the Essex Bank, transferable only in the books of said corporation, at said bank, by the said L. G. Bingham or his attorney." At the same time Bing-

ham signed, sealed, and delivered to the plaintiffs the following instrument: "Know all men by these presents, that I, L. G. Bingham, for value received, have bargained, sold, assigned, and transferred and by these presents do bargain, sell, assign, and transfer unto A. Fisher and Thomas Denny forty shares of the stock of the Essex Bank, standing in my name on the books of the said bank, and do hereby constitute and appoint my true and lawful attorney irrevocable, for me and in my name and stead, but to use, to sell, assign, transfer, and set over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute, with like full power; hereby ratifying and confirming all that my said attorney or substitute or substitutes shall lawfully do by virtue hereof. In witness whereof I have hereunto set my hand and seal the twenty-sixth day of February one thousand eight hundred and fifty-two."

On the 13th of April, 1852, the plaintiffs addressed a letter to the president of the bank at Haverhill, informing him that they had forty shares of Essex Bank stock, with power of attorney annexed, which shares had been issued to Bingham, and which they were authorized to sell; desiring the president's assistance in getting a purchaser; and saying that Bingham was absent for a few days on account of sickness in his family, but would probably be home by the time they could receive a reply, on receiving which they would forward the stock if the price should answer. The president testified that he received such a letter, but did not at the time consider it a proper notice or demand to transfer the stock.

On the 10th of May, 1852, an attorney of the plaintiffs demanded of the defendants, at the bank, a transfer to them of said shares, and exhibited to the cashier the certificate and power of attorney; and the cashier informed said attorney that said shares had been attached at the suit of Nathaniel C. McLean of Cincinnati, as the property of Bingham. Said attorney afterwards, at the time of the sale of said shares on the execution of McLean, gave the defendants notice of the sale to the plaintiffs.

The plaintiffs here rested their case, and the defendants moved for a nonsuit; but the judge ordered them to proceed with their defence.

The defendants then put in their act of incorporation, the third section of which is in these words: "The stock of said bank shall be transferable only at its banking house, and on its books" (St. 1851, c. 269, § 3).

They also put in an attested copy of the writ and proceedings in the suit of McLean against Bingham, showing an attachment of said shares on the 7th of May, 1852, on a writ returnable to the June term of the court of common pleas in this county, and a sale thereof on execution on the 14th day of July, 1852.

They also introduced evidence tending to show that the shares

stood in the name of Bingham on said 7th of May; and that they received no notice of the sale or transfer thereof to any party till the 10th of May; and that the letter introduced by the plaintiffs was never seen by the cashier, nor noted on the books or papers of the bank, and was not on the files of the bank.

Evidence was introduced by both parties upon the point whether McLean had any notice of the sale to the plaintiffs when his attachment was made; which is not material to be stated.

It was then agreed "that the plaintiffs should take a *pro forma* verdict, and the case be reported to the whole court: the competency of all evidence on either side may be objected to, and the court may draw any inferences from legal evidence, which a jury would be authorized to draw; judgment to be entered on the verdict, or the plaintiffs to be nonsuited."

SHAW, C. J.:—

On the case presented by this report, it is argued, in behalf of the plaintiffs, that by the acts done by Bingham, the former owner, and the plaintiffs, all his legal interest and attachable property in those shares was divested, and had become vested in the plaintiffs before the 7th of May, when the attachment of McLean was made, and therefore that attachment was unavailing to affect them.

We do not consider the plaintiffs' letter of the 13th of April as bearing upon the question. It does not purport to give notice to the bank that the plaintiffs have purchased the shares; but rather the contrary, that they have the shares with power of transfer annexed. By apologizing for Bingham's temporary absence, they rather seem to intimate that his nominal ownership on the books still continued, to some extent and for some purpose. But, for reasons hereinafter stated, had this been a more formal notice of the transfer of the shares to the writers, and this given to a proper officer of the bank, it would have been unavailing.

Shares in incorporated companies, such as banks, insurance companies, bridges, turnpikes, and railroads, have long been considered in this Commonwealth as property of a definite and important character, with many of the qualities of visible, tangible, personal property, and having a value, and as capable of appreciation as vessels, or merchandise, or other personal chattels. But it is not visible or tangible, and therefore not, like merchandise, capable of passing by manual delivery.

A nearer analogy perhaps is that of a chose in action, capable, like this, of being assigned in equity, by a delivery over of the certificate, which is the assignor's muniment of title, with an assignment duly executed, transferring to the assignee all the assignor's right, title, and interest. And yet it is not like the assignment of a chose in action, which is the transfer of the assignor's interest in a debt, and vests in the assignee an equitable right to collect the debt in the name of the assignor.

The right is, strictly speaking, a right to participate, in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers, and the management of their concerns; to share in the dividends of profits, and to receive an *aliquot* part of the proceeds of the capital, on winding up and terminating the active existence and operations of the corporation. Again; when a transfer is rightfully made and completed, it vests a right in the transferee, not merely to act in the place of the vendor and in his name, but substitutes him, in all respects, as the legal and only holder of the shares transferred, to the same extent to which they were before held by the vendor. The title therefore by which such interest is held, is strictly a legal title; it is created and defined by law; its benefits are secured by law; it is transferable by operation of law, and may be attached on mesne process and seized on execution, and sold by legal authority to satisfy the debts of the owner.

Before any method was established by positive law, how, by what mode, or by what precise and definite act, such property should be considered as ceasing to be the property of the seller and becoming the property of the purchaser, courts of justice might well resort to the common-law modes of transferring similar incorporeal interests, and hold that a delivery of the only muniment of title held by the owner, with the execution and delivery of an assignment of his interest, by indorsement on the certificate or otherwise, should by analogy be held to be a valid transfer, and, when notified to the bank, should be considered as having taken effect at the date of such delivery.

But whatever common-law rules courts may have felt bound to adopt, in the absence of any express rule of law, in determining what act constitutes the actual transfer of shares, the point of time at which the one alienates and the other acquires a legal title to such shares, we can perceive no room to doubt that, where it is so regulated, such law must govern. In the present case there is such an express provision in the act of incorporation itself. The bank is of recent origin; the act was passed in 1851 (St. 1851, c. 269). Like most other modern acts of incorporation, the act, after creating the corporation, giving it a name, fixing its location and limiting its capital stock, defines its powers and duties by reference to other acts on the subject. But § 3 is a special provision to this effect: "The stock of said bank shall be transferable only at its banking house, and on its books." By the law of this Commonwealth, acts of incorporation are deemed public acts (Rev. Sts. c. 2, § 3). Like other public acts of legislation, their provisions constitute laws, by which all courts and magistrates, all citizens and subjects are bound.

But it was strongly urged, in the learned argument for the plaintiffs, in this case, that this provision in the charter can have no greater force and effect than a by-law of the corporation in the same terms, and does not make a transfer on the books of the bank neces-

sary to pass the title. There is something in one New York case which countenances this suggestion; but perhaps it originated in the peculiar provisions of the New York statutes. If the corporation are fully authorized to make by-laws regulating the transfer, there would seem to be some ground for holding that they would be binding upon those holding or seeking to hold shares in the same corporation. If a by-law would have the same effect, then it is unnecessary to make the distinction between a by-law binding upon the corporators, and all those claiming to stand in the relation of corporators, and a general law of the Commonwealth binding on all its subjects. But if there be such a distinction, then here is a law of the Commonwealth binding upon all.

But the argument goes further, and insists that the transfer at the bank is not essential to transfer the property to a *bona fide* purchaser, but is merely a regulation for the convenience and protection of the bank.

We can see no ground upon which thus to restrict the plain provision of the statute. If we may judge of the intended operation of an act of legislation from the useful and beneficial purposes it may tend to promote, we should construe it as having a much broader and more comprehensive scope. We are to take it in connection with all other existing laws.

As a great amount of property is held in Massachusetts in the shares of corporations, it is of importance that the title be easily and certainly ascertained; that the mode of acquiring and alienating it be fixed and known; and that it may at any time be made available, by process of law, for the debts of the owner.

In no way can these objects be so well effected as by a transfer at the bank. The law might have provided that the bearer of the certificate should be deemed the holder so that it might pass from hand to hand by mere manual delivery. But this would be attended with almost inextricable difficulty. It would be impossible for officers and co-proprietors to know who their associates were, and at every meeting nothing could be done till those present should produce their certificates, and thus show who were entitled to vote; and even then, certificates might change owners during the meeting. The shares could never be attached; for the officer could have no means to obtain possession of the certificate from a reluctant debtor adversely interested; and, without it, the shares might pass the next day to a purchaser without notice.

2. The certificate, in the form now given, may show who is the legal owner at the date of its issue; but this outstanding certificate may have been loaned, pledged, assigned in equity, which it is now contended would, as between the parties, be a good and valid transfer. It cannot therefore be known, by the books of the bank, who is proprietor at any one time.

3. It is obviously an object of great importance, that this large

amount of property should be attachable, and liable to be sold on execution. This has long been the policy of the State by earlier statutes, ultimately embraced in the Rev. Sts. c. 90, § 36; c. 97, §§ 36 *et seq.* The certificate being in the hands of the debtor, or some other person on his account, and his interest being adverse to that of the attaching creditor, the officer could seldom, if ever, take possession of it as of a chattel. It is therefore provided that the attachment may be effected by leaving written notice at the bank; and, on a sale on execution, it is made the duty of the bank and its officers, on notice and request, to give the purchaser a new certificate. This of necessity supersedes the outstanding certificate to the former holder.

All these objects are most effectually accomplished by making the transfer at the bank the decisive act of passing the property, the legal, transferable, attachable interest. I do not stop to ask precisely what particular act would constitute such a transfer; whether it must be actually entered on the books, or whether the delivery of the certificate by the holder ready to transfer, or with a written transfer executed, so that nothing remains but the mere executive act of the clerk, is sufficient. In either case, it would show who is at any time the actual owner by the books, and inform a creditor, or other person having occasion to know and right to inquire. It is necessary to fix some act, and some point of time, at which the property changes and vests in the vendee; and it will tend to the security of all parties concerned, to make that turning point consist in an act which whilst it may be easily proved, does at the same time give notoriety to the transfer. It would seem to us to be going beyond the rules of just exposition, to hold that a plain provision of statute law, calculated to promote the security of important legal rights of parties in important particulars, should be construed to be a regulation made for the convenience and protection of banks. The clause itself is too clear to admit of doubt: "shall be transferable only," that is, capable of being transferred; the largest and broadest term to express alienation on one part, and acquisition on the other; and the word "only" carries an implication as strong as negative words could make it, that is, in no other mode. It was not to prescribe one mode, leaving others unaffected; it made that mode exclusive.

Nor is this position without high authority to support it. In *Union Bank v. Laird* (2 Wheat. 390), it was held by the Supreme Court of the United States that, where shares were, by the act of incorporation, made transferable on the books, no person could acquire a legal title in any other mode.

The early Massachusetts cases cited for the plaintiffs, such as *Dix v. Cobb* (4 Mass. 508), were mere equitable assignments of choses in action, and held valid as equitable assignments.

Quiner v. Marblehead Social Ins. Co. (10 Mass. 476) was the case of a new corporation, the full amount not paid in, no certificates to

proprietors issued, but certain instalments had been paid in by subscribers, for which receipts had been given. The act of incorporation provided that no transfer should be valid till the stock was all paid in. It was held that an assignment of these certificates, with power to complete the payment in the name of the assignor, was a good assignment in equity. Besides, there does not appear to have been any clause in the charter or by-law directing how shares should be transferred when the company should be organized and in operation.

In the case of *Sargent v. Franklin Ins. Co.* (8 Pick. 90), the old certificate, together with an executed assignment of the shares, was tendered to the secretary of the company at their office in business hours, with a power of attorney to transfer on the books, and a new certificate was demanded. This was a full compliance with the by-law on the part of the purchasers; it was the duty of the company then to enter the assignment, and they could not set up their own wrongful act in refusing to enter the transfer, and an attempt to attach the shares themselves, in their own defence. The reasoning of the court may have gone further in stating the grounds, but these were amply sufficient to warrant the adjudication.

The case of *Sargent v. Essex Marine Railway* (9 Pick. 202) is much nearer the present case, and, so far as the requirement that the transfer be made at the bank rests on a mere by-law, is in point. The by-law required that all transfers be made in a book in a specific form, and transferable only on the books. The court consider this by-law, requiring a transfer in a particular form on the books of the bank, as an arrangement of the corporation for their own convenience. But they add: "Neither the act of incorporation, nor any other statute, requires that an assignment shall be recorded in order to give it validity" (9 Pick. 205). This seems to carry a clear implication that if any provision of law, binding on all persons as such, had required it to be recorded it must be entered in the books, or delivered to the proper officer for record, to give it validity.

We are aware that several of the New York cases cited in the argument are decisions contrary to the rule we now adopt. But it is to be remarked that, in the case of *Commercial Bank of Buffalo v. Kortright* (22 Wend. 348), before the Court of Errors, the Chancellor and a respectable minority of the members of the court dissented on this point, and were of opinion that, when the charter contains a provision that no transfer shall be valid unless registered in the books, an unregistered transfer does not convey a legal title, but an equitable interest only, subject to all prior equities.

And we think the authority of the case in New York is more than counterbalanced by the decisions of several of the neighboring States.

In Vermont, the court say: "We entertain no reasonable doubt that the mode of transfer of stock pointed out in the charter is the only mode which the public are bound to regard as conveying the

title. All persons, unaffected with notice to the contrary, are at liberty to act upon the faith of the title being where it appears upon the books of the corporation to be." *Sabin v. Bank of Woodstock* (21 Vt. 362).

In Connecticut, there are several cases precisely in point. The question of actual transfer is considered to be a question of legal title; and in all transfers under such charter and by-law, the change of title is held to take place when the instrument of transfer is received for record by the clerk, and the transfer bears date from that time. *Oxford Turnpike v. Bunnell* (6 Conn. 558).

In the present case, it is insisted that the plaintiffs presented the certificate, with a transfer from Bingham, and demanded a transfer before the sale on execution. This is true; but the attachment on mesne process was made before any such notice given and demand made by the plaintiffs; and the title of the attaching creditor relates back to the time of attachment. We are of opinion therefore that the attachment and subsequent sale gave that purchaser the better legal title.

Plaintiffs nonsuit.

BLACK v. ZACHARIE.

(3 Howard (U. S.) 482. 1845.)

MR. JUSTICE STORY delivered the opinion of the court :¹—

This is a writ of error to the Circuit Court of the United States for the eastern district of Louisiana. The original suit was brought in the State court, against Black alone, upon an attachment issued by Zacharie & Company against him, he being a citizen of South Carolina, and not resident in Louisiana; and upon this attachment certain shares of Black, in the Carrollton Bank, and the Gas Light and Banking Company, in Louisiana, were attached, to answer the exigency of the writ. Black appeared in the suit, and caused it to be removed into the Circuit Court. Black, upon his appearance, pleaded that prior to the attachment he had assigned the attached stock to James Chapman, of South Carolina, by a trust-deed, for the benefit of all his creditors. After the removal of the suit into the Circuit Court, Chapman filed an intervention, according to the Louisiana practice, and became a party to the suit to protect his interest under the trust-deed. In his petition of intervention he asserted his title, and that he had given due notice thereof to the Carrollton Bank, and the Gas Light and Banking Company; and that Zacharie & Co. had due notice thereof before their attachment.

The cause was tried by a jury upon the pleadings in the case; and upon the trial it was proved that the assignment was made by the

¹ The statement of facts is omitted.

trust-deed in South Carolina, by Black to Chapman, on the 28th of April, 1841. The attachment of Zacharie & Co. was made on the 4th of May, 1841, with a full knowledge of the assignment. Long before the attachment, the stock in the Carrollton Bank had been transferred and pledged to the Carrollton Bank, for a stock loan, and was then held by that bank, under that transfer, the equity of redeeming the same only remaining in Black. On the 15th of April, 1841, Black had executed a letter of attorney to the cashier of the Gas Light and Banking Company, to transfer the same to the Bank of South Carolina, of which notice was sent on the next day to the Gas Light and Banking Company, and notice was received by the latter on the 22d of April; but owing to some informality in the letter of attorney, the transfer was not then made, but the paper was sent back to be corrected, the company then agreeing to transfer it when the informality was corrected. The Bank of South Carolina was a holder of the stock, under this power, for value; and of this transaction also Zacharie & Co. had notice before their attachment.

At the trial, the jury found a verdict for the original plaintiffs, and judgment thereupon passed for them. Two bills of exceptions were taken to the ruling of the court at the trial, and upon these exceptions the cause has been brought before this court.

It does not seem necessary to recite at large the matters contained in these exceptions. They give rise to two questions, which have been fully argued at the bar, although very inartificially presented in the record: First, whether at the time of the commencement of the suit of Zacharie & Co. there was any debt due to them, upon which the attachment could, under the circumstances, be maintained. Secondly, whether the assignment to Chapman, being made in South Carolina, and known to Zacharie & Co. at the time of their attachment, and being by the laws of South Carolina a good and valid assignment, is entitled to a priority over the attachment. The latter question, so far as it respected the notice to Zacharie & Co., and the equity of the assignee, is not so precisely put as it is obvious it was intended to be, in the instructions asked by the intervenor. But it is plain from the qualifications of those instructions suggested by the court, that the court held that the delivery of the stock was not complete, and that the assignment did not pass the right to the stock to the assignee, unless the transfer was entered upon the books of the bank, notwithstanding the notice; and that the law of Louisiana upon the point was different from that of South Carolina. In this way only is the verdict at all reconcilable with the admitted state of facts.

In respect to the first question, it is plain to us that there was no debt due to Zacharie & Co. at the time when the attachment was made. The supposed debt was for the proceeds of a cargo of sugar and molasses, sold by Black on account of Zacharie & Co. Assuming those proceeds to be due and payable, Zacharie & Co. had drawn

certain bills of exchange upon Black, which had been accepted by the latter, for the full amount of those proceeds; and all of these bills had been negotiated to third persons, and were then outstanding, and three of them were not yet due. It is clear, upon principles of law, that this was a suspension of all right of action in Zacharie & Co., until after those bills had become due and dishonored, and were taken up by Zacharie & Co. It amounted to a new credit to Black for the amount of those acceptances, during the running of the bills, and gave Black a complete lien upon those proceeds, for his indemnity against those acceptances, until they were no longer outstanding after they had been dishonored.

Whether the transactions by the drawing and acceptance of these bills amounted to a novation of the debt, which might otherwise be due under the account current for the sales of the sugar and molasses, it is not necessary to decide; for, assuming that these transactions might be treated as a conditional novation only and not as an absolute novation, it would make no difference in the conclusion to which we should arrive under the circumstances of this case.

It is true that the statute law of Louisiana allows, in certain cases, an attachment to be maintained upon debts not yet due. But it is only under very special circumstances; and the present case does not fall within any predicament prescribed by that law. The statute does not apply to debts resting in mere contingency, whether they will ever become due to the attaching creditor or not; nor to any case except of absconding debtors; and this, therefore, is a case not governed by it. We think, then, that there was error in the ruling of the court in admitting that there was a sufficient debt established by the evidence to maintain the attachment.

The other point is one of much greater importance, although in our judgment not attended with any intrinsic difficulty. We admit, that the validity of this assignment to pass the right to Black in the stock attached depends upon the law of Louisiana and not upon that of South Carolina. From the nature of the stock of a corporation, which is created by and under the authority of a State, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that State, and not by the local law of any foreign State. And in the present case, if the local law of Louisiana had prohibited (as we think it had not) any assignment of an equitable interest in the stock attached, we should not have scrupled to have followed that law. The question is not here, whether the legal interest in the stock passed by the assignment before a transfer of the stock upon the books of the corporations; but whether the equitable interest therein, as contradistinguished from the legal interest, did not pass to and vest in the assignee by the law of Louisiana, so as to oust the right of any creditor with full notice of the assignment, from divesting the title of the assignee by a subsequent attachment thereof as the property of the debtor. In respect to

the Carrollton Bank it is clear that nothing but an equitable interest could be conveyed or was intended to be conveyed by the assignment; for the bank already held the legal title as a pledge for a stock loan. In respect to the Gas Light and Banking Company, the interest in the stock had been transferred to the Bank of South Carolina as a pledge, and the letter of attorney was given to perfect the equitable title into a legal title by an actual transfer on the books of the corporation. But, subject to that pledge, the equity was with the consent of the Bank of South Carolina vested in the assignee under the assignment. So that each case presented the same general question as to the validity of the equitable title by the law of Louisiana against attaching creditors, having full knowledge of that equity. Out of Louisiana, we believe that no such question could possibly arise; for courts of law, as well as courts of equity, are constantly, in all States where the common law prevails, in the habit of holding a prior assignment of the equitable interest in stock as superseding the rights of attaching creditors, who attach the same with a full knowledge of the assignment.

Upon full examination of the laws of Louisiana and the decisions of its courts, we see no reason to believe that a different doctrine on this subject prevails in that State. It is true that the same distinctions between legal and equitable rights may not as to the mode of remedy exist in that State, which are recognized in States governed by the common law; but the same purposes of substantial justice are attained there under similar circumstances as the courts in other States are accustomed to administer in a different form.

There is a marked distinction in the Louisiana law between the transfer of corporeal things movable, and things incorporeal. In the former a manual tradition of the thing is ordinarily but not universally required to perfect the title. In the case of incorporeal things no such tradition can take place, and therefore such a delivery as the thing admits of—a sort of symbolical delivery—is admitted by the law as a substitute. There are several articles of the Civil Code of Louisiana bearing directly on this point; but it will be sufficient only to cite a few of those which have been relied on by counsel. Art. 2612 declares, “In the transfer of debts, rights, or claims, to a third person, the delivery takes place between the transferrer and transferee by the giving of the title.” Art. 2613 declares, “The transferee is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place.” Art. 2456 declares, “The tradition of the incorporeal rights is to be made either by the delivery of the titles and of the act of transfer, or by the use made by the purchaser with the consent of the seller.” In *Bainbridge v. Clay* (16 Mart. (La.) 56), the Supreme Court of Louisiana said, “A debt due [by] the defendant on a *fiery facias* cannot as to third persons completely pass to the assignee unless there be what in sales of tangible prop-

erty is called a tradition or delivery; and this is effected as to choses in action by notice of the assignment to the debtor." Again, in *Babcock v. Maltbie* (19 Mart. (La.) 137), the same learned court said that the true test, in cases of assignment, is, "That where the owner of the property has lost all power over it and cannot change its destination, the creditors cannot attach." The same doctrine was directly affirmed in the recent case of *Urie v. Stevens* (2 Rob. (La.) 251). The principles announced in these decisions seem completely to cover the present suit. In the case of the Carrollton Bank the shares had actually passed to the bank itself as a pledge, and nothing but an equity remained in Black, capable of being transferred, and that was assigned by the deed of assignment to the assignee before the attachment, and was known to Zacharie & Co. at the time when they made their attachment; and at least as early as the next day it was made known to the bank. So that the creditors had full notice and the bank had full notice; and the creditors could not make a valid attachment when to their knowledge the property no longer belonged to their debtor. The case as to the Carrollton Bank falls, then, directly within the principles just stated. The owner had parted with all his property in the stock; he had lost all power over it; and he could not change its destination. The same principles apply *a fortiori* to the Gas Light and Banking Company; for there, not only had the creditors notice of the assignment before their attachment, but the company also had notice thereof before that period.

It is true that the charters of the Carrollton Bank and of the Gas Light and Banking Company provide that no transfer of the stock of these corporations shall be valid or effectual until such transfers shall be entered or registered in a book or books to be kept for that purpose by the corporation. But this is manifestly a regulation designed for the security of the bank itself, and of third persons taking transfers of the stock without notice of any prior equitable transfer. It relates to the transfer of the legal title, and not of any equitable interest in the stock subordinate to that title. In the case of the *Union Bank of Georgetown v. Laird* (2 Wheat. 390), this court took notice of the distinction between the legal and equitable title in cases of bank-stock, where the charter of the bank had provided for the mode of transfer. The general construction which has been put upon the charters of other banks containing similar provisions as to the transfer of their stock, is, that the provisions are designed solely for the safety and security of the bank itself, and of purchasers without notice; and that as between vendor and vendee a transfer, not in conformity to such provisions, is good to pass the equitable title and divest the vendor of all interest in the stock. Such are the decisions in the cases of the *Bank of Utica v. Smalley* (2 Cow. (N. Y.) 777, 778), *Gilbert v. Manchester Iron Co.* (11 Wend. (N. Y.) 628), *Commercial Bank of Buffalo v. Kortwright* (22 Id.

362), *Quiner v. The Marblehead Insurance Co.* (10 Mass. 476), and *Sergeant v. Franklin Insurance Co.* (8 Pick. (Mass.) 90).

We see no reason to doubt that the jurisprudence of Louisiana adopts a similar interpretation for the purpose of protecting equitable title against the claims of creditors of the transferrer, who have notice of such equitable titles. If it will protect an assignment of a chose in action against attaching creditors after notice of the assignment given to the debtor, because no title remains in the transferrer (as we have seen it will), *a fortiori* it ought to protect it where the attaching creditor himself has notice, since, in justice, he is entitled only to take under his attachment what rightfully remains in the transferrer. In the absence of any positive controlling statute or direct adjudication of the courts of Louisiana upon the very point, in contradiction to the doctrine maintained in other States, as one founded *ex æquo et bono*, in general justice, we may well presume, that a State deriving its jurisprudence from the Roman Law has not failed to act upon it.

There is another ground, auxiliary to this last view, which is entitled to great consideration. It is well settled as a doctrine of international jurisprudence, that personal property has no locality, and that the law of the owner's domicil is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary. This doctrine has, in the very late case of the *United States v. The United States Bank* (in June, 1844), been fully and directly recognized and affirmed by the Supreme Court of Louisiana, as a part of its own international jurisprudence; and it was applied in that very case to support an assignment made in Pennsylvania, by the Bank of the United States, to certain assignees, who were intervenors of goods, debts, credits, and effects in Louisiana. The court held that the assignment, being proved to be valid and effectual by the law of Pennsylvania, was to be deemed equally valid and effectual to pass the goods, debts, credits, and effects of the bank, to the assignees in Louisiana, against the attaching creditors, who had notice of the assignment at the time of their attachment. The decision turned upon the very doctrine of international jurisprudence just referred to. So that here we have the high authority of the State court in this very matter, that there is nothing in the jurisprudence of Louisiana, which forbids giving full effect and validity to an assignment of debts, credits, and equities, situate in that State, where the assignment is valid and effectual by the law of the State where it is made, so as to oust the rights of attaching creditors who have due notice thereof. Now, in the case before us, there is plenary evidence that the assignment was valid and effectual by the laws of South Carolina, when and where it was made, to pass the right to the property in controversy; and that the attaching creditors had notice thereof before their attachment was made; so that its validity

and effect are the same in Louisiana as in South Carolina. It is true that the legal title could not pass without a regular transfer of the stocks upon the books of the corporation; but it is equally true, that the title to the property, subject to the pledge thereof, was complete in the assignee, so as to bind the banks as well as the attaching creditors, after due notice to them respectively. We are, therefore, of opinion, that the district judge erred in directing the jury that the delivery of the stock was not complete unless the transfer was entered upon the books of the banks. That was true as to the absolute legal title, but it did not prevent the equitable title from passing to and becoming completely vested in the assignee under and in virtue of the assignment, so as to bind the attaching creditors, as soon as they had notice thereof, and in like manner the banks, as soon as they had notice thereof.

Upon both grounds, therefore, stated in the exceptions, the judgment of the Circuit Court is reversed, and the cause remanded to that court with directions to award a *venire facias de novo*.

SCRIPTURE v. SOAPSTONE COMPANY.

(50 N. H. 571. 1871.)

ASSUMPSIT, by Gilman Scripture against the Francetown Soapstone Company, for not delivering to the plaintiff certificates for forty-five shares of the capital stock of the Francetown Soapstone Company, alleging that the plaintiff purchased those shares of Frederick A. Barton, on the twenty-fourth day of May, 1867, he then being the owner of said stock, and having a certificate for the same, signed by the president and treasurer of said company, which the said Barton on that day assigned to the plaintiff, for value received, by an indorsement on the back of the certificate; and on February 3, 1868, the said Barton caused said certificate and assignment to be delivered to the treasurer of said company, by reason whereof the company promised to issue to the plaintiff a new certificate for said shares, and to pay him the dividends on said stock; alleging, also, a request by the plaintiff to issue said certificate to him and pay him the dividends thereon, and a refusal to do so.

Upon the trial here, upon the general issue, it appeared that the plaintiff purchased of the said Barton the forty-five shares of stock, and paid therefor ninety-five dollars per share, the par value being \$100, and that said Barton transferred the same to plaintiff by his indorsement upon the back of the certificate which he held for them; that said certificate so transferred was presented to the treasurer of said company, and a new certificate for those shares demanded by the plaintiff of the treasurer, which he declined to issue to him. The certificate issued to said Barton provided that the shares were "trans-

ferable in person, or by attorney, only on the books of the company, on the surrender of this certificate," and the transfer on the back of it was made "subject to the provisions of the charter and to the by-laws of the company." The reason assigned for refusing to issue a new certificate to the plaintiff was, that the shares had, previous to the time of such demand, been attached as said Barton's property, on a suit in favor of said company against him. Said sale and transfer were made May 24, 1867, and an attachment was in fact made January 28, 1868, as above set forth. In reply to this, the plaintiff urged that the defendant had notice or knowledge of the aforesaid sale and transfer before the said attachment, and offered to prove that F. A. Barton, who transferred these shares to plaintiff, was president of said company, and acted as their general agent in superintending the affairs thereof, and was such on May 24, 1867, at the time of the issuing of the certificate of said shares to him, and the transfer by himself to plaintiff, which was all done on May 24, 1867, and he continued so to act until about January 27, 1868; that the agent who succeeded said Barton, and who procured the attachment and caused a levy to be made on these shares, was a director in 1867, and knew of the sale and transfer of these shares from Barton to plaintiff, prior to and at the time of the attachment, and told, on one or more occasions prior to said attachment, that plaintiff owned \$5,000 of the stock; that the treasurer of said company had actual notice of the sale and transfer by Barton to plaintiff, and issued notice to plaintiff to attend the annual meeting of the stockholders of said company, in June, 1867, it appearing that said plaintiff, in June, 1867, had no shares standing in his name on the books of the said corporation; that after the attachment was made, on January 28, 1868, by this defendant, on a writ in its favor against Barton as his property, the president of the company gave plaintiff to understand that these shares would not be levied upon, — that the defendant did not intend to hold them on said attachment.

• And thereupon the cause was taken from the jury for the purpose of determining, as matter of law, whether the evidence offered was competent to prove notice or knowledge in the company, and whether, with such knowledge or notice, the attachment would be valid to hold these shares against the plaintiff. At the hearing, either party may read the pleadings, the certificate and transfer, the charter and by-laws of said company, and the writ in favor of the company against said Barton, and the return thereon, and the execution and levy thereon.

LADD, J.: —

The sale and transfer of these shares were made by Barton to the plaintiff May 24, 1867; and the case shows that the plaintiff paid \$95 per share for them, the par value being \$100.

It is alleged in the declaration, that on February 3, 1868, the plaintiff caused the certificate and assignment to be delivered to

the treasurer of the company; and it appears that the reason assigned for not issuing to him a new certificate was, that prior to that time, namely, on the 28th day of January, 1868, said shares had been attached as Barton's property on a writ in favor of the company against him.

If by the attachment a valid lien was created in favor of the company, it was under no obligation to enter the transfer on its books at the time the certificate was presented; and the plaintiff cannot maintain this suit.

The question then is, What effect shall be given to the attachment made January 28, 1868?

The plaintiff offered to prove that at the time of the sale said Barton was president of the corporation, and acted as its general agent in superintending the affairs thereof, and continued so to act until January 27, 1868, the day before the attachment was made; that the agent who succeeded Barton, and who procured the attachment and caused a levy to be made on the shares, was a director in 1867, and knew of the sale and transfer of the shares from Barton to the plaintiff prior to the time of the attachment; and that the treasurer of the company had actual notice of the sale and transfer as early as June, 1867; and other facts tending to show knowledge of the sale by the corporation at or about the time of the transaction.

We think this evidence was clearly admissible for the purpose proposed. The president and treasurer, by the by-laws, were directors *ex officio*; and it is fair to suppose that they were active members of the board, participating largely in the control and management of the affairs of the corporation. But even if those officers had not been members of the board of directors, there would probably be no difficulty in holding that notice to a general agent, who has the superintendence of the affairs of a corporation, is notice to the corporation, and therefore that the defendant is chargeable with knowledge possessed by its president and general agent, Barton. Angell and Ames on Corp., § 305, and cases in note; *Hovey v. Blanchard* (13 N. H. 145); *Marshall v. Ins. Co.* (27 N. H. 157); *Campbell v. Ins. Co.* (37 N. H. 35); *Patten v. Ins. Co.* (40 N. H. 375); *Fitzherbert v. Mather* (1 T. R. 12); *N. Y. & N. H. Railroad Co. v. Schuyler* (34 N. Y. 84).

We are thus brought to the question whether the attachment made by the defendant, with knowledge that the shares had been previously sold and transferred by Barton to the plaintiff, will hold them, for the reason that the transfer had not been made on the books of the company according to the provision contained in the certificate.

It does not appear that any mode of transfer is provided in the charter, and the only provision in the by-laws on that subject is contained in Art. 10, as follows: "Shares may be transferred by assignment on the back of the certificate, and surrender of the certificate

to the treasurer." This corresponds with the provision in the certificate, except that the words "only on the books of the company" appear in that instrument.

It is not necessary to inquire whether the provision contained in the by-laws was authorized by the charter; nor whether there is any difference in legal effect between a provision in the charter and one in the by-laws which have been adopted in pursuance of an authority conferred by the charter; nor whether the provision in the certificate should have any effect by way of contract between the shareowner and the corporation; for we think that, by a fair construction of the general law of the State in force at the time of this transaction, a transfer of shares in a corporation of this sort, to be complete and perfect for all purposes, must be entered upon the books of the company—Rev. Stats. chap. 141; *Pinkerton v. The M. & L. Railroad* (42 N. H. 424)—the object being, as is well said by defendant's counsel in their brief, "not only to give notice of the title, but to furnish an authentic record that would determine membership in the corporation, the right to vote, private liability for debt, liability to taxation, and all other incidents of ownership," etc.

It being admitted, then, that, for the protection of these various rights and interests of the corporation, the public, and creditors of the stockholders, the law provides that the title of a purchaser of shares shall not be complete, as against those having these various interests, until the transfer is entered on the books of the company, it becomes a very important inquiry to ascertain what is, in point of fact, the origin and basis of a purchaser's title to such shares when they pass from seller to buyer. Does it originate in and rest upon the contract of sale between the parties, or is it a creation of law, dating its birth from the record of the transfer on the company books?

A share in a corporation, which has for its object a division of profits among its stockholders, has been defined to be "a right to partake, according to the amount of the party's subscription, of the surplus profits from the use and disposal of the capital stock of the company to the purposes for which the company is constituted." Angell and Ames on Corp., § 557.

It cannot be disputed that this right is property of a definite and important character, with many of the qualities of visible, tangible, personal property, and having a value, and as capable of appreciation as vessels or merchandise, or other personal chattels. Shaw, C. J., in *Fisher v. Essex Bank* (5 Gray, 377). From this it follows, by inevitable inference, that it may be the subject of sale as much as any other species of property, real or personal, so that, as between vendor and vendee, the title may pass by their own act, and be thereby vested absolutely in the vendee.

It seems too clear for argument, that the ownership of the shares passes from the seller to the buyer by force of the contract of sale,

and not by operation of law; and if that be so, the buyer's title, so far as the seller is concerned, attaches the moment this contract is fully consummated between them.

This kind of property, being an intangible right, somewhat akin to the right to receive money due upon a bond or other chose in action, is incapable of actual manual delivery. All the seller can do, that corresponds at all to the delivery of personal chattels in other cases of sale, is, to hand over to the buyer his certificate, with a sufficient assignment by deed or otherwise, to entitle him to a transfer of the shares on the books of the company. When the seller has done this, his power and duty in the matter are ended, and it is at the option of the purchaser whether the transfer shall be recorded or not.

If the purchaser omits to have the record made, he can claim no rights as a member of the corporation; and he also incurs the further risk of having his title defeated by a subsequent attachment or sale to a *bona fide* purchaser.

It is difficult to see any substantial difference between the position of this plaintiff after the sale and assignment of the shares to him by Barton and before a transfer was made on the books, and that of the grantee in a deed of land before his deed is recorded. In both cases the seller has parted with his title, and, as to him, the buyer has acquired it. It is only third persons in either case whose rights or interests are affected by the omission.

In the case of an unrecorded deed, the grantor continues to be clothed with evidence of ownership after the conveyance, very similar to that which remains with the seller of shares before the transfer has been entered on the books. The record shows that he is still the owner of the land, when in fact he is not; and, so far as any interest a creditor can have in the matter is concerned, the same is precisely true in the case of shares in a corporation sold but not transferred on the books.

The statutes which we hold require the transfer of shares to be entered on the books of the corporation kept for that purpose, are certainly no more explicit and absolute than that which requires the recording of deeds. The object of the law, so far as creditors are concerned, is the same in both cases.

As between the parties, the title passes by contract and not by the record in both cases alike.

It is difficult to suggest any reason for holding that actual notice of an unrecorded deed to a subsequent purchaser or attaching creditor shall be equivalent to a record, so far as that purchaser or creditor is concerned, which does not with equal force require us to hold, in the present case, that actual notice to the defendant of a sale of these shares was equivalent, so far as its rights as a creditor are concerned, to a transfer entered in due form upon its books. This view is sustained by *Gooding v. Riley* (50 N. H. 400), where

the chief justice, upon an exhaustive review of the authorities bearing upon the question, arrives at the conclusion that purchasers or mortgagees of personal property, having notice of a prior outstanding equitable title, are affected by such knowledge in the same way and to the same extent as the grantee of land is affected by knowledge of a prior unrecorded deed; that both stand upon the same equitable principle.

The same result, substantially, is reached, if we consider that the omission of the plaintiff to have the transfer recorded places him in the same position as a purchaser of chattels, who permits them to remain in the hands of the seller after the sale.

Taking that view, the consequence contended for by defendant's counsel does not follow. The circumstance of such retention of possession may be explained. It is true that, in the absence of explanation, a secret trust will be presumed; but when an explanation is offered, it is for the jury to say, under proper instructions, whether the explanation is sufficient; and the fact that possession was so retained is for them to weigh, in connection with all other evidence bearing upon the actual character and complexion of the transaction between the parties.

Here the defendant had notice of the sale and assignment, and, as we hold, of all the facts attending the transaction, for the reason that Barton, its general agent, by whose knowledge it is bound, was a party to the transaction and knew all about it. Under these circumstances, it can hardly be heard to say, that it inferred fraud from the plaintiff's conduct, as a conclusion of law, when it knew, as matter of fact, that no fraud did really exist.

Suppose, after the sale by Barton to the plaintiff, Barton had sold the same shares again and applied the proceeds of such sale to his own uses. If the second purchaser were ignorant of the prior sale, he would get a good title, although Barton would have been guilty of a fraud against the plaintiff of the most gross and flagrant character. But if this second purchaser had notice of the former sale, — was aware of the situation of the title as between Barton and Scripture, — by concerting with the former to deprive the latter of his property he becomes a party to the fraud, and no process of reasoning, in logic or morals, will lead to any other result but that he would be equally guilty with the seller. To hold that such a purchaser acquired a good title would be to countenance the most scandalous bad faith and encourage dishonesty.

The difference between an attempt to gain a title under such circumstances by purchase and by an attachment is not very apparent, and certainly not very broad. At all events, we think it entirely clear that what cannot be accomplished in one way cannot be brought about in the other.

In any view we are able to take of the case, we think the question for the jury is whether the sale by Barton to Scripture was a *bona*

fide sale, or whether it was so tainted with a secret trust, or other element of fraud in fact, that it cannot be sustained; and upon that question the price paid for the shares as compared with their actual value, the omission of plaintiff to have the transfer recorded, and all other facts and circumstances tending to throw light upon the actual character of the transaction, will be proper evidence for the jury to consider. In short, that the sale may be attacked in the same manner and upon the same grounds as though the transfer had been entered upon the books of the corporation at the time the fact of the sale was brought to its knowledge.

Case discharged.

BROADWAY BANK v. McELRATH.

(13 N. J. Eq. 24. 1860.)

THIS case came on for final hearing on the bill, answer, and proofs. The facts fully appear in the opinion of the court.

THE CHANCELLOR:—

The property which forms the subject of controversy consists of fifty shares of the capital stock of the Trenton Iron Company, of the par value of one hundred dollars each, standing on the books of the company, in the name of McElrath. On the second of June, 1854, the certificate of the stock, accompanied by a power of attorney irrevocable for the transfer thereof, was delivered to the Broadway Bank, as collateral security on loan of four thousand dollars, obtained by McElrath from the bank, upon his individual note at four months. The loan was made upon the agreement of McElrath to deposit the stock as a collateral security, for the repayment of the loan, including as well the original note as all renewals thereof. The note was renewed, and the accruing interest paid, from time to time, until the 22d of November, 1857, when the last renewal was made.

On the 24th of August, 1857, the Hunterdon County Bank sued out of the Supreme Court of this State a writ of attachment against the estate of the said McElrath, as a non-resident debtor, by virtue of which the stock in question was attached as the property of McElrath. Judgment having been rendered in favor of the plaintiff in attachment, and also in favor of sundry applying creditors, the auditors in attachment were proceeding to make sale of the stock in question to satisfy those judgments when they were restrained by an injunction issuing in this cause. The complainants insist that they have an equitable lien upon the stock for the payment of the debt for which it was hypothecated as security. The defendants claim that they have acquired a valid title to the stock at law and in equity by virtue of the attachment.

The stock, irrespective of the complainants, was undoubtedly, under the provisions of the statute, the subject of attachment. The judgment at law has established the claims of the plaintiff and the applying creditors in attachment. The validity of the proceedings under the attachment are not drawn in question. The defendant's right to the property is unquestioned, except so far as it conflicts with the prior rights of the complainants.

By the 5th section of the charter of the Trenton Iron Company, approved February 16, 1847, (Pamph. Laws, 61) it is enacted that "the capital stock of the said corporation shall be deemed personal estate, and be transferable upon the books of the said corporation;" and by the 9th section of the charter, it is further enacted, "that books of transfer of stock shall be kept, and shall be evidence of the ownership of said stock in all elections and other matters submitted to the decision of the stockholders of the said corporation."

Independent of the provisions of the charter, the stock of an incorporated company is deemed personal estate, and may be transferred by a certificate of stock accompanied by a power of transfer. Angell & Ames on Corp., § 564.

And where it is provided by the charter or by-laws that the stock shall be transferred only upon the books of the corporation there is a decided weight of authority in support of the position, that a *bona fide* transfer by delivery of the certificate is nevertheless valid, as between vendor and vendee; that the equitable title passes by such transfer, and that the claim of the vendee is good in equity against the claim of an execution or attaching creditor of the vendor. Such provision, whether by charter or by-law, is regarded as designed to protect the interests of the corporation, and its stockholders. Its only office is held to be equivalent to that of the provision contained in the ninth section of the charter of the Trenton Iron Company, viz. "to afford evidence of the ownership of the stock in all elections and other matters submitted to the decision of the corporation," including all questions as to the ownership of the stock as between the corporation and its members. Angell & Ames on Corp., § 354; *Bank of Utica v. Smalley* (2 Cowen, 770); *Gilbert v. Manchester Iron Co.* (11 Wend. 627); *Kortright v. Buffalo Commercial Bank* (20 Wend. 91); *Same Case in Error* (22 Wend. 348); *Quiner v. Marblehead Insurance Co.* (10 Mass. 476); *Union Bank of Georgetown v. Laird* (2 Wheat. 390; 3 Howard 513); *Stebbins v. Phoenix Fire Insurance Co.* (3 Paige, 361; 3 Binney, 394); *Grant v. Mechanics' Bank* (15 Serg. & R. 143); *Bank of Kentucky v. Schuylkill Bank* (1 Parsons, 247); *United States v. Cutts* (1 Sumner, 133).

There is not an entire uniformity of authority upon the question, whether a transfer or pledge of stock as collateral security without a transfer upon the books of the company, as required by the charter, will protect the holder against the claims of an attaching creditor, though the weight of authority is decidedly in favor of the right of the assignee.

It is the well-settled rule in New York, where this contract was made, and where the contracting parties had their domicil at the time of the contract, and the pledge of the stock by McElrath to the bank.

It was so expressly decided in this State long prior to the date of that contract. *Rogers et al. v. Stevens* (4 Halst. Ch. 167).

So far as judicial determination could settle the question, it was settled prior to the pledge of this stock, both in the State where the contracting parties had their domicil and in the State where the corporation whose stock was transferred was chartered and transacted its business. The parties to the contract may fairly have relied upon the law, as thus settled, for the protection of their rights. It is of the utmost importance that questions so extensively and vitally affecting the rights of the business community should be regarded as settled by judicial decision, and not liable to be disturbed, except for the most cogent reasons. Upon the faith of decisions already made upon this very point, contracts have doubtless been entered into and securities taken to a very large amount. Whatever might be my conclusion as to the true construction of the statute, were the question now for the first time agitated, it would be alike unwise and unjust to overturn or impair rights acquired upon the faith of recognized legal principles.

I think it clear, moreover, whatever might be the strict legal interpretation of the provision in question, that the Legislature never designed it to impair the validity of a transfer of stock, as between the parties making it. It was not intended to introduce a new mode of acquiring title to stocks, much less to operate as a registry law, by furnishing conclusive evidence to the public of the ownership of the property. If such had been the design, it might have been expected that the Legislature would have required that the books of transfer should be at all times open to public inspection, and the record, not in certain specified cases merely but in all cases, made evidence of ownership.

Nor does sound policy require such construction to be given to the act. The pledge of stocks as collateral security has become a prevalent, and to the borrower, especially, an advantageous mode of effecting loans. In manufacturing companies especially, where the business of the company is carried on by the stockholder, and where his capital is mainly or exclusively vested in the stock, and employed in the active operations of business, the pledge of stocks affords the most ready and advantageous mode of effecting loans for the demands of business. To require a transfer of the stock to the lender as security for the loan against the right of attaching or execution creditors will at once destroy the value of the security, or compel the borrower to divest himself of his character as corporator, to forfeit his control of the business of the corporation, of his right to dividends, and of all his other rights as a stockholder in the corporation. Why should the owner of stocks be deprived of

the privilege of mortgaging or pledging his stock for the security of a loan, without stripping himself of all his rights of ownership more than the owner of any other property?

The objection is, that it will open the door to fraud, and deprive an execution or attaching creditor of the means of ascertaining the real ownership of the stock. It is worthy of notice that this clause requiring a transfer of stock on the books of the company was inserted in numerous charters long before the stock was made the subject of execution. But the objection, as applied to a transfer of stock, is of less weight than against a chattel mortgage, the chattel remaining in the hands of the mortgagor, which is held to be a valid security. *Runyon v. Groshon* (1 Beasley, 86).

The transfer book is not the only evidence of the ownership of stock. The certificate, which has always been deemed *prima facie* evidence of ownership, is the only evidence in possession of the owner, and, where there has been no transfer, is the only recognized evidence of title.

It is urged that the contract for the pledge of this stock was executory merely; that it does not purport to transfer the ownership of the shares, but simply gives an authority to transfer upon failing to pay the debt: and hence it is further argued, that the stock cannot be held as a pledge, because that requires a transfer of possession. The contract between the parties was in no sense executory. It was fully executed according to the intention of the parties. The absolute ownership of the stock, it is true, was not transferred, nor was it intended it should be. The spirit and design of the contract was that the legal ownership of the stock should continue in McElrath; that he should remain a member of the corporation, with the right to receive the dividends upon the stock, to vote at all elections, and with all other rights pertaining to him as a stockholder and member of the company, and that the bank should hold the stock as collateral security for the payment of the loan, with the absolute and irrevocable right of transferring the legal ownership upon failure to pay the debt. The same objection existed in many of the reported cases, where the right of the party holding the certificate of stock as evidence of his claim was sustained against the claims of attaching or execution creditors (3 Binney, 394; 4 Halst. Ch. 167).

Such a certificate annexed to or accompanying a blank power of attorney, we cannot doubt, not only according to the understanding of men in business, but upon well-settled principles of law, passes by delivery an equitable title to a *bona fide* purchaser; nor can such purchaser be justly prevented from converting his equitable into a legal title by filling up and exercising the power, whenever he is entitled to do so by the nature and terms of the contract, under which the certificates were delivered to him. When the stock is sold absolutely his right then to perfect his title is immediate; when it is

hypothecated, the right accrues when the debt meant to be secured becomes due and remains unpaid. Per Ackley, C. J., in *Fatman v. Lobach* (1 Duer, 361).

It is obvious, moreover, that so far as regards the legal ownership of the stock, if the transfer upon the books of the company alone can constitute legal ownership, that the contract of sale is as fully executed by delivering the certificate, with the power of immediate transfer on the books of the company, as by a formal assignment accompanying the certificate.

The holder of a certificate of shares of stock, accompanied by an irrevocable power of attorney to transfer them, is the apparent owner, and when he is the holder for value without notice his title cannot be impeached. *Leavitt v. Fisher* (4 Duer, 1).

Aside from the general principles by which I think the case must be controlled, it is worthy of notice that the charter of the company, the stock of which is here the subject of controversy, is somewhat variant from many of those which have formed the subject of adjudication. In the case of *Fisher v. The Essex Bank* (5 Gray, 373), the act of incorporation declared that the stock of the bank should be transferable only at its banking house and on its books. The court say that the word "only" carries an implication, as strong as negative words could make it, that the transfer should be in no other mode. It was not to prescribe one mode, leaving others unaffected; it made that mode exclusive. The charter of the Trenton Iron Company contains no such exclusive language. It declares merely that the stock shall be transferable on the books of the company, and further provides that the books of transfer shall be evidence of ownership, as between the company and its stockholders. If the transfer on the books was designed to be the only evidence of ownership, the latter provision would seem to be unnecessary.

The right of the bank is in no wise prejudiced by the fact that they appeared as applying creditors under the attachment, and presented their claim to the auditors.

The *bona fides* of their claim is not questioned, and they are entitled to the stock in question clear of the lien of the attachment.

Decree accordingly.

SCOTT v. BANK.

(21 *Blatchford*, 203. 1883.)

THIS was an action at law to recover damages from the defendant corporation for a refusal to allow a transfer upon its books, to the plaintiffs, of 10 shares of its stock. By a written stipulation of the parties, the case was tried by the Court, upon an agreed statement of facts, and a jury was waived. The facts were as follows:

On the 20th of May, 1868, one Samuel Wilmot was the owner of 10 shares of the capital stock of the Pequonnoek National Bank, a corporation created by and under the laws of the United States relating to national banking, and located in Bridgeport, Connecticut, the said 10 shares standing in his name on the books of said bank, and he was the lawful holder and owner of a stock-certificate of the said 10 shares, duly and regularly issued therefor by said bank. On or about the 20th of May, 1868, Wilmot assigned in the usual mode the said 10 shares to one Dunbar, in the city of New York, by delivering to Dunbar the said certificate and a written assignment of, and power of attorney to transfer, said 10 shares, the assignment and power of attorney being executed in blank. Subsequently, on or about the 1st of January, 1869, in the city of New York, Dunbar assigned, for a full and valuable consideration, the said 10 shares to William B. Scott and Albert E. Scott, composing the firm of William B. Scott & Co., who were and still are residents of and domiciled in the State and city of New York, by delivering to the said William B. Scott & Co. the said certificate, written assignment, and power of attorney. Subsequently, on the 13th of August, 1869, William B. Scott & Co. made demand upon the bank, at its place of business in Bridgeport, Connecticut, to transfer the said 10 shares from the name of Wilmot, in which name the said 10 shares still stood, to their own names, on the books of the said bank, and to issue a new certificate therefor in their names; and at the same time William B. Scott & Co. presented the said written assignment and power of attorney, and the said certificate, and offered to surrender the same for the purpose of having such transfer made. The bank, however, upon the ground that the said 10 shares had, on the 26th of July, 1869, been levied upon, by virtue of a writ of attachment, as hereinafter mentioned, refused to issue a new certificate, or to transfer the said 10 shares, as requested. Prior to the 13th of August, 1869, William B. Scott & Co. had not made any demand for transfer upon the said bank, nor given notice to the said bank of the assignment to them as aforesaid, nor of their possession of the said stock-certificate, and the said 10 shares of stock still stood in the name of Wilmot on the books of the bank. On the 20th of July, 1869, one Bishop commenced an action, in the Superior Court of the State of Connecticut in and for the county of Fairfield, against Wilmot, and on the 26th of July, 1869, the sheriff of the county of Fairfield levied upon the said 10 shares, under and by virtue of an attachment issued out of said Court, in said action, against the property of Wilmot. On the 13th of August, 1869, Bishop duly recovered judgment against Wilmot, and, within the time prescribed by law for the purpose of perfecting the lien of an attachment, to wit, on September 4th, 1869, execution was issued upon the said judgment to the sheriff of the county of Fairfield, and, on the 1st of October, 1869, the said 10 shares were seized by the sheriff under the said execution, and, on the 22nd of October, 1869,

the said 10 shares were sold at public auction by the sheriff to one Clark, to whom the sheriff issued his certificate; and thereupon the bank, upon the presentation of the certificate, transferred the said 10 shares on the books of the bank from the name of Wilmot to the name of Clark, and delivered to him a new certificate therefor, and has since paid and continues to pay the dividends accruing on the said 10 shares, to Clark, or his assigns, instead of William B. Scott & Co. The bank had no by-laws, and the practice of the bank, from its organization, had been uniformly to require the transferrer to authorize the transfer on the transfer books of the bank, either in person or by attorney, on the surrender of the outstanding certificate.

SHIPMAN, J. :—

In the absence of a statute, or of a provision in the charter, or of a by-law passed in pursuance of authority conferred by the charter, prescribing the exclusive manner in which the stock of a corporation shall be transferred, the stockowner has a right to transfer such property to a purchaser by the delivery of the stock-certificate, with a written assignment thereof. The title of a *bona fide* purchaser to whom such certificate and assignment have been delivered, will not be divested by the subsequent attachment of the stock at the suit of a creditor of the vendor. *Boston Music Hall v. Cory* (129 Mass. 435).

In some of the States, statutes have been passed, or provisions have been inserted in the charters of corporations, prescribing, either expressly or by implication, an exclusive method of transfer. The Courts of Connecticut and of Massachusetts have been quite rigid in maintaining the doctrine, that, where such statutes or charter provisions exist, an unrecorded transfer of stock shall not be valid as against attaching creditors of the vendor, and the Courts of the former State have strongly leaned towards a construction of the charters of Connecticut corporations that shall compel a record of the assignment.

The Connecticut decisions, especially the earlier ones which were made at a time when the rights of attaching creditors were strongly favored in that State, were to the effect that, "in cases where the Legislature, in the act of incorporation, either prescribe the mode of transferring stock, or authorize the company to do it in their by-laws, and the company do, in their by-laws, prescribe a mode as the only one to be pursued, that mode must be followed, or the legal title will not pass by an assignment which would be good at common law, had no particular and exclusive mode of transfer been prescribed." *Colt v. Ives* (31 Conn. 25). The reason of the rule is stated by the Court, in *Colt v. Ives*, as follows: "In regard to chattels, there must be a substantial change of possession accompanying and following the sale, or it will, unexplained, be conclusive evidence of a fraudulent trust which will render the sale void as to creditors. . . . And, in the case of the purchase of stock in a corporation, there must be such a transfer of it as the Legislature in

the charter or by statute prescribes; and notice of the assignment of choses in action, and the transfer required by statute of corporate stock, stand in lieu of the taking and retaining of the possession of personal chattels sold, being the only possession the nature of the property admits of."

In *Fisher v. Essex Bank* (5 Gray, 373), Chief Justice Shaw, after saying that, whatever common-law rules, in the absence of any express rule of law, Courts have adopted to determine what act constitutes the actual transfer of shares, when the transfer is so regulated, such law must govern, held, that an express provision in the act of incorporation of a bank, that the stock should be transferable only at its banking house, and on its books, made a transfer at the bank imperative as against an attaching creditor without notice of the previous assignment and delivery of the certificate to a purchaser. Judge Shaw's reasoning was to the effect, that "it is necessary to fix some act, and some point of time, at which the property changes and vests in the vendee," and that, by the charter, the transfer at the bank is made "the decisive act of passing the property, the legal, transferable, attachable interest."

The defendant claims the benefit of this series of decisions in the present case, and especially insists that, as the defendant corporation is located in Connecticut, the decisions of the Courts of that State should have a controlling effect.

The defendant having been incorporated under the National Banking Act, the rules which regulate the transfer of its stock are to be found in the statutes of the United States. The 12th section of the Act of June 3d, 1864 (13 U. S. Stat. at Large, 102), provided that the shares of the stock of a national bank shall be "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association." In the 8th section of the same act, the directors were empowered "to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred." These provisions are continued in substantially the same terms, in sections 5, 139 and 5, 136 of the Revised Statutes. The construction of the statute and the question of title as between the assignee and the attaching creditor are not controlled by the tenor of the decisions of any one State.

The construction which has been more generally placed upon these provisions in charters which require that the transfer shall be made only upon the books of the corporation, or upon provisions of a similar character, is, that this regulation is designed for the security of the bank and of *bona fide* purchasers who take transfers of the stock and possession of the certificates, without notice of any prior equitable transfer; and that, as between the parties to the sale, a transfer not in conformity to such provisions passes the equitable, though not the legal, title and vests the right to the shares in the purchaser. *Black v. Zacharie* (3 How. 483); *U. S. v. Cutts* (1

Sumn. 133); *N. Y. & N. H. R. R. Co. v. Schuyler* (34 N. Y. 80); *McNeil v. Tenth National Bank* (46 N. Y. 325). The New York decisions are to the effect that such a transfer conveys the legal title.

In *Johnson v. Laflin* (103 U. S. 800) a case involving the transfer of shares in a national banking association which, like the defendant, had made no by-laws on the subject of transfers of its stock, the Court say: "Shares in the capital stock of associations, under the national banking law, are salable and transferable at the will of the owner. They are, in these respects, like other personal property. The statute recognizes this transferability, although it authorizes every association to prescribe the manner of their transfer. . . . It is not necessary, however, to consider what restrictions would be within its (the bank's) power, for it had imposed none. As between Laflin and the broker, the transaction was consummated when the certificate was delivered to the latter, with the blank power of attorney indorsed, and the money was received from him. As between them, the title to the shares then passed; whether that be deemed a legal or equitable one matters not; the right to the shares then vested in the purchaser. The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps, also, to protect the purchaser against proceedings of the seller's creditors." From this recent decision of the Supreme Court, it appears that no exclusive method of transfer of stock in a national banking association is imposed by the provisions of the national banking act in regard to transfers, where no by-laws on the subject have been passed by the bank whose stock is in controversy, and that an unrecorded transfer is good as between the parties, and that the question of the rights of an attaching creditor of the seller to stock transferred by an unrecorded assignment, was regarded by the learned judge who wrote the opinion as one not definitely settled.

In holding that the unrecorded transfer has precedence over the attachment, I am influenced by the following considerations:—

1. In the absence of positive provisions of law, or rules of evidence, either statutory or by decisions of Courts, whereby transfers of property, made without notice to the public or without registry, are declared fraudulent or void as against attaching creditors without notice, or whereby certain specified acts are made prerequisite to the vesting of a new title, creditors take their debtor's property subject to all honest and *bona fide* liens and equitable transfers. *Boston Music Hall v. Cory* (129 Mass. 435); *Continental National Bank v. Eliot Nat. Bank* (7 Fed. Rep. 369). In this case there is no statutory provision and no by-law which requires that a transfer

of the stock must be recorded, and, in the absence of such provision, the non-recording of the transfer is not evidential of fraud, as is the case where the vendor retains possession of chattels after a sale. The delivery of the certificate and the assignment and the power to transfer is a sufficient delivery at common law. The statutes of Connecticut, in regard to the attachment of stock and the levy of execution thereon, do not give to the attaching creditor any peculiar rights in stock which has been transferred by an unrecorded transfer. The extent of the rights which the attaching creditor would have in such stock of a Connecticut corporation, is to be determined by other statutes than those which relate to attachment and levy of execution. *Boston Music Hall v. Cory (supra)*.

2. The tendency of modern decisions is to regard certificates of stock attached to an executed blank assignment and power to transfer, as approximating to negotiable securities, though neither in form or character negotiable. *Bank v. Lanier* (11 Wall. 369); *Bridgeport Bank v. Railroad Co.* (30 Conn. 270).

3. The Courts of those states which have most strongly upheld the superior rights of attaching creditors of the vendor as against the unrecorded equities of purchasers, regard the attaching creditor with less favor than formerly, "when attachments and sales on execution were the only compulsory mode of securing an appropriation of a debtor's property to the payment of his debts." *Colt v. Ives* (31 Conn. 25).

4. Decisions of high authority in the Federal Courts have given unrecorded transfers of stock for value precedence over subsequent attachments in behalf of creditors of the vendor, or over the claims of creditors. *U. S. v. Cutts* (1 Sumn. 133, approving *U. S. v. Vaughan*, 3 Binney, 394); *Continental National Bank v. Eliot National Bank*, by Judge Lowell (7 Fed. Rep. 369).

In the agreed statement of facts, it is agreed, that, if the plaintiffs are entitled to judgment, the amount of damages is the sum of \$1,030, plus the lawful interest on the same from August 13, 1869, to October 23, 1882. In an action of tort to recover unliquidated damages, if interest, as a part of the damages, is to be added to the principal sum found to be due, the rate of interest is now, in this State, six per cent. *Salter v. R. R. Co.* (86 N. Y. 401).

Let judgment be entered for the plaintiffs in the sum of \$1,845.41, and costs of suit.

CHAPTER XVI.

RIGHTS OF STOCKHOLDERS CONCERNING THE MANAGEMENT OF THE CORPORATION.

FOSS *v.* HARBOTTLE.(2 *Hare*, 461. 1843.)

VICE-CHANCELLOR [WIGRAM]: —

THE relief which the bill in this case seeks, as against the defendants who have demurred, is founded on several alleged grounds of complaint; of these it is only necessary that I should mention two, for the consideration of those two grounds involves the principle upon which I think all the demurrers must be determined. One ground is that the directors of the Victoria Park Company, the defendants Harbottle, Adshead, Byrom, and Bealey, have, in their character of directors, purchased their own lands of themselves for the use of the company, and have paid for them, or, rather, taken to themselves out of the moneys of the company a price exceeding the value of such lands. The other ground is that the defendants have raised money in a manner not authorized by their powers under their act of incorporation; and, especially, that they have mortgaged or encumbered the lands and property of the company, and applied the moneys thereby raised in effect, though circuitously, to pay the price of the land which they had so bought of themselves.

I do not now express any opinion upon the question, whether, leaving out of view the special form in which the plaintiffs have proceeded in the suit, the bill alleges a case in which a court of equity would say that the transactions in question are to be opened or dealt with in the manner which this bill seeks that they should be; but I certainly would not be understood by anything I said during the argument to do otherwise than express my cordial concurrence in the doctrine laid down in the case of *Hichens v. Congreve* (4 Russ. 562), and other cases of that class. I take those cases to be in accordance with the principles of this Court, and to be founded on justice and common sense. Whether particular cases fall within the principle of *Hichens v. Congreve* is another question. In *Hichens v. Congreve* property was sold to a company by persons in a fiduciary character, the conveyance reciting that £25,000 had been paid for the purchase; the fact being, that £10,000 only had been paid, £15,000 going into the hands of the persons to whom the purchase

was entrusted. I should not be in the least degree disposed to limit the operation of that doctrine in any case, in which a person projecting the formation of a company invited the public to join him in the project, on a representation that he had acquired property which was intended to be applied for the purposes of the company. I should strongly incline to hold that to be an invitation to the public to participate in the benefit of the property purchased, on the terms on which the projector had acquired it. The fiduciary character of the projector would, in such a case, commence from the time when he first began to deal with the public, and would of course be controlled in equity by the representation he then made to the public. If persons, on the other hand, intending to form a company, should purchase land with a view to the formation of it, and state at once that they were the owners of such land, and proposed to sell it at a price fixed, for the purposes of the company about to be formed, the transaction, so far as the public are concerned, commencing with that statement, might not fall within the principle of *Hichens v. Congreve*. A party may have a clear right to say, "I begin the transaction at this time; I have purchased land, no matter how or from whom, or at what price; I am willing to sell it at a certain price for a given purpose." It is not necessary that I should determine the effect of the transactions that are stated to have occurred in the present case. I make these observations only, that I may not be supposed, from anything which fell from me during the argument, to entertain the slightest hesitation with regard to the application, in a proper case, of the principles I have referred to. For the present purpose, I shall assume that a case is stated, entitling the company, as matters now stand, to complain of the transactions mentioned in the bill.

The Victoria Park Company is an incorporated body, and the conduct with which the defendants are charged in this suit is an injury not to the plaintiffs exclusively; it is an injury to the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. And from the case of the *Attorney-General v. Wilson* (Cr. & Ph. 1), without going further, it may be stated as undoubted law, that a bill or information by a corporation will lie to be relieved in respect of injuries which the corporation has suffered at the hands of persons standing in the situation of the directors upon this record. This bill, however, differs from that in the *Attorney-General v. Wilson* in this, — that instead of the corporation being formally represented as plaintiffs, the bill in this case is brought by two individual corporators, professedly on behalf of themselves and all the other members of the corporation, except those who committed the injuries complained of, — the plaintiffs assuming to themselves the right and power in that manner to sue on behalf of and represent the corporation itself.

It was not, nor could it successfully be argued, that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law, the corporation, and the aggregate members of the corporation, are not the same thing for purposes like this; and the only question can be, whether the facts alleged in this case justify a departure from the rule which *prima facie* would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative.

The demurrers are, — first, of three of the directors of the company, who are also alleged to have sold lands to the corporation under the circumstances charged; secondly, of Bealey, also a director, alleged to have made himself amenable to the jurisdiction of the Court to remedy the alleged injuries, though he was not a seller of land; thirdly, of Denison, a seller of land, in like manner alleged to be implicated in the frauds charged, though he was not a director; fourthly, of Mr. Bunting, the solicitor, and Mr. Lane, the architect of the company. These gentlemen are neither directors nor sellers of land, but all the frauds are alleged to have been committed with their privity, and they also are in this manner sought to be implicated in them. The most convenient course will be, to consider the demurrer of the three against whom the strongest case is stated; and the consideration of that case will apply to the whole.

The first objection taken in the argument for the defendants was, that the individual members of the corporation cannot in any case sue in the form in which this bill is framed. During the argument I intimated an opinion, to which, upon further consideration, I fully adhere, that the rule was much too broadly stated on the part of the defendants. I think there are cases in which a suit might properly be so framed. Corporations like this, of a private nature, are in truth little more than private partnerships; and in cases which may easily be suggested, it would be too much to hold, that a society of private persons associated together in undertakings, which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights, *inter se*, because, in order to make their common objects more attainable, the Crown or the Legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in *Wallworth v. Holt* (4 Myl. & Cr. 635. See also 17 Ves. 320, per Lord Eldon), and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of

technical rules respecting the mode in which corporations are required to sue.

But, on the other hand, it must not be without reasons of a very urgent character that established rules of law and practice are to be departed from, — rules, which, though in a sense technical, are founded on general principles of justice and convenience; and the question is, whether a case is stated in this bill, entitling the plaintiffs to sue in their private characters. [His Honor stated the substance of the act, sections 1, 38, 39, 43, 46, 47, 48, 49, 67, 70, 114, and 129.] The result of these clauses is, that the directors are made the governing body, subject to the superior control of the proprietors assembled in general meetings; and, as I understand the act, the proprietors so assembled have power, due notice being given of the purposes of the meeting, to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they may have originated. There may possibly be some exceptions to this proposition, but such is the general effect of the provisions of the statute.

Now, that my opinion upon this case may be clearly understood, I will consider separately the two principal grounds of complaint to which I have adverted, with reference to a very marked distinction between them. The first ground of complaint is one which, though it might *prima facie* entitle the corporation to rescind the transactions complained of, does not absolutely and of necessity fall under the description of a void transaction. The corporation might elect to adopt those transactions, and hold the directors bound by them. In other words, the transactions admit of confirmation at the option of the corporation. The second ground of complaint may stand in a different position; I allude to the mortgaging in a manner not authorized by the powers of the act. This, being beyond the powers of the corporation, may admit of no confirmation whilst any one dissenting voice is raised against it. This distinction is found in the case of *Preston v. The Grand Collier Dock Company* (11 Sim. 327; s. c. 2 Railway Cases, 335).

On the first point, it is only necessary to refer to the clauses of the act to show, that, whilst the supreme governing body, the proprietors at a special general meeting assembled, retain the power of exercising the functions conferred upon them by the act of incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the plaintiffs on the present record. This in effect purports to be a suit by *cestui que trusts*, complaining of a fraud committed or alleged to have been committed by persons in a fiduciary character. The complaint is, that those trustees have sold lands to themselves, ostensibly for the benefit of the *cestui que trusts*. The proposition I have advanced is, that although the act should prove to be voidable, the *cestui que trusts* may elect to confirm it. Now, who are the *cestui que trusts* in this case? The cor-

poration, in a sense, is undoubtedly the *cestui que trust*; but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound. How then can this Court act in a suit constituted as this is, if it is to be assumed, for the purposes of the argument, that the powers of the body of the proprietors are still in existence, and may lawfully be exercised for a purpose like that I have suggested? Whilst the Court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive to show that the frame of this suit cannot be sustained whilst that body retains its functions. In order then that this suit may be sustained, it must be shown either that there is no such power as I have supposed remaining in the proprietors, or, at least, that all means have been resorted to and found ineffectual to set that body in motion: this latter point is nowhere suggested in the bill: there is no suggestion that an attempt has been made by any proprietor to set the body of proprietors in motion, or to procure a meeting to be convened for the purpose of revoking the acts complained of. The question then is, whether this bill is so framed as of necessity to exclude the supposition that the supreme body of proprietors is now in a condition to confirm the transactions in question; or, if those transactions are to be impeached in a court of justice, whether the proprietors have not power to set the corporation in motion for the purpose of vindicating its own rights.

[His Honor recapitulated the history and present situation of the company, as it appeared upon the bill.]

I pause here to examine the difficulty which is supposed by the bill to oppose itself to the body of proprietors assembling and acting at an extraordinary general meeting. The 48th section of the act says, that a certain number of proprietors may call such a meeting by means of a notice to be addressed to the board of directors, and left with clerk or secretary, at the principal office of the company one month before the time of meeting, or the board is not bound to notice it. The bill says that there is no board of directors properly constituted, — no clerk, — no principal office of the company, — no power of electing more directors, — and that the appointment of the clerk being in the board of directors, no clerk can in fact now be appointed. I am certainly not prepared to go the whole length of the plaintiff's argument founded upon the 48th section. I admit

that the month required would probably be considered imperative; but is not the mode of service directory only? Could the board of directors *de facto*, for the time being, by neglecting to appoint a clerk or have a principal office, deprive the superior body of proprietors of the power which the act gives that body over the board of directors? Would not a notice in substance, — a notice, for example, such as the 129th section provides for in other cases, — be a sufficient notice? Is not the particular form of notice which is pointed out by the 48th section a form of notice given only for the convenience of the proprietors and directors? And if an impediment should exist, and, *a fortiori*, if that impediment should exist by the misconduct of the board of directors, it would be difficult to contend with success that the powers of the corporation are to be paralyzed, because there is no clerk on whom service can be made. I require more cogent arguments than I have yet heard to satisfy me that the mode of service prescribed by the 48th section, if that were the only point in the case, is more than directory. The like observations will apply to the place of service; but as to that, I think the case is relieved from difficulty by the fact that the business of the company is stated to be principally conducted at the office of the solicitor, for I am not aware that there is anything in the statute which attaches any peculiar character to the spot designated as the principal office. In substance, the board of directors *de facto*, whether qualified or not, carry on the business of the company at a given place, and under this act of Parliament it is manifest that service at that place would be deemed good service on the company.

If that difficulty were removed, and the plaintiff should say, that by the death or bankruptcy of directors, and the carelessness of proprietors (for that term must be added), the governing body has lost its powers to act, I should repeat the inquiries I have before suggested, and ask whether, in such a case also, the 48th section is not directory, so far as it appears to require the refusal or neglect of the board of directors to call a general meeting, before the proprietors can by advertisement call such a meeting for themselves. Adverting to the undoubted powers conferred upon the proprietors, to hold special general meetings without the consent and against the will of the board of directors, and the permanent powers which the body of proprietors must of necessity have, I am yet to be persuaded that the existence of this corporation (for without a lawful governing body it cannot usefully or practically continue) can be dependent upon the accidents which at any given moment may reduce the number of directors below three. The board of directors, as I have already observed, have no power to put a veto upon the will of any ten proprietors who may decide to call a special general meeting; and if ten proprietors cannot be found, who are willing to call a special general meeting, the plaintiffs can scarcely contend that this suit can be sustained. At all events, what is there to prevent the

corporators from suing in the name of the corporation? It cannot be contended that the body of proprietors have not sufficient interest in these questions to institute a suit in the name of the corporation. The latter observations, I am aware, are little more than another mode of putting the former questions which I have suggested. I am strongly inclined to think, if it were necessary to decide these points, it could not be successfully contended that the clauses of the act of Parliament which are referred to are anything more than directory, if it be, indeed, impossible from accident to pursue the form directed by the act. I attribute to the proprietors no power which the act does not give them: they have the power, without the consent and against the will of the directors, of calling a meeting, and of controlling their acts; and if by any inevitable accident the prescribed form of calling a meeting should become impracticable, there is still a mode of calling it, which, upon the general principles that govern the powers of corporations, I think would be held to be sufficient for the purpose.

It is not, however, upon such considerations that I shall decide this case. The view of the case which has appeared to me conclusive, is that the existence of a board of directors *de facto* is sufficiently apparent upon the statements in the bill. The bankruptcy of Westhead, the last of the three directors who became bankrupt, took place on the 2nd of January, 1840: the bill alleges that he thereupon ceased to be qualified to act as director, and his office became vacated; but it does not say that he ceased to act as a director; nor, although it is said that thenceforward there was no board "properly constituted," is it alleged that there was no board *de facto* exercising the functions of directors. These, and several other statements of the bill, are pregnant with the admission of the existence of a board *de facto*. By whom was the company governed, and its affairs conducted, between the time of Westhead's bankruptcy, and that of the filing of the bill, in October, 1842? What directors or managers of the business of the company have lent their sanction to the mortgages, and other transactions complained of, as having taken place since January, 1840, and by which the corporation is said or supposed to be, at least to some extent, legally bound? Whatever the bill may say of the illegal constitution of the board of directors, because the individual directors are not duly qualified, it does not anywhere suggest that there has not been during the whole period, and that there was not when the bill was filed, a board of directors *de facto*, acting in and carrying on the affairs of the corporation, and whose acting must have been acquiesced in by the body of proprietors; at least, ever since the illegal constitution of the board of directors became known, and the acts in question were discovered. But if there has been or is a board *de facto*, their acts may be valid, although the persons so acting may not have been duly qualified. The 114th section of the act provides that all acts,

deeds, and things, done or executed at any meeting of the directors, by any person acting as a director of the said company, shall, notwithstanding it may afterwards be discovered that there was some defect or error in the appointment of such director, or that such director was disqualified, or, being an interim director, was disapproved of by an annual general meeting of proprietors, be as valid and effectual as if such person had been duly appointed and was qualified to be a director." The foundation upon which I consider the plaintiffs can alone have a right to sue in the form of this bill must wholly fail, if there has been a governing body of directors *de facto*. There is no longer the impediment to convening a meeting of proprietors, who by their vote might direct proceedings like the present to be taken in the name of the corporation, or of a treasurer of the corporation (if that were necessary); or who, by rejecting such a proposal, would, in effect, decide that the corporation was not aggrieved by the transactions in question. Now, since the 2d of January, 1840, there must have been three annual general meetings of the company held in July in every year, according to the provisions of the act. These annual general meetings can only be regularly called by the board of directors. The bill does not suggest that the requisitions of the act have not been complied with in this respect, either by omitting to call the meeting, or by calling it informally; but the bill, on the contrary, avers that several general meetings, and extraordinary general meetings, and other meetings of the shareholders of the company, were duly convened and held at divers times between the time when the company was established and the year 1841; including, therefore, in this period of formality of proceeding, as well as of capacity in constitution, an entire year after Westhead's bankruptcy.

Another statement of the bill leading to the same inference — the existence of an acting board — is that which avers, that since the year 1839, down, in fact, to the time of filing the bill, that is, during these three years, the company has had no office of its own, but the affairs of the company have been principally conducted at the office of Mr. Bunting. Now this, as I must read it, is a direct admission that the affairs of the company have been carried on by some persons. By whom then have they been carried on? The statute makes the board of directors the body by whom alone those affairs are to be ordered and conducted. There is no other person or set of persons empowered by the act to conduct the affairs of the company; and there is no allegation in the bill that any persons, other than the board of directors originally appointed, have taken upon themselves that business. In the absence of any special allegation to the contrary, I am bound to assume that the affairs of the company have been carried on by the body in whom alone the powers for that purpose were vested by the act, namely, a board of directors.

Again, the bill alleges, that, since the bankruptcy of Westhead, the bankrupts have joined in executing the conveyances of the property of the company to mortgagees. It could only have been in the character of directors that they could confer any title by the conveyance; in that character the mortgagees would have required them to be parties, and it is in that character that I must assume they executed the deeds.

If the case rested here, I must of necessity assume the existence of a board of directors, and in the absence of any allegation that the board *de facto*, in whose acting the company must, upon this bill, be taken to have acquiesced, have been applied to and have refused to appoint a clerk and treasurer (if that be necessary), or take such other steps as may be necessary for calling a special general meeting, or had refused to call such special general meeting, the bill does not exclude every case which the pleader was bound to exclude in order to justify a suit on behalf of a corporation, in a form which assumes its practical dissolution. But the bill goes on to show that special general meetings have been holden since January, 1840. The bill, as I have before observed, states that several general meetings, and extraordinary general meetings, have been holden between the establishment of the company and the year 1841, not excluding the year 1840, which was during Westhead's disqualification, "and that at such meetings false and delusive statements respecting the circumstances and prospects of the company, were made by the said directors of the company to the proprietors who attended such meetings, and the truth of the several fraudulent and improper acts and proceedings herein complained of was not disclosed;" and the bill specifies some meetings in particular. Against the pleader, I must intend, that some such meetings may have been holden at a time when there was no board properly constituted, and no clerk or treasurer or principal office of the company, save such as appear by the bill to have existed; and if that were so, the whole of the case of the plaintiffs, founded on the impracticability of calling a special general meeting, fails. Assuming then, as I am bound to do, the existence, for some time at least, of a state of things in which the company was governed by a board of directors *de facto*, some of the members of which were individually disqualified, and in which, notwithstanding the want of a clerk, treasurer, or office, the powers of the proprietors were called into exercise at general meetings, the question is, when did that state of things cease to exist, so as to justify the extraordinary proceeding of the plaintiffs by this suit? The plaintiffs have not stated by their bill any facts to show that such was not the actual state of things at the time their bill was filed, and, in the absence of any statement to the contrary, I must intend that it was so.

The case of *Preston v. The Grand Collier Dock Company* was referred to as an example of a suit in the present form; but there

the circumstances were in no respect parallel with the present: the object of that suit was to decide the rights or liabilities of one class of the members of the corporation against another, in respect of a matter in which the corporation itself had no power to vary the situation of either.

I have applied strictly the rule of making every intendment against the pleader in this case, — that is, of intending everything to have been lawful and consistent with the constitution of the company, which is not expressly shown on the bill to have been unlawful or inconsistent with that constitution. And I am bound to make this intendment, not only on the general rule, but also on the rules of pleading which require a plaintiff to frame his case so distinctly and unambiguously, that the defendant may not be embarrassed in determining on the form which his defence should assume. *Attorney-General v. Corporation of Norwich* (2 Myl. & Cr. 406). The bill, I cannot but observe, is framed with great care, and with more than ordinary professional skill and knowledge; but the averments do not exclude that which, *prima facie*, must be taken to have been the case, that during the years 1840, 1841, and 1842, there was a governing body, — that by such body the business of the company was carried on, — that there was no insurmountable impediment to the exercise of the powers of the proprietors assembled in general meetings to control the affairs of the company, and that such general meetings were actually held. The continued existence of a board *de facto* is not merely not excluded by the averments, but the statements in the bill of the acts which have been done suppose, and even require, the existence of such a board. Now if the plaintiff had alleged that there had been no board of directors *de facto*, and had on that ground impeached the transactions complained of, the defendants might have met the case by plea, and thereby have defended themselves from answering the bill. If it should be said that the defendants might now have pleaded that there was a board of directors *de facto*, the answer is, that they might then have been told that the fact sufficiently appeared upon the bill, and therefore they ought to have demurred. Uncertainty is a defect in pleading, of which advantage may be taken by demurrer. If I were to overrule these demurrers, I might be depriving the defendants of the power of so protecting themselves; and that because the plaintiff has not chosen, with due precision, to put forward that fact, which, if alleged, might have been met by plea, but which, not being so alleged, leaves the bill open to demurrer.

I must further observe, that although the bill does, with great caution, attempt to meet every case which, it was supposed, might have been fatal to it upon demurrer, yet it is by allegations of the most general kind, and many of which cannot by possibility be true. It alleges the recent discovery of the acts complained of, but it gives no allegation whatsoever for the purpose of telling when or how

such discovery was made, or what it led to. I am bound to give the plaintiff, on a general demurrer, the benefit of the allegation that the matters complained of have been recently discovered, whatever the term "recently discovered" may mean; but when I look into the schedule to the act I find that many of those matters must have been known at a very early period in the history of the company. I find also provisions of the act requiring that books shall be kept in which all transactions shall be fully and fairly stated; and I do not find in the bill anything like a precise allegation that the production of those books would not have given the information, or that there have not been means of seeing those books at least at some time since 1835, or since the transactions in question took place, so that, in point of fact, many of the transactions might and may have been sooner known. These are observations upon which I do not found my judgment, but which I use as explaining why it is I have felt bound in favor of the defendants to construe this bill with strictness.

The second point, which relates to the charges and incumbrances alleged to have been illegally made on the property of the company, is open to the reasoning which I have applied to the first point, upon the question whether, in the present case, individual members are at liberty to complain in the form adopted by this bill; for why should this anomalous form of suit be resorted to if the powers of the corporation may be called into exercise? But this part of the case is of greater difficulty upon the merits. I follow with entire assent, the opinion expressed by the Vice-Chancellor in *Preston v. The Grand Collier Dock Company*, that, if a transaction be void, and not merely voidable, the corporation cannot confirm it, so as to bind a dissenting minority of its members. But that will not dispose of this question. The case made with regard to these mortgages or incumbrances is, that they were executed in violation of the provisions of the act. The mortgagees are not defendants to the bill, nor does the bill seek to avoid the security itself, if it could be avoided, on which I give no opinion. The bill prays inquiries with a view to proceedings being taken *aliunde* to set aside these transactions against the mortgagees. The object of this bill against the defendants is to make them individually and personally responsible to the extent of the injury alleged to have been received by the corporation, from the making of the mortgages. Whatever the case might be, if the object of the suit was to rescind these transactions, and the allegations in the bill showed that justice could not be done to the shareholders without allowing two to sue on behalf of themselves and others, very different considerations arise in a case like the present, in which the consequences only of the alleged illegal acts are sought to be visited personally upon the directors. The money forming the consideration for the mortgages was received, and was expended in, or partly in, the transactions which are the subject of the first ground of complaint. Upon this, one question

appears to me to be, whether the company could confirm the former transactions, take the benefit of the money that has been raised, and yet, as against the directors personally, complain of the acts which they have done, by means whereof the company obtains that benefit which I suppose to have been admitted and adopted by such confirmation. I think it would not be open to the company to do this; and my opinion already expressed on the first point is, that the transactions which constitute the first ground of complaint may possibly be beneficial to the company, and may be so regarded by the proprietors, and admit of confirmation. I am of opinion that this question, — the question of confirmation or avoidance, — cannot properly be litigated upon this record, regard being had to the existing state and powers of the corporation, and that therefore that part of the bill which seeks to visit the directors personally with the consequences of the impeached mortgages and charges, the benefit of which the company enjoys, is in the same predicament as that which relates to the other subjects of complaint. Both questions stand on the same ground, and, for the reasons which I stated in considering the former point, these demurrers must be allowed.

MACDOUGALL *v.* GARDINER.

(*L. R.* 1 *Ch. D.* 13. 1875.)

THIS was an appeal from a decision of Vice-Chancellor Malins overruling a demurrer to the bill.

The bill was filed by Alexander William Macdougall, on behalf of himself and all other shareholders in the Emma Silver Mining Company, Limited, except the directors, against the directors and the company.

The bill, after stating that the company was incorporated in November, 1871, for the purpose of working a mine in the United States of America, called the Emma Silver Mine, set out several of the articles of association, amongst which were those numbered 40 and 42, which provided for summoning special general meetings, and 45, which enabled any member to propose and introduce at a general meeting any subject relating to the affairs of the company of which he had given a special notice, and also the following articles: —

“49. The chairman may, with the consent of the meeting, adjourn any meeting from time to time, and from place to place; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

“50. At any general meeting, unless a poll be demanded by at least

five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of the proceedings of the company, shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favor of or against such resolution.

"51. If a poll be demanded by five or more members, it shall be taken in such manner as the chairman shall direct, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting, the chairman of the meeting shall be entitled to a second or casting vote."

"53. Every member shall have one vote for every share held by him."

"57. Votes may be given personally or by proxy."

The bill also, after stating that the plaintiff became a shareholder in 1874, and was, when the bill was filed, the registered holder of 1750 shares in the company, alleged various fraudulent transactions on the part of the promoters and the company, and that the plaintiff and other members of the company believed that the present directors were interested in these matters adversely to the company, and therefore desired to have some person elected a director who would endeavor to obtain a full investigation of these matters.

The allegations contained in the bill on this subject are stated at greater length in the previous report.

According to the statement in the bill the plaintiff and his friends, being unsuccessful in their efforts, in September, 1874, signed a requisition calling on the directors to summon an extraordinary general meeting for the purpose of requesting the chairman, Colonel Gardiner, to resign his directorship, and to appoint another director in his place. This requisition was signed by shareholders holding more than one-fifth of the capital of the company. And accordingly, on the 6th of October, 1874, the directors issued a notice convening a special general meeting for the 14th of October.

The plaintiff received proxies authorizing him to vote at the special meeting from shareholders holding 15,000 shares, while the directors did not receive proxies to an extent reaching one half of the number of shares represented by the plaintiff. Previously to the meeting, the directors sent stamped proxies round to each of the shareholders, empowering Mr. Hutton, one of the directors, to vote for them at the meeting and at any adjournment.

Although the plaintiff and his party had such a majority if all the votes were properly polled, the defendants filled the room with persons holding one or two shares each, who, on a show of hands, would give the defendants the majority of votes.

The plaintiff prepared several resolutions for the purpose of proposing them at the meeting, the two first of which were as follows:—

1. That in the opinion of this meeting it is not consistent with the best interests of the company that Mr. Robert May Gardiner should remain a director of the company, and that he accordingly be requested to resign his office.

2. That the said Mr. Robert May Gardiner, not being present to meet the shareholders of this company, after the requisition calling this meeting (first lodged on the 8th of September last), and signed by — shareholders, he is now removed from the office of director, and that Mr. — be appointed in his stead.

The meeting took place on the 14th of October, 1874. Colonel Gardiner was absent in America, and Mr. Hutton was in the chair. He addressed the members, and urged an adjournment of the meeting, partly on the ground that a petition to wind up the company had been presented by a shareholder, and that it was expedient to postpone the discussion of the matters before the meeting until after the petition had been disposed of. The plaintiff proposed the first resolution to the meeting, although Mr. Burnand, the only other director present, openly dissented from the view. In the midst of the discussion which followed, and after the plaintiff had pointed out that if the resolution were passed he would follow it up by others, copies of which the chairman held in his hand, a member proposed the adjournment of the meeting for a month. This proposal was seconded, and the chairman then put the resolution to the meeting, and declared it to be carried. The 25th, 26th, and 27th paragraphs of the bill contained in substance the following allegations:—

25. The friends of the directors voted in favor of the resolution, while the plaintiff and the shareholders acting with him voted against it; and the chairman declared, on the show of hands, that the resolution had been carried. Five members of the company then present, including the plaintiff, demanded a poll, but the chairman refused to grant one, on the alleged ground that a poll could not be taken on the question whether the meeting should be adjourned or not; he at once left the chair, declaring the meeting adjourned, and immediately left the room; but the demand for the poll was duly signed and handed in.

26. There was no ground, under the articles of the company, or otherwise, for holding that a poll could not be taken upon whether the meeting should be adjourned or not, especially when by the motion for adjournment the question before the meeting was, whether certain important matters should then be discussed and voted, or whether they should be postponed for a long or indefinite time. Mr. Hutton, however, had, in order to stifle the discussion, and to prevent the matters being voted upon to consider which the meeting was called, in collusion with the other directors, or some of them, determined to carry a vote of adjournment by show of hands and then to refuse a poll on that question, so as to prevent the proxies given to the plaintiff and his supporters from being used in

support of the resolutions which he was about to bring forward, and which would undoubtedly have been passed but for the conduct of the defendants.

27. After the poll had been refused, several of the members of the company, including the directors, left the room, but a large number still remained, who voted the plaintiff into the chair, when the plaintiff's resolutions were passed, the name of Charles Henry Dunhill, M.D., of York, a duly qualified shareholder in the company, having been first added to the second resolution, he having been proposed and seconded and duly elected as a director of the said company in the place of Colonel Gardiner.

The 28th paragraph of the bill set out a letter by the plaintiff giving notice to the directors of the passing of the resolutions after Mr. Hutton had left the chair, and the allegations concluded as follows:—

“29. In this state of things the plaintiff and the other shareholders in the company believe, and it is the fact, that the defendants, the directors of the said company, are about to conclude some arrangements with the persons against whom the company has claims, such as the original vendors of the said mining property to the company, or the promoters of the said company, and others, for the purpose of settling those claims to the great injury of the company and the shareholders therein and without submitting those terms to the shareholders of said company; and the plaintiff apprehends, and the fact is, that the proposed compromises will at once be carried through unless the defendants are restrained from so doing by the order of this Honorable Court. The danger is in fact so imminent, that it is impossible for the plaintiff and those acting with him to call another meeting for the purpose of removing all the directors of the company from their office, or for any other purpose which might effectually stop the said compromises, in time to prevent their being carried out; and even if such another meeting could be convened in time, the defendants, by the same proceeding as they adopted on the 14th day of October, would be again able to break up and would succeed in breaking up the said meeting, by improperly deciding that it was adjourned by a mere show of hands held up by a few friends or nominees of the said directors who are interested in putting an end to all further investigation into the aforesaid matters.”

The bill prayed for a declaration that the refusal to grant a poll on the question whether the meeting should be adjourned at the meeting of the 14th of October was illegal and improper, and for an injunction to restrain the directors from concluding any arrangements with respect to legal proceedings commenced or to be commenced against the vendors of the property to the company, or with any other persons, until such arrangement, if proposed, should have been submitted to the shareholders in the company, and should have been approved of by them; and for a declaration that Gardiner had

ceased to be a director, and might be restrained from acting as such director, or that a meeting of the shareholders should be summoned for the purpose of submitting the plaintiff's resolutions to them.

At the time the bill was filed a petition to wind up the company was pending, and until it was heard, which was not till April, all proceedings in the suit were stayed. The petition having been dismissed, Colonel Gardiner demurred.

The Vice-Chancellor overruled the demurrer, and from this decision the demurring defendant appealed.

JAMES, L. J. :—

I am of opinion that this demurrer ought to be allowed. I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rule in *Mozley v. Alston* and *Lord v. Copper Miners' Company* and *Foss v. Harbottle* should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by one shareholder on behalf of himself and others, unless there be something illegal, oppressive or fraudulent,—unless there is something *ultra vires* on the part of the company *qua* company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company,—there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done. If the majority of the company really are in favor of any particular shareholder who has been interfered with improperly by misconduct of a director, by misconduct of a chairman, by miscarriage of a meeting or of certain shareholders at a particular date,—if the company thinks that any shareholder has anything which ought to be made the subject of complaint, there is never any difficulty whatever arising from the apparent possession of the seal by the directors, or from any such cause, in filing a bill in the name of the company, if the majority of the company desire it to be filed. Any one of the shareholders might have filed his bill in the name of the company; and then if the directors had said, "You are not the company; the majority do not act with you, but with us," the Court would, as it has done in other cases, have taken the means of ascertaining which party it is, the plaintiff's or defendant's, which really represents the majority of the company.

Everything in this bill, as far as I can see, if it is wrong, is a wrong to the company, because every meeting that is called must be for some

purpose or other, — it must be for the purpose of doing or undoing something which is supposed to accrue for the benefit of the company. Whether it ought to have been done, or ought not to have been done, depends upon whether it is for the good of the company it should have been done, or for the good of the company it should not have been done; and, putting aside all illegality on the part of the majority, it is for the company to determine whether it is for the good of the company that the thing should be done or should not be done, or left unnoticed. I cannot conceive that there is any equity on the part of a shareholder, on behalf of himself and the minority, to say, "True it is that the majority have a right to determine everything connected with the management of the company, but then we have a right — and every individual has a right — to have a meeting held in strict form in accordance with the articles." Has a particular individual the right to have it for the purpose of using his power of eloquence to induce the others to listen to him and to take his view? That is an equity which I have never yet heard of in this Court, and I have never known it insisted upon before; that is to say, that this Court is to entertain a bill for the purpose of enabling one particular member of the company to have an opportunity of expressing his opinions *viva voce* at a meeting of the shareholders. If so, I do not know why we should not go further, and say, not only must the meeting be held, but the shareholders must stay there to listen to him and to be convinced by him. The truth is, that is only part of the machinery and means by which the internal management is carried on. The whole question comes back to a question of internal management; that is to say, whether the meeting ought or ought not to be held in a particular way, whether the directors ought or ought not to have sanctioned certain proceedings which they are about to sanction, whether one director ought or ought not to be removed, and whether another director ought or ought not to have been appointed. If there is some one managing the affairs of the company who ought not to manage them, and if they are being managed in a way in which they ought not to be managed, the company are the proper persons to complain of that. It seems to me, therefore that the thing is perfectly plain and obvious, and when the Master of the Rolls had the case before him he immediately pointed it out, and said, "You have the wrong plaintiff here — the plaintiff must be the company." From the first opening of this case before us, I have never had any doubt in my own mind that this was a bill which, if it was to be sustained at all, could only be sustained by the company.

But then the plaintiff says, "Give us leave to amend." It is rather late to ask for leave to amend when the amendments might have been obtained from the Master of the Rolls before any costs had been incurred. But the question is, is there anything substantial in this case on which we should give leave to amend on the part of the company? I can see nothing. I do not think we ought to

give leave to amend for the purpose merely of getting a declaration as to what the proper mode of dealing with the adjournment was, because that would be simply to give a declaration without any relief. The company cannot file a bill saying, "Tell us the meaning of the rules, and what is to be done under them." They must find that out for themselves in the best way they can. We do not sit here to express an opinion on something which may lead to no practical result. I am not aware that there could be any practical result following upon a declaration obtained by the company as to the particular mode in which the meeting ought to have been adjourned, or in what particular way the meetings in the future should be adjourned. If there is any doubt about it, if they cannot satisfy themselves as to the way of doing it out of doors, they must call a meeting and make it clear what is the mode in which they wish and propose to have it done. Then, as to the rest of the relief prayed, that the directors were not to do something without the consent of the shareholders. Of course they cannot do so, and the shareholders can always call meetings if they please. Then, as to the part of the prayer which asks that somebody else shall be restrained from acting, that is in truth given up, — it is admitted at the bar that these resolutions could not have been properly put at the meeting.

It seems to me, therefore, that upon the allegations of this bill there really is no relief which the company can ask for and which we could give the company. We happen to know that the party of the plaintiff is now in full possession of the company, and the company will, no doubt, do what is right according to his view.

The demurrer must be allowed, with the usual consequences and without leave to amend.

MELLISH, L. J. :—

I am of the same opinion. I think it is a matter of considerable importance rightly to determine this question, whether a suit ought to be brought in the name of the company or in the name of one of the shareholders on behalf of the others. It is not at all a technical question, but it may make a very serious difference in the management of the affairs of the company. The difference is this:— Looking to the nature of these companies, looking at the way in which their articles are formed, and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them, — some directors may have been irregularly appointed, some directors as irregularly turned out, or something or other may have been done which ought not to have been done according to the proper construction of the articles. Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantankerous member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a

majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the name of the company does certainly greatly tend to stop litigation.

In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that, as I understand it, is what has been decided by the cases of *Mozley v. Alston* and *Foss v. Harbottle*. In my opinion that is the rule that is to be maintained. Of course if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing, and there the minority are entitled to come before this Court to maintain their rights; but if what is complained of is simply that something which the majority are entitled to do has been done or undone irregularly, then I think it is quite right that nobody should have a right to set that aside, or to institute a suit in Chancery about it, except the company itself.

BAGGALLAY, J. A. :—

The matters complained of by this bill, and in respect of which relief is sought, are two in number,—the one the refusal of the chairman at the meeting on the 14th of October to grant a poll, and the other that certain arrangements are in contemplation by the directors which may have a prejudicial effect upon the shareholders generally. As regards the first of these two matters, a declaration is asked that the refusal to grant a poll was illegal; and two alternative forms of relief are prayed consequent upon such declaration,—the one that the resolutions which were passed at the meeting held under the presidency of the plaintiff after the original chairman had retired were valid and binding; the other that a meeting should be called under the direction of the Court for the purpose of having those resolutions submitted to the meeting so called.

Now, as regards the former of those two alternatives, I think it was very wisely and properly abandoned in the course of the argument, because one of two things is clear,—either that the second meeting of the 14th of October was a continuation of the former one, or an original and independent meeting; if it was a continuation of the former one, the only proper proceedings which could have been taken would have been to have treated the declaration of the former

chairman that the meeting was adjourned as a nullity, and to have directed a poll to be taken on the subject of adjournment; if, on the other hand, it is regarded as an original meeting, it was not summoned in manner provided by the articles, and the resolutions passed could not be binding. The other alternative form of relief seems to me to be such as this Court is not in the habit of granting, namely, to direct a meeting to be called in order that at that meeting certain resolutions should be submitted. I am not prepared to say that a case for calling a meeting may not arise, particularly when the Court desires to have for its own information the views of the shareholders. Meetings have been directed even where the company is not in course of liquidation, but such a course of proceeding is not usual, and certainly I am not aware that any such case has ever occurred when the calling of a meeting is within the power of the shareholders themselves.

Then if you get rid of these two alternative forms of relief, what becomes of the first paragraph of the prayer, which merely asks a declaration that the view taken by the chairman was illegal and improper, and asks a declaration to that effect with no consequential relief? I apprehend that it is not the practice of the Court to make declarations of so utterly useless a character as is there asked.

But that leaves the second paragraph of the prayer to be considered. Now that is based upon an assumed intention on the part of the directors to enter into certain arrangements which may be prejudicial to the shareholders. But what is the real fact? If you turn to the articles you will find that there the fullest possible powers are given to the directors not only to manage the affairs of the company, but to commence, prosecute, continue, or discontinue, any litigation that is pending, and it is proposed to ask the Court to make a declaration that those articles are to be overborne by a further rule or declaration of the Court that the directors are not to act without the shareholders' consent, and that a restriction which the shareholders have themselves waived is to be supplemented by the order of the Court. It appears to me, therefore, that not in respect of any one of the several species of relief asked by this bill could relief be given by whomsoever the bill is filed.

I entirely concur in the views expressed by the Lords Justices, that as far as regards the constitution of this suit, even if the allegations formed the subject-matter for a suit in this Court, the proper parties are not plaintiffs. I entirely concur in the views expressed by them and the reasons assigned. I should certainly have been disposed to have assented to the proposition to give leave to amend the bill had I thought that by amendment of the bill a fair case for the intervention of this Court could have been made, but being perfectly satisfied, for the reasons I have just mentioned, that the allegations of the bill, apart from the parties who may happen to be the plaintiffs, are not such as this Court could act upon, I am of opinion that it would be most idle to give leave to amend.

FORREST *v.* RAILWAY COMPANY.(4 *De Gex, F. & J.* 125. 1861.)

THIS was the appeal of the plaintiff from the dismissal of his bill by the Master of the Rolls. The plaintiff was a shareholder in the Manchester, Sheffield and Lincolnshire Railway Company, and sued on behalf of himself and the other shareholders of the company for an injunction to restrain the defendants from conveying in vessels or boats passengers, cattle, or goods from Hull or Grimsby to Spurn Point.

By the 12 & 13 Vict. c. 61, by which the company was incorporated, it was enacted (sect. 185) that the company might establish and maintain within the limits of 220 yards measured westward from the centre of the haven or creek of New Holland, in Lincolnshire, and such other limits as were comprised in an undertaking amalgamated under the act with the defendants' undertaking, and known as "The Humber Piers and Steam Communication at New Holland," as aforesaid, steam or other boats, floats or rafts for the conveyance of carriages, horses, cattle, goods, wares, merchandise, and other portable articles and foot passengers, over and across the river Humber from any part within the limits aforesaid within the parish of Barrow-upon-Humber to the town or borough of Kingston-upon-Hull and back; and from time to time to do all other things necessary for establishing, maintaining, regulating, and managing the said communication, and making the same as useful and advantageous to the public as might be; and that all persons with carriages, horses, cattle, goods, wares, and merchandise, and all foot passengers should have liberty to pass by the boats of the said company from any point within the limits aforesaid in the said parish of Barrow-upon-Humber to the town and borough of Kingston-upon-Hull and back, upon payment of the respective tolls thereafter granted.

"Spurn Point" is a headland or promontory lying some way to the south-east of Hull and running into the German Ocean; and the bill alleged that the company were running excursion boats to this place, which was beyond the limits prescribed by the act, and that this was beyond the powers of the company under their act, and was also prejudicial to another company called "The Gainsborough United Steam Packet Company, Limited," in which the plaintiff was a large shareholder. The prayer of the bill was for a declaration that the defendants were not authorized or empowered to convey and were not justified in conveying in boats or vessels passengers, cattle, or goods from the said town or borough of Kingston-upon-Hull to Spurn Point aforesaid and back, or in conveying passengers from

Grimsby to Spurn Point, or in conveying or carrying passengers, cattle, or goods in boats or vessels from or to any place except over and across the said river Humber, from any parts within the limits mentioned in the said special act within the parish of Barrow-upon-Humber to the town or borough of Kingston-upon-Hull and back, and for an injunction accordingly.

The defendants by their answer stated that the steamboats which the company was bound to keep and maintain for the service of the ferry, were never all in use at the same time for the purposes of the ferry, and that for many years past the defendants had been in the habit from time to time of advertising excursion trains to Hull from Manchester and other places on their line of railway; and as a further inducement to the public to avail themselves of such excursion trains, had frequently advertised in connection therewith a trip down the Humber from Hull to Spurn Point, a distance of about twenty-eight miles, and that a great number of passengers brought by the company's excursion trains to Hull and many friends of such excursionists and other persons at Hull had been from time to time conveyed from Hull to Spurn Point aforesaid, and back to Hull by such of the steamboats of the company as were not at the time required for the packet service across the Humber, and which would, if they had not been so employed, have been idle and profitless to the company. They further stated that the suit was not for the benefit of the other shareholders of the company on whose behalf the plaintiff held himself out as suing, but was instituted solely to promote and serve the interests of the Gainsborough United Steam Packet Company Limited, and that all the other shareholders of the defendants' company were opposed to the suit.

Evidence was gone into, and the plaintiff on his cross-examination admitted that he held only £82 stock in the railway company, but was the holder of twelve £30 shares in the packet company, which was paying a dividend of £10 per cent; and that the excursion traffic had been continued for eight or ten years. He also admitted that the directors of the packet company had directed the institution of the suit, and indemnified him against costs. The Master of the Rolls dismissed the bill on the ground that the act sought to be restrained was not *ultra vires*.

THE LORD CHANCELLOR (WESTBURY): —

In this case I am asked to reverse the order of the Master of the Rolls dismissing this bill with costs. I desire it to be distinctly understood that my decision does not proceed upon the grounds stated by the Master of the Rolls. It is unnecessary for me to express any opinion upon the ground stated by His Honor which, if they are correct, would be confined entirely to this particular case, because they have reference to the peculiar constitution of the present company. But the ground upon which I proceed is entirely that of personal exception to the character of the plaintiff, and the

foundation of my decision is contained in this passage of the plaintiff's own examination not attempted to be qualified or questioned. He says in that examination, "The directors of the packet company directed the institution of this suit, and indemnify me against costs." It is not that they persuaded him to institute the suit, not that they instigated the suit, but that the directors of the other company have "directed the suit," and are to indemnify the plaintiff against the costs of it. To use a familiar expression, the plaintiff is the puppet of that company. It has been a very wholesome doctrine of this Court that one shareholder having in view the legitimate purposes of the company may be permitted in this Court to maintain a suit on behalf of himself and the other shareholders of the company, but the principle upon which that constructive representation of the shareholders is permitted indisputably requires that the suit shall be a *bona fide* one, faithfully, truthfully, sincerely directed to the benefit and the interests of those shareholders whom the plaintiff claims a right to represent. But can I permit a man who is the puppet of another company to represent the shareholders of the company against whom he desires to establish the interests and benefits of a rival scheme? That would be entirely contrary to the principle upon which this constructive representation has been permitted to be founded. When the plaintiff sues in that capacity any personal exception to the plaintiff remains, and it would be in direct contradiction of every principle of truth and justice if I permitted a man to come here clothed in the garb of a shareholder of company A., but who is in reality a shareholder in company B., and has no sympathy whatever with, no real purpose of promoting the interests of the other company. Such a thing would be so much at variance with the principles of a court of equity that it would be impossible for it to entertain a suit of that description which is a mere mockery, a mere illusory proceeding.

It is, however, said that this objection was considered some years ago in the well-known case of *Colman v. The Eastern Counties Railway Company* (10 Beav. 1), and was overruled by the late Master of the Rolls, Lord Langdale. All I mean to say about that case is that the objection there proceeded upon a different ground. The proposition of Lord Langdale is that it is no ground of personal exception to a plaintiff that he has been instigated to institute his suit by another company. If the proposition be limited to the extent of the words in which it is expressed, possibly there may be no exception to that proposition, but undoubtedly I would not assent to it if carried one jot beyond those limits. I desire, however, to point out again the wide difference which exists between a suit "directed" to be instituted by the directors of another company, and a suit which is *bona fide* instituted by the plaintiff, persuaded only to the institution of it by the arguments of another company. In the one case the suit is the suit of the plaintiff, and is for aught that appears

instituted at the peril of the plaintiff. In the other case, the whole origin of the suit and the direction and conduct of it emanate altogether from the other company, and the suit would have no existence whatever but for the order of the other company. I consider, therefore, that the language in which the Master of the Rolls expresses himself upon the proposition then submitted to him does not in the smallest degree interfere with or weaken the ground that I have taken.

I have nothing to do with the motives of the plaintiffs suing in this Court. If they come here in a *bona fide* character, the reason for their coming here is a matter beyond the province of a court of justice to inquire into (see Kerr, Inj. 549). But if a man comes here representing to me that he is a *bona fide* shareholder in a company, and that it is the *bona fide* suit of that company, and it turns out not to be the suit of that company, but in reality to be in its origin and its very birth and creation the suit of another company, then I repeat that this is an illusory proceeding, and ought not to be attended to by the Court. The well-known words, — the trite quotation, — will occur to the minds of those who hear me. *Fabula non est judicium in scena, non in foro res agitur*. If this gentleman be permitted to come and assume merely for the purpose of coming into this Court the garb of a shareholder, but at the same time explicitly announces, "This suit is not directed to the purposes of that company; I have nothing in common with the shareholders of that company; it has not emanated from the wish of the shareholders; it does not emanate from me as a shareholder; it is not my act; I am directed to do it by another party, and another body of men," then in point of fact the suit is not the expression of his own will, nor is it the legitimate prosecution of his own interests or his own objects, but it is the prosecution of the interests and objects of persons who have no right whatever to invoke the interference of this Court.

I treat this suit as an imposition on the Court. By these words I mean no reflection upon the plaintiff himself, because he has told the truth, and does not appear at any time to have desired to conceal it. But as he comes here in the character of a shareholder in the company, and tells me frankly that the institution of the suit is not his own act, but an act that he has been directed to do by the other company, then, using the words without offence, I denominate that suit an imposition on the Court, and I dismiss it accordingly, and affirm, though on a different ground, the order that has been made.

I refuse this application with costs.

ATWOOL v. MERRYWEATHER.

(L. R. 5 Eq. 464 n. 1867.)

THIS was a bill by the plaintiff, on behalf of himself and all other shareholders in the East Pant Du United Lead Mining Company, Limited, except the persons who were defendants thereto, against Samuel Merryweather, Henry Whitworth, and the East Pant Du Company, Limited, for the purpose of setting aside a contract for the sale and purchase of certain mines (for the purpose of purchasing and working which the company was formed), and compelling repayment from Merryweather and Whitworth of the sum of £3,940, or such portions as had been received by them, and a return of the 600 shares allotted to Merryweather.

The bill stated the incorporation, in 1863, of the company under the promotion of defendants Merryweather and Whitworth, who published a prospectus stating that the company was formed "for the purpose of purchasing and working the extensive and valuable mining sets known as the East Pant Du and Colomendy Lead Mines," and containing very favorable representations of the value of the mines, for the purchase of which the company was stated to have arranged for £7,000, — £4,000 to be paid in cash, and £3,000 in shares of the company.

The capital was fixed at £30,000, divided into 6,000 shares of £5 each; but only 2,000 shares had been taken altogether, on which £3,940 had been received. This money was paid to Merryweather, and 600 shares were registered in his name as paid up, in part payment of the £7,000, the alleged price of the mines.

Upon inquiries, the following circumstances were discovered in reference to the formation of the company: Merryweather applied to Whitworth to assist him in disposing of the mines in question, which he held under an agreement for a lease for twenty-one years, and had then discovered to be of no value. Merryweather proposed to dispose of his interest for £4,000, and the scheme concocted between himself and Whitworth was, that a company should be formed for the purpose of purchasing and working the mines, which were to be sold to such company for £7,000.

Of this money Merryweather was to get £4,000, while the remaining £3,000 was to be paid to Whitworth for his assistance in getting up the company. This agreement was concealed from the other directors, who were induced to believe that £7,000 was *bona fide* to be paid as the purchase-money.

A committee appointed at a meeting of the 1st of June, 1864, recommended by their report that the undertaking should be aban-

done, steps taken to relieve the company from any liability on the contract, and to recover back the money already paid by the shareholders.

At an extraordinary general meeting held on the 16th of June, 1864, a resolution was passed for receiving the report by a majority of the shareholders, and on the 30th of June, 1864, a bill was filed in the name of the company, alleging that the contract for the purchase of the mine had been fraudulently obtained by the defendant Merryweather, and was void, and that he was not entitled to the 600 shares allotted to him in respect of it, and praying that the purchase of the mine might be set aside, and the money paid returned to the shareholders who had advanced it.

On the 6th of July Merryweather and Whitworth caused notices to be issued for a meeting of the board of directors "to consider the course to be taken in reference to the chancery proceedings which have been instituted in the name of the company." At the meeting held on the 9th of July, Merryweather, Whitworth, and Ashworth (the three out of the six directors present at the meeting) passed a resolution that proceedings should be taken to get the bill taken off the file.

On the 1st of August, 1864, the Court was moved to take the bill off the file, but the motion was ordered to stand over till the next term, in order to give an opportunity to call a general meeting of the shareholders of the company to take the matter into consideration. A meeting was accordingly held on the 12th of October, "for the purpose of taking the said bill into consideration, and adopting such resolutions in reference thereto as the meeting may determine upon."

A resolution was proposed for adoption and continuing the Chancery proceedings, whereupon an amendment was proposed by Whitworth for referring all matters in difference between the shareholders and Merryweather to arbitration, and for staying all legal proceedings. This amendment was lost by 11 votes to 4 upon a show of hands, and the original resolution was carried by 10 to 4. A poll having been demanded upon the amendment, proxies were produced, and 14 persons, holding altogether 1070 shares and 324 votes, voted against the amendment, and 12 persons, holding 1490 shares and, having 344 votes, voted for the amendment. But excluding the votes of the defendants Merryweather and Whitworth, there was a majority of 86 votes against the amendment, and excluding only the votes of Merryweather there was a majority against it of 58 votes. The motion to take the bill off the file was renewed, and on the 5th of December, 1864, the Vice-Chancellor Sir W. P. Wood directed the bill to be taken off the file, but made no order as to the costs of the motion. See 2 H. & M. 254.

The present bill, which was filed on the 14th of December, 1864, by a holder of 100 shares in the company (purchased on the faith of the statements contained in the prospectus), suing on behalf of him-

self and all other the shareholders in the East Pant Du Company, except the defendants, against Merryweather, Whitworth, and the company as defendants, alleged that none of the shareholders in the company other than the defendants were desirous that the contract with Merryweather should be carried into effect, or that the relief prayed should not be granted; that the defendants had altogether 106 votes as shareholders in the company, and obtained proxies of the other shareholders who voted for the amendment by entering into engagements to indemnify them against loss; "and such votes, together with the aforesaid 106 votes of the said defendants, constitute a majority of the shareholders' votes in the company."

The bill also alleged, that even without such proxies the 106 votes held by the defendants made it impossible to obtain a fair decision at a general meeting.

The bill further charged, that the contract was obtained by misrepresentations as to the value, with full knowledge by the defendants that the mines were worthless, that £4,000 was an exorbitant price for them, and that no other portion of the £7,000 was ever intended to be treated as purchase-money of the mines, but was intended to be paid to Whitworth, the defendants having become promoters of the company solely for the purpose of raising the £7,000 for their own private benefit; that these facts were fraudulently concealed from the other directors and shareholders, and that if they had been disclosed the company never would have contracted to purchase the mines. The bill prayed that the contract for the purchase of the mine might be set aside, and a return of the money and shares received by Whitworth and Merryweather; and an injunction to restrain any proceeding to recover the balance of the purchase-money; compensation for all damage and loss occasioned to the company; and, if necessary, that the company might be dissolved and wound up under the direction of the Court.

Mr. Kay, Q. C., and Mr. Fry, for the plaintiff: — A sufficient case of fraud, collusion, and suppression has been shown to enable the Court to set aside the contract, and it is competent for an individual shareholder to maintain a suit for setting aside the contract, even if such suit were opposed by a majority of the shareholders. But that is not the case here, as, by excluding the votes of Merryweather, there is a majority in favor of setting aside the purchase and winding up the company. *Bromley v. Smith* (1 Sim. 8); *Preston v. Grand Collier Dock Company* (11 Sim. 327); *Hichens v. Congreve* (4 Russ. 562); *Beck v. Kantorowicz* (3 K. & J. 230); *Lovell v. Hicks* (2 Y. & C. Ex. 46, 481).

Mr. Druce, Q. C., and Mr. A. E. Miller, for Merryweather's assignee: — Upon the frame of the suit, the contract is not void, but merely voidable, and the majority of the shareholders may confirm it, and bind the whole body for that purpose. The suit, therefore, in its present form, is improperly framed: *Foss v. Harbottle*

(2 Hare, 461, 494); and the proper course would have been for the plaintiff to have filed a bill for leave to use the name of the company against the parties to the contract. Assuming the price paid for the mine to have been excessive, the plaintiff may have a case for making the directors account, but that affords him no *locus standi* as against the vendors for setting aside the contract. *Pulford v. Richards* (17 Beav. 87); *Fraser v. Whalley* (2 H. & M. 10).

SIR W. PAGE WOOD, V. C. :—

I think that, upon principle, a contract of this kind cannot stand, and that there is not such a defect in the constitution of the suit as would be fatal, according to the authority of *Foss v. Harbottle* (2 Hare, 461).

Looking at the facts as they come out, I am clearly of opinion that this arrangement, by which Merryweather was to have £4,000 and Whitworth £3,000, was concealed from everybody, and that Merryweather assisted in that concealment by allowing his name to appear as the sole vendor, and taking the purchase-money.

Upon such a transaction the Court will hold that the whole contract is a complete fraud. I do not in the least say that where persons with their eyes open know that the agent who secures them the bargain is going to take money for it, that would not be all right enough. If the company knew this gentleman was to have this amount as promotion-money, well and good. There might have been some difficulty, Mr. Whitworth being a director, if it had been a sale by Merryweather and Whitworth *eo nomine*, both of them together. If that had been the case, more might have been said about the frame of the suit. But here it is a simple fraud, and nothing else. Merryweather knowing Whitworth's position with regard to the company, and that as an honest man Whitworth was bound to tell the company what price he bought the mines for, agreed that the mine should be sold to the company for £7,000, and that the real price, £4,000, should not be disclosed to the company.

With regard to the frame of the suit, a question of some nicety arises, how far such relief can be given at the instance of a shareholder on behalf of himself and other shareholders, on the ground that the transaction might be confirmed by the whole body if they thought fit, and that the case would fall within *Foss v. Harbottle*, according to which the suit must be by the whole company. On the previous occasion, when it was desired to take proceedings to set aside this transaction, a gentleman took upon himself to file a bill in the name of the company. A motion was made to take that bill off the file, as the person filing the bill was not the solicitor of the company, and was not authorized to file the bill, and I ordered the bill to be taken off the file. There was a majority against setting aside this transaction. The number of votes for rescinding the transaction was 324, and 344 the other way. But Merryweather, in respect

of the shares obtained by this sale, which I have held cannot stand, had 73 votes, and Whitworth 28, making altogether 106 out of the 344. If I were to hold that no bill could be filed by shareholders to get rid of the transaction on the ground of the doctrine of *Foss v. Harbottle*, it would be simply impossible to set aside a fraud committed by a director under such circumstances, as the director obtaining so many shares by fraud would always be able to out-vote everybody else. I held on a former occasion, and I adhere to that decision, that the Court must first be satisfied that the plaintiffs were authorized to call themselves the company, the solicitor who put the bill upon the file having no retainer under the corporate seal.

This bill being filed by the plaintiff on behalf of himself and the other shareholders, it is suggested that the proper course would be to file a bill on behalf of himself and the other shareholders for leave to use the name of the company, in order to set aside that contract. I do not think that circuitous course is necessary under any circumstances. It is quite clear that it is not necessary here, because in this case the purchase of the mines is the only thing for which this company was incorporated. It appears to me that it would not be competent for a majority of the shareholders against a minority to say that they insist upon a matter of that kind where the whole inception of the company is simply a motion by a fraudulent agent, *qua* director, to confirm a purchase as made for £7,000, which was made for £4,000. The whole thing was obtained by fraud, and the persons who may possibly form a majority of the shareholders could not in any way sanction a transaction of that kind.

I think in this particular case it is hardly necessary to rely upon that, because, having it plainly before me that I have a majority of the shareholders, independent of those implicated in the fraud, supporting the bill, it would be idle to go through the circuitous course of saying that leave must be obtained to file a bill for the company, and *pro forma* have a totally different litigation. The only course now to take is to set aside the contract for sale and purchase of the mines, and cancel the agreement for such sale. The purchase-money must be repaid with interest, and the share certificates given to Merryweather, delivered up. The profits made by the company to be set off, and the company to have a lien for the balance. I shall also declare that the company ought to be wound up.

MENIER *v.* HOOPER'S TELEGRAPH WORKS.*(L. R. 9 Ch. Ap 350. 1874.)*

THE bill in this case was filed by E. J. Menier, on behalf of himself and all other shareholders of the European and South American Telegraph Company (except such of them as were defendants), against a company called Hooper's Telegraph Works, W. Hooper, H. W. Crace, and the European and South American Telegraph Company, and stated (amongst other things) as follows: That the European Company was incorporated in 1871 with the object of carrying out an agreement between the plaintiff, Menier, and one Bradford, and others, for constructing a submarine telegraph from Europe to South America, under certain conventions and decrees of foreign governments. The capital of the company was to be £1,250,000, in 62,500 £20 shares, and by the articles of association provisions were made for holding meetings of the company, at which every member was to have one vote for every share held by him. That Hooper's Company were to make and lay down for the European Company telegraph cables from Portugal to Brazil. That a prospectus was issued and many shares were applied for, but in consequence of objections raised the directors determined not to proceed with the allotment to the public, and the only shares allotted were 3,000 to Hooper's Company, 2,000 to the plaintiff, and 325 to thirteen persons, ten of whom were the directors. That £3 was paid on each of the shares so allotted. That one of the concessions for making the telegraph had been granted to the Baron de Maua, who was at one time chairman of the European Company, and this concession was claimed by the European Company. That a bill was filed in this Court by the European Company against the Baron de Maua, and another company, praying a declaration that the Baron de Maua was a trustee of the concession for the European Company, and that he might be restrained from transferring it to any one else. That a motion was made for an interlocutory injunction, and was refused by the Vice-Chancellor Malins, but on the balance of convenience only. That the European Company, and also Hooper's Company, at first intended to appeal against the order of the Vice-Chancellor Malins. That Hooper's Company afterwards determined not to appeal, and then the directors of the European Company determined not to appeal, but to take steps for winding up the European Company. That the plaintiff was resident in Paris and ignorant of English law, and believed that any arrangements adopted by the directors would be for the benefit of the European Company, and not exclusively in the interests of Hooper's Company. That the plaintiff wished the appeal to proceed, and offered to bear the costs.

That on the 12th of February, 1873, an extraordinary meeting of the European Company was held, at which a resolution was passed that the company be wound up voluntarily, and that the defendant Crace be the liquidator. That the resolution was proposed by one Kennedy, a director of Hooper's Company, and that Crace was secretary of Hooper's Company. That this resolution was confirmed at another extraordinary meeting, at which five persons only were present, of whom three were directors nominated by Hooper's Company, and one was Crace, the secretary. That the plaintiff protested against these proceedings. That the plaintiff was then ignorant, but had since discovered, that these proceedings took place through the influence of Hooper's Company. The bill then stated the circumstances of an arrangement between Hooper's Company and the Telegraph Construction and Maintenance Company and the Baron de Maua, under which it would be to the advantage of Hooper's Company that the agreement between them and the European Company should be put an end to, in order to benefit Baron de Maua's Company, and in order that Hooper's Company might sell to another company the cable they were making for the European Company. That these arrangements were concealed from the plaintiff and other shareholders in the European Company. That Hooper's Company procured the abandonment of the suit against the Baron de Maua, and the winding-up of the European Company, through the influence which they had as holders of 3,000 shares in the European Company, and through the influence of the directors nominated by them.

And the bill prayed that Hooper's Company might be declared not entitled to the benefit of the profits derived from the abandonment of the suit and other arrangements aforesaid, and might be declared a trustee of those profits for the plaintiff and the other shareholders in the European Company; and that the European Company and the defendants might be restrained from repaying to Hooper's Company any of the money paid on the allotment of shares in the European Company, and from disposing of the property of the European Company.

To this bill the defendants Hooper's Company and W. Hooper demurred for want of equity; and the defendants Crace and the European Company also demurred, and for cause of demurrer showed that the plaintiff had not made out such a case as entitled him to discovery or relief.

The Vice-Chancellor Bacon, on the 12th of January, 1874, overruled both demurrers; and the defendants appealed.

Mr. Fry, Q. C. and Mr. Millar, for Hooper's Company: A shareholder has a right to vote as he pleases, and to suit his own interests. If not, the Court in every case might have to interfere whenever there was a small majority, and consider what were the motives of each shareholder. If there was a suit by the company against any individual shareholder, he would not be disabled from voting. He is not

a trustee for any one, and he may vote against the interests of the company or of any of the other shareholders. No constructive trust can be raised: *Gray v. Lewis* (Law Rep. 8 Ch. 1035). In *Atwool v. Merryweather* (Law Rep. 5 Eq. 464, n.) the vote was impeached. If such a suit can be maintained, one shareholder may file a bill to have a certain contract set aside, and another to have it carried on. Such a suit can only be maintained by the company against the directors. At all events, the proceedings ought to be in the liquidation, and not by bill.

Mr. Kay, Q. C., Mr. Jackson, Q. C., and Mr. Everitt, for the plaintiff, were not called upon.

SIR W. M. JAMES, L. J.:—

I am of opinion that the order of the Vice-Chancellor in this case is quite right.

The case made by the bill is very shortly this: The defendants, who have a majority of shares in the company, have made an arrangement by which they have dealt with matters affecting the whole company, the interest in which belongs to the minority as well as to the majority. They have dealt with them in consideration of their obtaining for themselves certain advantages. Hooper's Company have obtained certain advantages by dealing with something which was the property of the whole company. The minority of the shareholders say in effect that the majority has divided the assets of the company, more or less, between themselves, to the exclusion of the minority. I think it would be a shocking thing if that could be done, because if so the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it. Assuming the case to be as alleged by the bill, then the majority have put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of the benefits ascertained for them in the best way in which the Court can do it, and given to them.

It is said, however, that this is not the right form of suit, because, according to the principles laid down in *Foss v. Harbottle* (2 Hare, 461) and other similar cases, the Court ought to be very slow indeed in allowing a shareholder to file a bill, where the company is the proper plaintiff. This particular case seems to me precisely one of the exceptions referred to by Vice-Chancellor Wood in *Atwool v. Merryweather* (Law Rep. 5 Eq. 464, n.), a case in which the majority were the defendants, the wrong-doers, who were alleged to have put the minority's property into their pockets. In this case it is right and proper for a bill to be filed by one shareholder on behalf of himself and all the other shareholders.

Therefore the demurrer ought to be overruled.

SIR G. MELLISH, L. J.:—

I am entirely of the same opinion. It so happens that the Hooper's

Company are the majority in this company, and a suit by this company was pending which might or might not turn out advantageously to this company. The plaintiff says that Hooper's Company, being the majority, have procured that suit to be settled upon terms favorable to themselves, they getting a consideration for settling it in the shape of a profitable bargain for the laying of a cable. I am of opinion that although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of the shareholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them. I also entirely agree that under the circumstances the suit is properly brought in the name of the plaintiff on behalf of himself and all the other shareholders.

The appeal will be dismissed with costs.

RUSSELL v. WAKEFIELD WATERWORKS COMPANY.

(*L. R.* 20 *Eq.* 474. 1875.)

DEMURRER.

The bill was filed by the plaintiff Henry Edward Russell on behalf of himself and all the other shareholders in the Wakefield Waterworks Company, except such of the defendants as were shareholders therein. The defendants were the said Wakefield Waterworks Company, the six directors of the same company, and the six promoters of an undertaking called the Wakefield and District New Water Bill.

The bill alleged that in the year 1874 the plaintiff became, by purchase, the duly registered owner of two fully paid up shares in the defendant company; that he afterwards heard of the payment of £5,500 to the promoters of the Wakefield and District New Water Bill to buy up their opposition; that in the balance-sheet for the half-year ending the 30th of June, 1874, there was the following entry in the capital account: "Parliamentary expenses, £8,517 14s. 9d."; and that the balance-sheet for the half-year ending the 31st of December, 1874, contained the following entry: "Parliamentary expenses, £9,083 10s. 11d.;" but that neither the balance-sheets nor the reports contained any explanation of these entries.

That the plaintiff's solicitor was informed by the secretary to the company that the sum of money paid to the promoters of the New Water Bill was included in the said sum of £8,517 14s. 9d., and charged to the capital account of June, 1874, and was paid by the directors in accordance with a resolution of the shareholders authorizing them to do all necessary acts, and in exercise of the lawful powers of the directors, and that the accounts containing the payments had since been passed and confirmed by the shareholders.

That the plaintiff had ascertained the following facts with reference to the transaction in question: During the session of Parliament in the year 1874 the defendants, the directors of the waterworks company, introduced a bill into Parliament authorizing them to make new reservoirs and works, and to raise more money, and to extend their limits of supply. During the same session a bill was introduced by the defendants, the promoters thereof, entitled the Wakefield and District New Water Bill, whereby it was proposed to erect waterworks of a similar character to those proposed by the defendant company for the supply of Wakefield and its neighborhood, and the promoters lodged a petition against the bill introduced by the said directors. On the 9th of April the promoters of the Wakefield and District New Water Bill withdrew their bill, such withdrawal being, as the plaintiff alleged, the result of a corrupt agreement made between the promoters of that bill and the directors of the defendant company, and which was in the following terms:—

“Terms of agreement between the Wakefield Waterworks Company and the Wakefield New Waterworks Company, made this 7th of April, 1874. The directors of the Wakefield Old Waterworks Company pledge their words as men of honor to proceed with their present application to Parliament for a supply of water from Langsett, and to use their utmost endeavors to secure the passing of their new bill in both Houses of Parliament during the present session, and will also pay to the directors of the Wakefield New Waterworks Company the sum of £5,500 for the costs and expenses incurred by them in connection with their present scheme, on condition that the Wakefield New Waterworks Company do forthwith withdraw their bill now before Parliament, and also withdraw at once the petition filed by the Wakefield New Waterworks Company and the inhabitants and consumers of water in Wakefield and its neighborhood, recently lodged or filed, and do use their influence, and do render all the assistance in their power to the directors of the Wakefield Old Waterworks Company (if and when required by them), at the expense of the said last-named company, to secure the passing of the present bill of the Wakefield Old Waterworks Company, now before Parliament, into law during the present session of Parliament. As witness the hands of the directors of the said two companies.” This agreement was signed by the several defendants the directors of the defendant company, and by the several defendants the promoters of the said bill, on the 7th of April, 1874, and on or about that date the directors of the defendant company paid to the promoters of the said bill out of the moneys of the defendant company the sum of £5,500.

The bill alleged that the promoters had express notice that the sum of £5,500 was paid out of the moneys of the defendant company, and that the directors had no authority so to pay the same; that no general meeting of the shareholders of the defendant company was

held, and no resolution passed for the purpose of authorizing the said agreement, or the payment of the said £5,500.

The plaintiff insisted that the transaction was illegal, and that its illegality was known to the directors and promoters; and he charged that the said sum of £5,500 was illegally paid out of the capital funds of the defendant company to the said promoters, and that they received such moneys with full notice and knowledge that the same was being so paid to them illegally, and by a breach of trust; that the promoters concurred in such a breach of trust; and that the directors and promoters were liable to repay the same.

The bill prayed that it might be declared that the agreement of the 7th of April, 1874, and the said payment of the sum of £5,500 were not within the powers of the defendant company; that an account might be taken of the moneys so paid, and that the defendants, the directors and promoters, might be ordered to repay the same.

The defendants demurred generally for want of equity.

SIR G. JESSEL, M. R.:—

I am of opinion that this bill is open to general demurrer on two grounds. The nature of the case which I suppose was intended to be made by the bill is that the waterworks company were not authorized to pay a sum of £5,500 to the promoters of an opposition company, who were opposing a bill for extending the powers of what I will call the old company, in order to buy off the opposition. The bill seeks to make liable both the directors of the old company who had paid the money and the promoters of the new company who received the money.

The two objections, which I think are well founded, are these: first, it is said there is no case made by the bill showing that the act complained of was beyond the powers of the old company, there being no direct allegation of fraud, although the word "corrupt" is used; and secondly, it is said that, even if the act complained of was shown to be *ultra vires*, it was a case in which the old company, which was an incorporated company, ought to sue. [His Honor then reviewed the allegations in the bill, and considered that the bill did not allege that the payment complained of was beyond the powers of the old company.]

A great deal of the argument in this case turned upon what may be described perhaps, in one sense, as a technical objection, but which is a very formidable and important objection. It was said that this is a bill to make a stranger pay back money belonging to a company which the stranger has illegally or improperly possessed himself of, or appropriated to his own use, and that any person who takes possession of a trust fund is liable to be sued in equity by the owner of the trust fund if he had notice at the time that it was a trust fund; and although he gave value, still in that way the bill can be maintained against him.

The answer was, that where the owner of the trust fund is an incorporated company, the corporation is the only party to sue; the stranger has nothing whatever to do with the individual corporators; and although in a sense it is their property, because individual corporators make up the corporation, yet in law it is not their property, but the property of the corporation, and therefore the right person to sue is the corporation, who is the *cestui que trust* or equitable owner of the fund. That I take to be the general rule of this Court. In this Court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this Court say that he is not a constructive trustee.

But the general rule being that the *cestui que trust* must sue, and not the individual corporator who has only an ultimate beneficial interest, the only point remaining to be considered is, whether there are any exceptions to the general rule. I entirely agree that the general rule, if I may say so respectfully, is correctly stated by Lord Justice James in the case of *Gray v. Lewis* (L. R. 8 Ch. 1035, 1050): "Where there is a body corporate capable of filing a bill for itself to recover property, either from its directors or officers, or from any other person, that corporate body is the proper plaintiff, and the only proper plaintiff." I do not understand the Lord Justice to intend to state more than the general rule, because he began by saying: "It is very important, in order to avoid oppressive litigation, to adhere to the rule laid down in *Mozley v. Alston* (1 Ph. 790), and *Foss v. Harbottle* (2 Hare 461), which cases have always been considered as settling the law of this Court." So that in laying down the general rule he did not intend to impeach or interfere with those cases, but only to express the result of them. In reality *Mozley v. Alston* (1 Ph. 790) simply affirmed *Foss v. Harbottle*, and therefore when you want to find the rule, you must look to *Foss v. Harbottle*, where you will find the general rule is that which I have stated. But that is not a universal rule; that is, it is a rule subject to exceptions, and the exceptions depend very much on the necessity of the case, — that is, the necessity for the Court doing justice.

In *Foss v. Harbottle* (2 Hare 491), Vice-Chancellor Sir J. Wigram says this: "The first objection taken in the argument for the defendants was that the individual members of the corporation cannot in any case sue in the form in which this bill is framed. During the argument I intimated an opinion to which, upon further consideration, I fully adhere, that the rule was much too broadly stated on the part of the defendants. I think there are cases in which a suit might properly be so framed. Corporations like this of a private nature are in truth little more than private partnerships, and in cases which may easily be suggested it would be too much to hold

that a society of private persons associated together in undertakings which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights *inter se* because, in order to make their common objects more attainable, the Crown or the Legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham, in *Walworth v. Holt* (2 My. & C. 619, 635) and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue." That I take to be the correct law on the subject.

It remains to consider what are those exceptional cases in which, for the due attainment of justice, such a suit should be allowed. We are all familiar with one large class of cases which are certainly the first exception to the rule. They are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation. Such a bill, indeed, may be maintained by a single corporator, not suing on behalf of himself and of others, as was settled in the House of Lords in a case of *Simpson v. Westminster Palace Hotel Company* (8 H. L. C. 712). If the subject-matter of the suit is an agreement between the corporation acting by its directors or managers and some other corporation or some other person strangers to the corporation, it is quite proper and quite usual to make that other corporation or person a defendant to the suit, because that other corporation or person has an interest, and a great interest, in arguing the question and having it decided, once for all, whether the agreement in question is really within the powers or without the powers of the corporation of which the corporator is a member. So that in these cases you must always bring before the Court the other corporation.

The cases are so numerous on this subject, that one ought not perhaps to refer to them. But I may mention a few of them. There is, first, the well-known case of *Hare v. London and Northwestern Railway Company* (2 J. & H. 80); there is the case of *Simpson v. Denison* (10 Hare, 51); there is the case of *Beman v. Rufford* (1 Sim. N. s. 550); and a vast number of cases as regards agreements between railway companies, which have been held to be *ultra vires*. When you have got the second corporation or person a party to the suit, it may happen that, in addition to the relief that you are entitled to as regards the first, you are entitled to have relief against the second for something that has been done under the

ultra vires agreement. You may be entitled to have money paid back which has been paid under the *ultra vires* agreement, as in the case of *Salomons v. Laing* (12 Beav. 377), and you may be entitled to have property returned or other acts done. If the detainer or holder of the money or property, that is, the second corporation or other person, is already a party, and a necessary party, to the suit, it would be indeed a lame and halting conclusion if the Court were to say it could do justice in a suit so framed by ordering the money to be returned or the property restored. It is a necessary incident to the first part of the relief which can be obtained by individual corporators, and will do complete justice on each side, and that has always been the practice of the Court. Therefore, in a case so framed there is no objection to a suit by an individual corporator to recover from another corporator, or from any other persons being strangers to this corporation, the money or property so improperly obtained. But that is not the only case. Any other case in which the claims of justice require it is within the exception.

Another instance occurred in the case of *Atwool v. Merryweather* (L. R. 5 Eq. 464 n.), in which the corporation was controlled by the evil doer, and would not allow its name to be used as plaintiff in the suit. It was said that justice required that the majority of the corporators should not appropriate to themselves the property of the minority, and then use their own votes at the general meeting of the corporation to prevent their being used by the corporation, and consequently in a case of that kind the corporators who form part of the minority might file a bill on their own behalf to get back the property or money so illegally appropriated. It is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shown either that the wrong-doer had command of the majority of the votes, so that it would be absurd to call the meeting; or it can be shown that there has been a general meeting substantially approving of what has been done; or it can be shown from the acts of the corporation as a corporation, distinguished from the mere acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and are not willing to sue. In all those cases the same doctrine applies, and the individual corporator may maintain the suit. As I have said before, the rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with. I do not intend by the observations I have made in any way to restrain the generality of the terms made use of by the learned judge who decided the case of *Foss v. Harbottle* (2 Hare, 461). Therefore I cannot help seeing it is quite possible so to amend this bill as to get rid of the difficulty which now exists, and I think that on this part of the case I should give leave to amend. Of course, in allowing the demurrer, I allow it in the usual form.

MASON v. HARRIS.

(L. R. 11 Ch. Div. 97. 1879.)

THIS was an action by Mason and Carter on behalf of themselves and all the shareholders in the Hull Central Drapery Company, Limited, except the persons named as defendants, against Harris, Shipstone, Mead, and the company, to set aside for fraud an agreement dated the 1st of May, 1877, and to restrain Harris from continuing to act as managing director of the company, and from negotiating or parting with any bills of exchange belonging to the company, and from retaining in his possession or using for his own purposes any property of the company, and from transferring or selling the vendor's shares in the company.

The allegations in the statement of claim were to the following effect: 1 and 2. By an agreement dated the 1st of May, 1877, between Harris, thereafter called the vendor, of the one part, and the plaintiff, Mason, Walker, the defendants, Shipstone and Mead and Hancock and Bainbridge, thereafter called the promoters, of the other part, it was agreed that the promoters should forthwith take the necessary steps for forming and incorporating a limited company under the above name, with a nominal capital of £30,000 in 3,000 £10 shares. The board of directors to consist of not more than five and not less than three members. Harris to be managing director for five years at a salary of £360 a year, with such further remuneration as therein mentioned if the dividend exceeded $7\frac{1}{2}$ per cent. Harris agreed to sell to the company when incorporated, and the promoters agreed that the company should purchase upon the terms therein mentioned, certain freehold business premises and the business and goods therein mentioned. The price to be for the freehold £7,300; for the trade fixtures, plant, and utensils, £675, for the stock in trade, £6,322; and for the goodwill, etc., £3,511. The sum of £5,000, part of this purchase-money, was to be paid in 1,000 shares treated as paid up to the extent of £5 per share. £5,000 more was to be paid within six months by equal weekly instalments, and the balance within twelve months, each instalment to be secured by a bill drawn by the vendor upon and accepted by the company. The unpaid purchase-money was to carry interest at £5 per cent per annum, and the 1,000 vendor's shares were not to be salable or transferable by the vendor till after the 14th of May, 1882. 3. The company was registered on the 12th of June, 1877. 4, 5, 6. The memorandum stated the objects of the company to be the purchasing the above premises and business and the carrying on such business, and the capital to be £30,000 in 3,000 £10 shares. The articles pro-

vided that the vendor's shares should not be transferable till after the 14th of May, 1882; and that on every question to be decided by a poll every member should have one vote for every two shares up to ten, one additional vote for every five shares beyond the first ten up to twenty, and an additional vote for every ten shares after twenty. 7. Shortly after the incorporation of the company the plaintiff Carter was appointed secretary, and is a holder of fifty-eight shares. 8. The plaintiff Mason was a director till shortly before the issue of the writ, and is a holder of twenty-five shares. 9, 10. The agreement of the 1st of May, 1877, was entered into on the faith of representations by Harris to the promoters that the profits for the years 1875 and 1876 had amounted to £3,511. The agreement between the parties was that the sum to be paid for the goodwill should be two years' profits, and £3,511 was inserted in the agreement as the price of the goodwill, on the vendor's accountant certifying that the profits for the two years had amounted to that sum. 11, 12. The company on its incorporation commenced business, and shortly afterwards Carter discovered that the profits of the business in 1875 and 1876 had been but a little over £300 a year. 13, 14. At the first meeting of the directors Carter informed them of the last-mentioned fact, and the directors directed that an accountant should be employed to ascertain the actual profit for 1875 and 1876, but no accountant has been appointed nor any further inquiry made into the matter. 15. Harris made the representation as to the profits knowing it to be false. 16. In September, 1877, the company being in want of money, the plaintiff Mason handed some title deeds of property of his own to Carter and Harris, that they might be deposited with the company's bankers to secure an advance to the company. Harris took the deeds and deposited them to secure the balance of his own account. 17, 18. On or about the 17th of November, 1877, Harris took away about £200 cash belonging to the company, and about the same time one of his sons by his direction took away some bills belonging to the company. At a meeting of the directors on the 19th of November Harris admitted that the money had been taken by him, and the bills for him, and promised to replace the cash and give the company an indemnity against the bills; but on the following day he refused to give such indemnity and still refuses to do so. 19. Another meeting of directors was held to investigate the matters in pars. 17 and 18; but in consequence of the conduct of Harris it had to be adjourned in confusion. Subsequently, on the 27th of November, Harris called in seven or eight persons, and compelled Carter under threats of personal violence to hand over the property of the company and leave the offices. 20. Harris, though often applied to, has not returned the deeds or bills. 21. Only one dividend has been paid. It was declared by the directors under the influence of Harris, though no profits had been made. 22. Harris has dealt with the vendor's shares in a way

prejudicial to the company. 23. Harris is in necessitous circumstances, and if allowed to retain the bills of exchange will negotiate them for his own private purposes, and if allowed to retain his position will further apply the property of the company to his own use. "24. The defendant Shipstone is a near relative, and the defendant Mead a shopman of the defendant B. Harris, and relative of the defendant Shipstone, and both are directors of the defendant company, and as directors they have aided and abetted the defendant B. Harris in the acts thereinbefore mentioned, and they refuse to take any steps whatsoever with reference to such acts, and they and the defendant B. Harris form a majority of the board of directors of the defendant company. 25. By reason of the 1000 vendor's shares which have been given to the defendant B. Harris, under clause 10 of the said agreement of the 1st of May, 1877, the defendant R. Harris has under the 86th article of the said articles of association 106 votes at any general meeting of the defendant company. 26. Besides the defendant B. Harris there are in all about thirty-one shareholders in the defendant company, holding in the aggregate about 311 shares. Out of the 311 shares, however, 151 or thereabouts are held by relatives or nominees of the defendant B. Harris, and the calls on such shares have not been duly paid up in accordance with the articles of association, and the holders of such shares are not entitled to vote at any general meeting of the defendant company. 27. Of the remaining 160 shares the plaintiffs and shareholders agreeing with them represent over 100 shares, and but for the votes of the defendant B. Harris would have a majority of votes at a general meeting of the defendant company. 28. In consequence of the preponderating number of votes possessed by the defendant B. Harris it is impossible for the plaintiffs or any shareholders to take any steps within the defendant company to remedy the acts of the defendant B. Harris hereinbefore mentioned, and if such acts be not forthwith remedied, and the defendant B. Harris removed from his office of managing director, or restrained from interfering in the affairs of the defendant company, the said company will be ruined and the plaintiffs' property therein destroyed."

The nature of the relief claimed is stated above.

Harris demurred on the ground that the allegations in the statement of claim did not show any cause of action in respect whereof the plaintiffs were entitled to sue, or to which effect could be given by the Court against him, and further, as to so much of the statement of claim as sought to have the agreement of the 1st of May, 1877, set aside, that the plaintiffs had no such interest therein as would entitle them to sue Harris in respect thereof, and that even if they ever had such interest, they had by their laches, delay, and acquiescence, disentitled themselves to the relief claimed, and as to the whole of the statement of claim, on the ground that the plaintiffs were not entitled, either alone or on behalf of the share-

holders or any of them, to sue Harris in respect of the matters in question.

Shipstone and Mead demurred on the ground that the facts alleged in the statement of claim did not show any cause of action to which effect could be given by the Court as against them, and because no such relief as thereby sought could be given at the suit of the plaintiffs, or any person or persons other than the company.

The company put in a statement of defence, submitting that no such relief as thereby sought ought to be or could be granted, if at all, except at the suit of the company.

The demurrers came on to be heard before Vice-Chancellor Malins on the 22d of January, 1879.

Higgins, Q. C., and Ingle Joyce, for the demurrer of Harris: The principal objection we raise is that the company ought to have been the plaintiffs in this action. In this respect it is like the case of *MacDougall v. Gardiner* (1 Ch. D. 13), where Lord Justice James said there might be a variety of things which a company might well complain of, but which they might not think it right to make the subject of litigation, and it was the company as a company which had to determine whether it would take steps itself to prevent the wrong being done. The form of the action is incorrect, as it is brought by a shareholder on behalf of himself and the other shareholders. That was held to be an improper form in *Gray v. Lewis* (Law Rep. 8 Ch. 1049) where Lord Justice James said it was very important to adhere to the rule in *Mozley v. Alston* (1 Ph. 790), and *Foss v. Harbottle* (2 Hare, 461), by which the law was settled that when there is a corporate body capable of filing a bill for itself to recover property, either from its directors or officers, or from any other person, then that corporate body is the proper plaintiff, and the only proper plaintiff. The same principle was applied in *Morris v. Morris* (before Vice-Chancellor Hall, January 15th, 1877). If the company is not made plaintiff, then it is the duty of the plaintiff to show that he has exhausted all the means in his power of obtaining a remedy through the company. *Atwool v. Merryweather* (Law Rep. 5 Eq. 464, n.). We say further, that even if the company were plaintiff no relief could be had, for that the agreement sought to be set aside was not an agreement made with the company at all.

Glasse, Q. C., and Wilkinson, in support of the bill: Harris having got a majority of the directors on his side, and a majority of the votes in his hands, there must be a liberty to sue in this way, otherwise a fraud committed by a majority of shareholders on the minority would be without remedy. In the case of *In re Imperial Bank of China and Japan* (Law Rep. 1 Ch. 339), liberty was given to two dissentient shareholders to take proceedings for setting aside a resolution come to by the majority of the shareholders, and in *Menier v. Hooper's Telegraph Works* (Law Rep. 9

Ch. 350), it was held that the bill was properly filed by one shareholder on behalf of himself and the other shareholders, against the company; and this was also the form of action in *Moffatt v. Farquhar* (7 Ch. D. 591). But if the Court should be of opinion that the company ought to be plaintiffs, then there is power given by Rules of Court, 1875, Order XVI., rule 2, to allow the company to be added as plaintiffs. This was done by the Master of the Rolls in *Duckett v. Gover* (6 Ch. D. 82). As to the objection that this is not a contract by the company, it was a contract entered into on behalf of the company before formation, adopted by the company when formed, and carried into effect by the funds of the company, so that there must be the same rights as if the company had originally been a party to it.

MALINS, V. C.:—

This company was originally promoted by Harris, and his views were carried into effect by the formation of the company, and by raising the money by calls, and the company took the contract upon themselves. That was the point I decided in *Spiller v. Paris Skating Rink Company* (7 Ch. D. 368), where I held that a company had power to ratify a contract made by the promoters before the company was in existence.

It is therefore a contract by Harris to sell, and by the company to purchase, the business. The bill then alleges that the value of the profits of the business were stated by Harris to have been £3,500 for two years, whereas they were in fact only a little over £300 per annum, and that the larger amount was stated by Harris wilfully and fraudulently, knowing it to be false. So here I have an allegation that these statements were wilfully and fraudulently made. It is the common case of a man selling a business, and grossly overrating the value of it. Then there is the charge of taking away cash and bills belonging to the company. These are allegations which for the present purpose I must assume to be true, and so also as to the charges introduced for the purpose of showing that the control of the company is in the hands of Harris, and the plaintiff is therefore unable to obtain redress. The claim, therefore, is, that the agreement may be delivered up to be cancelled on the ground of fraud, and that Harris may pay back the money which he has fraudulently obtained, and an injunction to restrain Harris from retaining in his possession or using for his own purposes any property of the company.

Now upon the allegations in this claim, if they turn out to be true, it is clear that Harris will be bound to pay back every farthing he received under the contract he has obtained, because he has obtained the money, according to these allegations, under false representations, and if he has to pay back the money, it will be to the company. I think in all such cases it is better that the company should be the plaintiffs, unless there are any special grounds making such a

course improper, as for instance, where there is a majority overbearing the minority. That was the case in *Atwool v. Merryweather* (Law Rep. 5 Eq. 464, n.), and so again in *Menier v. Hooper's Telegraph Works* (Law Rep. 9 Ch. 350), where the majority of a company proposed to benefit themselves at the expense of the minority; there the Court held that the bill was rightly filed by one shareholder on behalf of the others against the company.

Now, if it were necessary to decide the case, I should come to the conclusion that the plaintiffs are entitled to sustain the action. It does not come within those cases in which individual shareholders can sue instead of using the name of the company, and before *Duckett v. Gover* (6 Ch. D. 82) was cited, I suggested that it would be better to have the name of the company used, in order to have the real question decided. That would, I thought, be the most reasonable course, but I have been referred to that case of *Duckett v. Gover*. There the case was that a shareholder brought an action on behalf of himself and other shareholders against the company's solicitors and vendors, to set aside an alleged secret and fraudulent contract, and to recover a large sum of money for the company from their solicitors, the company being joined as defendants instead of plaintiffs. There was no reason alleged why the company had been made defendants instead of plaintiffs, nor was there any allegation that the plaintiff was unable to join them as plaintiffs. It was merely a mistake in the pleading, and the Master of the Rolls allowed the demurrer, and gave leave to the plaintiff to amend his writ and statement of claim by adding the company as plaintiffs. The Master of the Rolls in that case availed himself of the power given to the Court by Order XVI., rule 2, to add a plaintiff to the record where the action has been commenced through a mistake, and in this case I am of opinion that it would be better that the company who have been defrauded should be made plaintiffs. This appears to me to be a much stronger case than that which was before the Master of the Rolls. If it were necessary to decide now, I should overrule the demurrer, but I think it better under all circumstances to allow the demurrer, on the ground that the company ought to be made plaintiffs, and give the plaintiff liberty, if he chooses, to amend the record by adding the company as plaintiffs, and if the plaintiff does not amend within fourteen days, the action will be dismissed. I will follow the terms of the order in *Duckett v. Gover*, and as to costs, they will be reserved till the trial of the action.

An order in the same terms was made upon the other demurrer of Shipstone and Mead.

The plaintiffs appealed. The appeal was heard on the 5th of March.

Glasse, Q. C., and Wilkinson, for the appeal:—The demurrers ought to be overruled. The case is within *Atwool v. Merryweather* (Law Rep. 5 Eq. 464, n.), and *Menier v. Hooper's Telegraph Com-*

pany (Law Rep. 9 Ch. 350). We cannot sue in the name of the company when the majority of the directors support Harris and he commands a majority of votes. *Duckett v. Gover* (6 Ch. D. 82) has no bearing on the case, for the bill there had no allegations corresponding to paragraph 28 of the present statement of claim.

[Jessel, M. R.:— In that case the suit was framed as it was merely by an oversight on the part of the pleader. The company were in favor of the suit. I gave them an opportunity of deciding whether they would become plaintiffs, and they determined to become so.]

Higgins, Q. C., and Ingle Joyce, for the demurrer: The demurrer of Shipstone and Mead ought to be simply allowed. No case is made and no relief prayed against them.

[Jessel, M. R.:— The action seeks to set aside an agreement to which they were parties, and it alleges that they being directors aid and abet Harris in the unlawful acts complained of.]

Then as to the form of suit, we say that no relief can be given unless the company is plaintiff, and we contend that the plaintiffs ought to have used the name of the company: *Lindley on Partnership* (3d ed. p. 965). The Court, under Order XVI., rule 2, can order the company to be made plaintiff, and this was done in *Duckett v. Gover*.

[Jessel, M. R.:— The report is not as clear as it might be on this point, but the fact is that I gave fourteen days to see whether the company would not authorize their being joined as plaintiffs, and authority was duly obtained. There was afterwards an application to strike out the name of the company on the ground that they had been added as plaintiffs without authority. This application I refused, being satisfied that the company had duly sanctioned the step.]

We submit that, except in cases relating to proceedings *ultra vires*, an action cannot be commenced by shareholders without giving the company an opportunity of deciding whether it will sue. A poll might be taken, and if a majority of shareholders, exclusive of those under the control of the fraudulent persons, are in favor of the action, it may safely be commenced in the name of the company. *Lindley on Partnership* (3d ed.) p. 965.

[James, L. J.:— That is trying the question of fraud as a preliminary step for ascertaining the frame of the action in which it is to be tried.]

Pender v. Lushington (6 Ch. D. 70) supports the view that the plaintiffs could have used the name of the company.

JESSEL, M. R.:—

It is impossible on reading the judgment of the Vice-Chancellor not to see that he would have decided in favor of the plaintiffs if he had not thought himself compelled by a technical rule to decide against them. The question is whether he was so compelled. I

think that he was not, and I think that his conclusion in favor of the plaintiffs on the merits was correct. The rules applicable to the case are so well expressed in *MacDougall v. Gardiner* (1 Ch. D. 13), that I will not attempt to improve upon them. As a general rule the company must sue in respect of a claim of this nature, but general rules have their exceptions, and one exception to the rule requiring the company to be plaintiff is, that where a fraud is committed by persons who can command a majority of votes, the minority can sue. The reason is plain, as unless such an exception were allowed it would be in the power of a majority to defraud the minority with impunity. If the majority were to make a fraudulent sale and put the money into their own pockets, would it be reasonable to say that the majority could confirm the sale? That the Court can in such a case interfere at the suit of the minority is established by *Atwool v. Merryweather* (Law Rep. 5 Eq. 464, n.) and *Menier v. Hooper's Telegraph Company* (Law Rep. 9 Ch. 350). Here it is alleged that Harris, by means of fraudulent misrepresentations, sold property to the promoters of the company at a great overvalue, and received money which ought to be repaid to the company even if the transaction is affirmed. It appears from paragraph 24 that Harris has obtained such influence over the directors that a majority side with him, and will not do anything to remedy the wrong complained of. It further appears from paragraphs 25, 26, 27, and 28, that Harris holds such a number of shares that he can outvote those who wish the sale set aside. By reason, therefore, of his influence with the directors and his number of votes he has the sole control of the company. The case is precisely within the rules laid down by Lord Justice James in *Menier v. Hooper's Telegraph Company* (Law Rep. 9 Ch. 350). Is it reasonable to say to a minority of shareholders who are defrauded by the majority that they must apply to the company to institute proceedings? Even independently of the authorities I should be prepared to say no. Facts are alleged which show it to be impossible to get the company to impeach the acts complained of. On demurrer the truth of these allegations is admitted, and a demurrer on the ground that the suit is not in proper form cannot be sustained.

There is a minor point as regards the demurrer by Shipstone and Mead, and as to them it would have been better if the statement of claim had been more definite. They are stated to have been directors; it is not alleged in so many words, but must be taken to have been the case, that they were directors from the first. It is stated that the directors declared a dividend although no profits had been made. It is argued that they may have paid it out of their own pockets, and not out of the capital of the company, but that is not a natural reading of the statement. Then the 24th paragraph states that Shipstone and Mead have aided and abetted Harris in the acts hereinbefore mentioned. That refers to all the acts before men-

tioned, and taking it most strictly against the pleader, it sufficiently refers to the declaration of a dividend. Then it goes on to allege that "they refuse to take any steps whatever with reference to such acts." There is enough alleged against them to make them at all events liable to the costs of the action, and their demurrer cannot be allowed.

JAMES, L. J.:—

I am of the same opinion. No judge has ever laid down more strongly than I the rule that in general in these cases the company must be the plaintiff. But an exception to that rule was established by *Atwool v. Merryweather* (Law Rep. 5 Eq. 464, n.), and this case is within it.

It has been suggested that the Court has some means of directing a meeting to be called in which the corrupt shareholders shall not be able to vote. If the Court had any such power that mode of proceeding might furnish the best remedy in cases of this nature, but I cannot see how any directions for holding such a meeting could be given.

Mead and Shipstone are directors of the company, and are parties to the instrument which it is sought to set aside, and those circumstances alone might make them proper parties to the action. But there is also an allegation that they are aiding and abetting Harris, and their doing so is one reason why the action cannot be brought in the name of the company. I am, therefore, of opinion that their demurrer cannot be sustained.

BRAMWELL, L. J.:—

I am of the same opinion.

DODGE v. WOOLSEY.

(18 *Howard* (U. S.) 331. 1855.)

MR. JUSTICE WAYNE delivered the opinion of the court:—

It must often happen, under such a government as that of the United States, that constitutional questions will be brought to this court for decision, demanding extended investigation and its most careful judgment.

This is one of that kind; but fortunately it involves no new principles, nor any assertion of judicial action which has not been repeatedly declared to be within the constitutional and legislative jurisdiction of the courts of the United States, and by way of appeal or by writ of error, as the case may be, within that of the Supreme Court.

It is a suit in chancery, which was brought by John M. Woolsey, in the circuit court of the United States, for the district of Ohio,

seeking to enjoin the collection of a tax assessed by the State of Ohio on the Commercial Branch Bank of Cleveland, a branch of the State Bank of Ohio. He makes George C. Dodge, the tax collector, the directors of the bank, and the bank itself, defendants.

Woolsey avers that he is a citizen of the State of Connecticut, that he is the owner of thirty shares in the Branch Bank of Cleveland, that Dodge and the other defendants are all citizens of the State of Ohio, and that the Commercial Bank of Cleveland is a corporation, and was made such, as a branch of the State Bank of Ohio, by an act of the General Assembly of that State, passed the 24th of February, 1845, entitled, "An act to incorporate the State Bank of Ohio and other banking companies." He alleges that the Commercial Bank has in all things complied with the requirements of its charter, and that, by the 60th section of the act, it is declared that each banking company organized under it and complying with its provisions, shall, semi-annually, on the 1st of May and 1st of November of each year, those being the days for declaring dividends, set off to the State of Ohio six per cent on the profits, deducting therefrom the expenses and ascertained losses of the company, for six months next preceding each dividend day; and that the sums so set off shall be in lieu of all taxes to which said company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject; and that the cashier of such company shall, within ten days thereafter, inform the auditor of the State of Ohio of the amount set off, and shall pay the same to the treasurer of the State on the order of the auditor.

It is averred that the Bank of Cleveland had at all times complied with the requirements of the act. That, in the year 1853, it set off to the State six per cent on the two semi-annual dividends which had been made in that year, on the first day of May and the first day of November, which amounted in the aggregate to the sum of \$3,206.65. That the same had been notified to the auditor, and that the bank had always been ready to pay the same when demanded. The complainant then avers, that three years before bringing his suit, having full confidence that the State of Ohio would observe good faith towards the bank in respect to its franchises and privileges conferred upon it by the act of incorporation, and that it would adhere with fidelity to the rule of taxation provided for in the charter, he had purchased thirty shares of the capital stock of the bank, and that he was then the owner of the same. He further states, after he had made such purchases, that on the 17th of June, 1851, a draft of a new constitution had been submitted to the electors of the State for their acceptance or rejection, which, if accepted by a majority of the electors who should vote, was to take effect as the constitution of the State, on the 1st of September, 1851. It is admitted that it was accepted, that it became and now is the constitution of the State of Ohio. It is provided in sections two and three of the 12th article

of that constitution, that laws shall be passed, taxing by an uniform rule, all moneys, credits, investments in bonds, stock, joint-stock companies, or otherwise; and that the General Assembly shall provide by law for taxing the notes and bills discounted or purchased, money loaned, and all other property, effects, or dues whatever, without deduction, of all banks now existing, or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals. And in the 4th section of the 13th article of the constitution of 1851, it is further declared, that the property of corporations now existing, or hereafter created, shall be subject to taxation, as the property of individuals.

It appears also by the bill, that the General Assembly of the State of Ohio passed an act on the 13th of April, 1852, for the assessment and taxation of all property in the State, and for levying taxes on the same according to its true value in money, in which it is declared to be the duty of the president and cashier of every bank, or banking company, that shall have been, or may hereafter be, incorporated by the laws of the State, and having the right to issue bills for circulation as money, to make and return, under oath, to the auditor of the county in which such banks may be, in the month of May, annually, a written statement containing, first, the average amount of notes and bills discounted or purchased, which amount shall include all the loans or discounts, whether originally made, or renewed during the year, or at any time previous; whether made on bills of exchange, notes, bonds, mortgages, or other evidence of indebtedness, at their actual cost value in money; whether due previous to, during, or after the period aforesaid, and on which said banking company has, at any time, recovered or received, or is entitled to receive, any profit or other consideration whatever, either in the shape of interest, discount, exchange, or otherwise; and secondly, the average amount of all other moneys, effects, or dues of every description, belonging to such bank or banking company, loaned, invested, or otherwise used or employed, with a view to profit, or upon which such bank or banking company receives, or is entitled to receive, interest.

The act then makes it the duty of the auditors, in the counties in which a bank or banking companies may be, to receive from them returns of notes and bills discounted, and all other moneys and effects or dues, as provided for in the 19th section of the act, to enter the same for taxation upon the grand duplicate of the property of the county, and upon the city duplicate for city taxes, in cases where the city tax is not returned upon the grand duplicate, but is collected by city officers; which amounts so returned and entered shall be taxed for the same purposes and to the same extent that personal property is or may be taxed in the place where such bank or banking company is situated. It is then averred that the presi-

dent and cashier of the Commercial Bank of Cleveland, fearing the penalty imposed by the act for a refusal or neglect to make a return according to the act, did, in the month of May, in the year 1852, make a return, protesting against the right of the State to assess a tax upon the bank, other than that which was provided for in the charter of its incorporation, of the 24th of February, 1845. But it appears that the return so coerced from the president and directors of the bank had been assessed by the auditor, for the tax of 1852, at \$10,197.55, exceeding by \$7,526.72 the amount of tax for which the bank was liable under its charter, which George C. Dodge, as collector of taxes, seized and collected by distress on its moneys. It is also shown by the bill, that there has been another entry of taxation against the bank for the year 1853, of \$14,771.87, exceeding the sum to which it is liable under its charter by \$11,665.22 for that year.

It is against the collection of this tax that John M. Woolsey, as a stockholder in the bank, has brought this suit, claiming an exemption from it as a stockholder, upon the ground that the act of the General Assembly of the State of Ohio, and the tax assessed under it upon the bank, are in violation of the 10th section of the 1st article of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts. And he seeks the aid of the circuit court to enjoin Dodge, the defendant, from collecting the same from the bank, as collector of taxes, as he had threatened to do by distress, and as he had done for the assessed tax for the year 1852.

The complainant gives a further aspect to his suit which it is also proper to notice. It is, if the taxes are permitted to be assessed and collected from the bank, under the act of the 13th of April, 1852, it will virtually destroy and annul the contract between the State and the bank, in respect to the tax which the State imposed upon it by the charter of its incorporation, in lieu of all other taxes upon the bank or the stockholders thereof, on account of stock owned therein; that his stock will be thereby lessened in value, his dividends diminished; and that the tax is so onerous upon the bank that it will compel a suspension and final cessation of its business. He finally declares that as a stockholder, on his own behalf, he had requested the directors of the bank to take measures, by suit or otherwise, to assert the franchises of the bank against the collection of what he believes to be an unconstitutional tax, and that they had refused to do so.

To this bill the defendant, George C. Dodge, filed an answer. The other defendants did not answer. He admits the material allegations of the bill, except the allegation that the tax law of April 13, 1852, is unconstitutional; says that the act is in conformity with the constitution of Ohio, which took effect September 1, 1851, and that it is in harmony with the Constitution of the United States. He denies that any application was made by Woolsey to the directors of the bank, to take measures, by suit or other-

wise, to prevent the collection of the tax, and insists that this averment was inserted merely for the purpose of giving color to a proceeding in chancery. That the complainant would not have sustained an irreparable injury even if he had, as treasurer, proceeded to distrain for the tax; for that the bank would have had a remedy at law against him for all damages which might have been sustained in consequence of such distress, as he is worth, at a reasonable estimate, eighty thousand dollars after the payment of all his debts. And he insists that the complainant had not exhibited such a case as entitled him to the interposition of a court of equity. To this answer a general replication was filed. But it was agreed by the counsel in the cause, that the complainant had by his attorney addressed a letter to the Commercial Bank of Cleveland, to institute proper proceedings to prevent the collection of the tax by Dodge, in the same manner as has been done by the attorney of a stockholder in the Canal Bank of Cleveland, for a tax assessed upon it under the same act, and that the action of the board of the Commercial Bank, in answer to Woolsey's application, was the same as had been given by the directors of the Canal Bank. That resolution was in these words: "Resolved, that we fully concur in the views expressed in said letter as to the illegality of the tax therein named, and believe it to be in no way binding upon the bank; but, in consideration of the many obstacles in the way of testing the law in the courts of the State, we cannot consent to take the action which we are called upon to take, but must leave the said Kleman to pursue such measures as he may deem best in the premises."

Upon the foregoing pleadings and admission, the circuit court rendered a final decree for the complainant, perpetually enjoining the treasurer against the collection of the tax, under the Act of the 13th of February, 1852, and subjecting the defendant, Dodge, to the payment of the costs of the suit. From that decision the defendant, Dodge, has appealed to this court.

His counsel have relied upon the following points to sustain the appeal:—

1. The complainant does not show himself to be entitled to relief in a court of chancery, because the charter of the bank provides, that its affairs shall be managed by a board of directors, and that they are not amenable to the stockholders for an error of judgment merely. And that in order to make them so, it should have been averred that they were in collusion with the tax-collector in their refusal to take legal steps to test the validity of the tax.

2. It was urged that this suit had been improperly brought in the circuit court of the United States for the district of Ohio, because it is a contrivance to create a jurisdiction, where none fairly exists, by substituting an individual stockholder in place of the Commercial Bank as complainant and making the directors defendants; the stockholder being made complainant, because he is a citizen of

the State of Connecticut, and the directors being made defendants to give countenance to his suit.

3. It was said, if the foregoing points were not available to defeat the action, that it might be contended that the defendant was in the discharge of his official duty when interrupted by the mandate of the circuit court, and that the tax had been properly assessed by a law of the State, in conformity with its constitution of the 1st of September, 1851.

We will consider the points in their order. The first comprehends two propositions, namely: that courts of equity have no jurisdiction over corporations, as such, at the suit of a stockholder for violations of charters, and none for the errors of judgment of those who manage their business ordinarily.

There has been a conflict of judicial authority in both. Still, it has been found necessary, for prevention of injuries for which common-law courts were inadequate, to entertain in equity such a jurisdiction in the progressive development of the powers and effects of private corporations upon all the business and interests of society.

It is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. *Cunliffe v. Manchester and Bolton Canal Company* (2 Russ. & Mylne Ch. R. 480, n.); *Ware v. Grand Junction Water Company* (2 Russ. & Mylne, 470); *Bagshaw v. Eastern Counties Railway Company* (7 Hare Ch. R. 114); *Angell & Ames*, 4th ed. 424, and the other cases there cited.

It was ruled in the case of *Cunliffe v. The Manchester and Bolton Canal Company* (2 Russ. & Mylne Ch. R. 481), that where the legal remedy against a corporation is inadequate, a court of equity will interfere, and that there were cases in which a bill in equity will lie against a corporation by one of its members. "It is a breach of trust towards a shareholder in a joint-stock incorporated company, established for certain definite purposes prescribed by its charter, if the funds or credit of the company are, without his consent, diverted from such purpose, though the misapplication be sanctioned by the votes of a majority; and, therefore, he may file a bill in equity

against the company in his own behalf, to restrain the company by injunction from any such diversion or misapplication." In the case of *Ware v. Grand Junction Water Company* (2 Russell & Mylne), a bill filed by a member of the company against it, Lord Brougham said: "It is said this is an attempt on the part of the company to do acts which they are not empowered to do by the acts of Parliament," meaning the charter of the company; "so far I restrain them by an injunction." "Indeed, an investment in the stock of a corporation must, by every one, be considered a wild speculation, if it exposed the owners of the stock to all sorts of risk in support of plausible projects not set forth and authorized by the act of incorporation, and which may possibly lead to extraordinary losses." The same jurisdiction was invoked and applied in the case of *Bagshaw v. The Eastern Counties Railway Company*; so, also, in *Coleman v. The Same Company* (10 Beavan's Ch. Reports, 1). It appeared in that case that the directors of the company, for the purpose of increasing their traffic, proposed to guarantee certain profits, and to secure the capital of an intended steam-packet company, which was to act in connection with the railway. It was held, such a transaction was not within the scope of their powers, and they were restrained by injunction. And in the second place, that in such a case one of the shareholders in the railway company was entitled to sue in behalf of himself and all the other shareholders, except the directors, who were defendants, although some of the shareholders had taken shares in the steam-packet company. It was contended in this case that the corporation might pledge without limit the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability was to increase the traffic upon the railway, and thereby increase the traffic to the shareholders. But the Master of the Rolls, Lord Langdale, said, "There is no authority for anything of that kind."

But further, it is not only illegal for a corporation to apply its capital to objects not contemplated by its charter, but also to apply its profits. And therefore a shareholder may maintain a bill in equity against the directors and compel the company to refund any of the profits thus improperly applied. It is an improper application for a railway company to invest the profits of the company in the purchase of shares in another company. The dividend, says Lord Langdale, in *Solamons v. Laing*, 14 Jurist for December, 1850, which belongs to the shareholders, and is divisible among them, may be applied severally as their own property; but the company itself or the directors, or any number of shareholders, at a meeting or otherwise, have no right to dispose of his shares of the general dividends, which belong to the particular shareholder, in any manner contrary to the will, or without the consent or authority of that particular shareholder.

We do not mean to say that the jurisdiction in equity over corporations at the suit of a shareholder has not been contested. The cases cited in this argument show it to have been otherwise; but when the case of *Hodges v. The New England Screw Company et al.* was cited against it, (we may say the best argued and judicially considered case which we know upon the point, both upon the original hearing and rehearing of that cause), the counsel could not have been aware of the fact that, upon the rehearing of it, the learned court, which had decided that courts of equity have no jurisdiction over corporations as such at the suit of a stockholder for violations of charter, reviewed and recalled that conclusion. The language of the court is: "We have thought it our duty to review in this general form this new and unsettled jurisdiction, and to say, in view of the novelty and importance of the subject, and the additional light which has been thrown upon it since the trial, we consider the jurisdiction of this court over corporations for breaches of charter, at the suit of shareholders, and how far it shall be extended, and subject to what limits, is still an open question in this court." 1 Rhode Island Reports, 312, — rehearing of the case September term, 1853.

The result of the cases is well stated in Angell & Ames, paragraphs 391, 393. "In cases where the legal remedy against a corporation is inadequate, a court of equity will interfere, is well settled, and there are cases in which a bill in equity will lie against a corporation by one of its members." "Though the result of the authorities clearly is, that in a corporation, when acting within the scope of and in obedience to the provisions of its constitution, the will of the majority, duly expressed at a legally constituted meeting, must govern; yet beyond the limits of the act of incorporation the will of the majority cannot make an act valid; and the powers of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed, that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension, or simple negligence on the part of the directors."

We have then the rule and its limitation. It is contended that this case is within the limitation; or that the directors of the Commercial Bank of Cleveland, in their action in respect to the tax assessed upon it, under the Act of April 18, 1852, and in their refusal to take proper measures for testing its validity, have committed an "error of judgment merely."

It is obvious, from the rule, that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought; that the pleadings must be relied upon to collect

what they are, — to ascertain in what character and to what end a shareholder invokes the interposition of a court of equity, on account of the mismanagement of a board of directors, whether such acts are out of or beyond the limits of the act of incorporation, either of commission contrary thereto, or of negligence in not doing what it may be their chartered duty to do.

This brings us to the inquiry, as to what the directors have done in this case, and what they refused to do, upon the application of their co-corporator, John M. Woolsey. After a full statement of his case, comprehending all of his rights and theirs also, alleging in his bill that his object was to test the validity of a tax upon the ground that it was unconstitutional, because it impaired the obligation of a contract made by the State of Ohio with the Commercial Bank of Cleveland, and the stockholders thereof; he represents in his own behalf, as a stockholder, that he had applied to the directors requesting them to take measures, by suit or otherwise, to prevent the collection of the tax by the treasurer, and that they refused to do so, accompanying, however, their refusal with the declaration that they fully concurred with Woolsey in his views as to the illegality of the tax; that they believed it in no way binding upon the bank; but that, in consideration of the many obstacles in the way of resisting the collection of the tax in the courts of the State, they could not consent to take legal measures for testing it. Besides this refusal, the papers in the case disclose the fact that the directors had previously made two protests against the constitutionality of the tax, because it was repugnant to the Constitution of the United States, and to that of Ohio also, both concluding with a resolution that they would not, as then advised, pay the tax, unless compelled by law to do so, and that they were determined to rely upon the constitutional and legal rights of the bank under its charter. Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty, than of an error of judgment. It was a non-performance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency. It was a mistake, it is true, of what their duty required from them, according to their own sense of it, but, being a duty by their own confession, their refusal was an act outside of the obligation which the charter imposed upon them to protect what they conscientiously believed to be the franchises of the bank. A sense of duty and conduct contrary to it is not "an error of judgment merely," and cannot be so called in any case. It amounted to an illegal application of the profits due to the stockholders of the bank, into which a court of equity will inquire to prevent its being made.

Thinking, as we do, that the action of the board of directors was not "an error of judgment merely," but a breach of duty, it is our opinion that they were properly made parties to the bill, and that

the jurisdiction of a court of equity reaches such a case to give such a remedy as its circumstances may require. This conclusion makes it unnecessary for us to notice further the point made by the counsel that the suit should have been brought in the name of the corporation, in support of which they cited the case of the *Bank of the United States v. Osborn*. The obvious difference between this case and that is, that the Bank of the United States brought a bill in the circuit court of the United States for the district of Ohio, to resist a tax assessed under an act of that State, and executed by its auditor, and here the directors of the Commercial Bank of Cleveland, by refusing to do what they declared it to be their duty to do, have forced one of its corporators, in self-defence, to sue. If the directors had done so in a State court of Ohio, and put their case upon the unconstitutionality of the tax act, because it impaired the obligation of a contract, and had the decision been against such claim, the judgment of the State court could have been re-examined, in that particular, in the Supreme Court of the United States, under the same authority or jurisdiction by which it reversed the judgment of the supreme court of Ohio on the case of the *Piqua Branch of the State Bank of Ohio v. Jacob Knoop, Treasurer of Miami County* (16 How. 369).

But it was said in the argument, that this suit had been improperly brought in the circuit court of the United States, because it was a contrivance by Woolsey, or between him and the directors of the bank, to give that court jurisdiction, on account of their residence and citizenship being in different States. That the subject-matter of the suit was within the exclusive jurisdiction of the State courts, and that, if the jurisdiction in the courts of the United States was sustained, it would make inoperative to a great extent the 7th amendment of the Constitution of the United States and the 16th section of the Judiciary Act of 1789, this last being a declaratory act, settling the law, as to cases of equity jurisdiction, in the nature of a proviso, limitation, or exception to its exercise. And further, that it would make the judiciary of the United States paramount to that of the individual States, and the legislative and executive departments of the federal government paramount to the same departments of the individual States.

We first remark as to the imputation of contrivance, that it is the assertion of a fact which does not appear in the case, one which the defendants should have proved, if they meant to rely upon it to abate or defeat the complainant's suit, and that, not having done so, as they might have attempted to do, we cannot presume its existence. Mr. Woolsey's right as a citizen of the State of Connecticut, to sue citizens of the State of Ohio in the courts of the United States, for that State, cannot be questioned. The papers in the case also show, that the directors and himself occupy antagonist grounds in respect to the controversy which their refusal to sue

forced him to take in defence of his rights as a shareholder in the bank. Nor can the counsel for the defendant assume the existence of such a fact in the argument of their case in this court, in the absence of any attempt on their part to prove it in the circuit court.

We remark, as to the subject-matter of the suit being within the exclusive jurisdiction of the State courts, that the courts of the United States and the courts of the States have concurrent jurisdiction in all cases between citizens of different States, whatever may be the matter in controversy, if it be one for judicial cognizance. Such is the Constitution of the United States, and the legislation of Congress "in pursuance thereof." And when it was urged that the jurisdiction of the case belonged exclusively to the State courts of Ohio, under the 7th article of the amendments to the Constitution, and the 16th section of the Judiciary Act of 1789 was invoked to sustain the position, it seems it was forgotten that this court and other courts of the United States had repeatedly decided that the equity jurisdiction of the courts of the United States is independent of the local law of any State, and is the same in nature and extent as the equity jurisdiction of England, from which it is derived, and that it is no objection to this jurisdiction that there is a remedy under the local law. *Gordon v. Hobart* (2 Sumner, C. C. Rep. 401).

It was also said by both of the counsel for the defendant, and argued with some zeal, that if the court sustained the jurisdiction in this case, it would be difficult to determine whether anything and how much of State sovereignty may hereafter exist. We shall give to this observation our particular consideration, regretting that it should be necessary, but not doubting that such a jurisdiction exists at the suit of a shareholder, and that the appellate jurisdiction of this court may be exercised in the matter, not only without taking away any of the rights of the States, but by doing so giving additional securities for their preservation, to the great benefit of the people of the United States. If it does not exist and was not exercised, we should indeed have a very imperfect national government, altogether unworthy of the wisdom and foresight of those who framed it; incompetent, too, to secure for the future those advantages hitherto secured by it to the people of the United States, and which were in their contemplation, when, by their conventions in the several States, the Constitution was ratified.

Impelled then by a sense of duty to the Constitution, and the administration of so much of it as has been assigned to the judiciary, we proceed with the discussion.¹

The last position taken by the counsel for the defendant, now the appellant here, is, that George C. Dodge was in the discharge of his official duty as treasurer of Cuyahoga County in the State of Ohio, when interrupted by the mandate of the circuit court; that the tax

¹ Part of the opinion relating to the constitutional question is omitted.

in his hands for collection against the bank was regularly assessed under a valid law of the State, passed April 18, 1852, in conformity with the requisitions of the constitution, adopted June 17, 1851, which took effect 1st of September, 1851.

It was admitted, in the argument of it, that the only difference between this case and that of the *Piqua Branch of the State of Ohio v. Jacob Knoop* (16 Howard, 369), is, that the latter was a claim for a tax under a law of Ohio, of March 21, 1851, under the former constitution of Ohio, of 1802; and that the tax now claimed is assessed under the act of April 18, 1852, under the new constitution of Ohio.

Both acts, in effect, are the same in their operation upon the charter of the bank, as that was passed by the General Assembly of Ohio in the year 1845. Each of them is intended to collect, by way of tax, a larger sum than the bank was liable to pay, under the charter of 1845. This is admitted. It is not denied the record shows that the tax assessed for the year 1853 exceeds the sum to which it was liable, under its charter, \$11,565.22. The tax assessed is \$14,771.87. The tax which it would have paid, under the act of 1845, would have been \$3,206.65.

The fact raises the question whether the tax now claimed has not been assessed in violation of the 10th section of the 1st article of the Constitution, which declares that no State shall pass any law impairing the obligation of contracts.

The law of 1845 was an agreement with the bank, *quasi ex contractu*, — and also an agreement separately with the shareholders, *quasi ex contractu*, — that neither the bank as such, nor the shareholders as such, should be liable to any other tax larger than that which was to be levied under the 60th section of the act of 1845.

The 60th section is, “that each banking company under the act, on accepting thereof and complying with its provisions, shall semi-annually, on the days designated for declaring dividends, set off to the State six per cent on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject. The sum so set off to be paid to the treasurer on the order of the auditor of the State.” The act under which the tax of 1853 has been assessed is: “That the president and cashier of every bank and banking company that shall have been, or may hereafter be, incorporated by the laws of this State, and having the right to issue bills of circulation as money, shall make and return, under oath, to the auditor of the county in which such bank or banking company may be situated, in the month of May annually, a written statement containing, first, the average amount of notes and bills discounted or purchased, which amount shall include all the loans or discounts, whether originally made or renewed during the year aforesaid, or at any previous time, whether made on bills of ex-

change, notes, bonds, or mortgages, or any other evidence of indebtedness, at their actual cost value in money, whether due previous to, during, or after the period aforesaid, and on which such banking company has at any time reserved or received, or is entitled to receive, any profit or other consideration whatever; and, secondly, the average amount of all other moneys, effects, or dues of every description belonging to the bank or banking company, loaned, invested, or otherwise used with a view to profit, or upon which the bank, &c., receives, or is entitled to receive, interest."

The two acts have been put in connection, that the difference between the modes of taxation may be more obvious; and it will be readily seen, that the second is not intended to tax the profits of the bank, but its entire business, capital, circulation, credits, and debts due to it, being professed to be intended to equalize the tax to be paid by the bank with that required to be paid upon personal property. A careful examination of the two acts, and of the tabular returns annexed to this opinion, will prove that such equality of taxation has not been attained. It will show that the bank is taxed more than three times the number of mills upon the dollars that is assessed upon personal property, whatever may be comprehended under that denomination by the Act of the 13th April, 1852. But if it did not, it could make no difference in our conclusion. For the tax to be paid by the bank under the act of 24th February, 1824, is a legislative contract, equally operative upon the State and upon the bank, and the stockholders of the bank, until the expiration of its charter, which will be in 1866. No critical examination of the words, "that on the days designated for declaring dividends, to wit, on the first Monday in May and November of each year, the bank shall set off to the said State of Ohio six per cent on the profits, deducting therefrom the expenses and ascertained losses of said company for six months next preceding each dividend day, and that the sums or amounts so set off shall be in lieu of all taxes to which said company or the stockholders thereof on account of stock owned therein would otherwise be subject," could make them more exact in meaning than they are. The words "would otherwise be subject," relate to the legislative power to tax, and is a relinquishment of it, binding upon that Legislature which passed the act, and upon succeeding Legislatures, as a contract not to tax the bank during its continuance with more than six per cent upon its semi-annual profits. A change of constitution cannot release a State from contracts made under a constitution which permits them to be made. The inquiry is, Is the contract permitted by the existing constitution? If so, and that cannot be denied in this case, the sovereignty which ratified it in 1802 was the same sovereignty which made the constitution of 1851, neither having more power than the other to impair a contract made by the state Legislature with individuals. The moral obligations never die. If broken by States and nations,

though the terms of reproach are not the same with which we are accustomed to designate the faithlessness of individuals, the violation of justice is not the less.

This case is coincident with that of the *Piqua Branch of the State Bank of Ohio v. Knoop* (16 How. 369), decided by this court in the year 1853. It rules this in every particular; and to the opinion then given we have nothing to add, nor anything to take away. We affirm the decree of the circuit court, and direct a mandate accordingly.

MR. JUSTICE CATRON, MR. JUSTICE DANIEL and MR. JUSTICE CAMPBELL dissented.

RAILWAY COMPANY v. ALLERTON.

(18 Wall. 233. 1873.)

APPEAL from the Circuit Court for the Northern District of Illinois; the case being thus:—

The Chicago City Railway Company was a corporation owning a street railroad in Chicago. The directors of the company, without consulting the stockholders or calling a meeting of them, resolved to increase the capital stock of the company from \$1,250,000 to \$1,500,000. To this one Allerton, who was a stockholder, objected, and filed a bill praying for an injunction to prevent the increase. His position was that it could not be lawfully made without the concurrence of the stockholders, and in support of this view he relied upon the constitution of Illinois, adopted in July, 1870, by the thirteenth section of the eleventh article of which it is declared as follows:—

“No railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created; and all stock-dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void. The capital stock of no railroad corporation shall be increased for any purpose, except upon giving sixty days’ public notice in such manner as may be provided by law.”

He also relied on an act of the Legislature of Illinois, passed March 26, 1872, to execute and carry out the above provision of the constitution, by which, amongst other things, it was enacted that no corporation should change its name or place of business, increase or decrease its capital stock, or the number of its directors, or consolidate with other corporations, without a vote of two-thirds of the stock at a stockholders’ meeting.

The railway company, in its answer, relied upon its charter, granted February 14, 1859, the third and fourth sections of which were as follows:—

"Section 3. The capital stock of said corporation shall be one hundred thousand dollars, and may be increased from time to time, at the pleasure of said corporation.

"Section 4. All the corporate powers of said corporation shall be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint."

The position of the company was that the third section conferred an unrestricted right to increase the capital stock at will, and that the fourth vested this power in the board of directors, and that the constitutional provision and act above referred to, if applied to this corporation, would impair the validity of the contract. It was further set up, however, that the said provision did not apply to railways worked by horse-power. The court below decreed in favor of the complainant, and the company took the present appeal.

MR. JUSTICE BRADLEY delivered the opinion of the court: —

Without attempting to decide the constitutional question, or to give a construction to the act of the Legislature, we are satisfied that the decree must be affirmed on the broad ground that a change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by the charter cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose, and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association.

Authority to increase the capital stock of a corporation may undoubtedly be conferred by a law passed subsequent to the charter; but such a law should regularly be accepted by the stockholders. Such assent might be inferred by subsequent acquiescence; but in some form or other it must be given to render the increase valid and binding on them. Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members. The reason is obvious.

First, as it respects the purposes and object. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates, would be to commit them to an enterprise which they never embraced, and would be manifestly unjust.

Secondly, as it respects the constituency, or capital and membership. This is the next most important and fundamental point in the

constitution of a body corporate. To change it without the consent of the stockholders would be to make them members of an association in which they never consented to become such. It would change the relative influence, control, and profit of each member. If the directors alone could do it, they could always perpetuate their own power. Their agency does not extend to such an act unless so expressed in the charter, or subsequent enabling act; and such subsequent act, as before said, would not bind the stockholders without their acceptance of it, or assent to it in some form. Even when the additional stock is distributed to each stockholder *pro rata*, it would often work injustice, because many of the stockholders might be unable to take their respective shares, and might thus lose their relative interest and influence in the corporate concerns.

These conclusions flow naturally from the character of such associations; of course, the associates themselves may adopt or assent to a different rule. If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is, the stockholders) to make such a change by a stockholders' vote, in the regular way. Perhaps a subsequent ratification or assent to a change already made would be equally effective. It is unnecessary to decide that point at this time. But if it is desired to confer such a power on the directors, so as to make their acts binding and final, it should be expressly conferred.

Where the stock expressly allowed by a charter has not been all subscribed, the power of the directors to receive subscriptions for the balance may stand on a different footing. Such an act might, perhaps, be considered as merely getting in the capital already provided for the operations and necessities of the company, and, therefore, as belonging to the orderly and proper administration of the company's affairs. Even in such case, however, prudent and fair directors would prefer to have the sanction of the stockholders to their acts. But that is not the present case, and need not be further considered.

Decree affirmed.

DAVENPORT v. DOWS.

(18 Wall. 626. 1873.)

APPEAL from the Circuit Court for the District of Iowa.

Dows, a citizen of New York, in behalf of himself and all other non-resident citizens of Iowa, who were stockholders in the Chicago, Rock Island, and Pacific Railroad Company, filed a bill in the court below against the city of Davenport, and its marshal, to arrest the

collection of a tax, alleged to be illegal, levied by the said city for general revenue purposes, on the property of the company within its limits. The bill assigned as a reason for its being filed by Dows, a stockholder in the company, instead of by the company itself, that the company neglected and refused to take action on the subject. A demurrer was interposed to the bill, which was overruled, and on the defendants' refusing to answer over, the Circuit Court ordered that the collection of the tax be perpetually enjoined. From this, its action, the defendants appealed, insisting that the Circuit Court erred in overruling the demurrer, for three reasons:—

First. Because the railroad company was not made a party to the bill.

Second. Because the complainant had a complete remedy at law; and,

Third. Because the tax in question was a proper charge against the property of the corporation.

MR. JUSTICE DAVIS delivered the opinion of the court:—

It is unnecessary to notice the last two reasons assigned why the demurrer should not have been overruled, as the first is well taken. Indeed, it would be improper to pass on the merits of the controversy until the proper parties to be affected by the decision are before the court.

That a stockholder may bring a suit when a corporation refuses is settled in *Dodge v. Woolsey* (18 Howard, 340); but such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation. *Robinson v. Smith* (3 Paige, 222, 233); *Cunningham v. Pell* (5 Id. 607); *Hersey v. Veazie* (24 Maine, 1); *Charleston Insurance and Trust Co. v. Sebring* (5 Richardson, Equity, 342); *Western Railroad Co. v. Nolan* (48 New York, 573); *Bagshaw v. Eastern Union Railroad Co.* (7 Hare, 114-131).

In this case the tax sought to be avoided was assessed against the Chicago, Rock Island, and Pacific Railroad Company, and the decree rendered discharges the company from the payment of this tax. The

corporation, therefore, should have been made a party to the suit, and as it was not, the demurrer should have been sustained.

Decree reversed, and the cause remanded for further proceedings, in conformity with this opinion.

HAWES *v.* OAKLAND.

(104 U. S. 450. 1881.)

APPEAL from the Circuit Court of the United States for the District of California.

MR. JUSTICE MILLER delivered the opinion of the court : —

This is an appeal from a decree in chancery dismissing the complainant's bill, wherein he, a citizen of New York, alleges that he is a stockholder in the Contra Costa Water-Works Company, a California corporation, and that he files it on behalf of himself and all other stockholders who may choose to come in and contribute to the costs and expenses of the suit.

The defendants are the city of Oakland, the Contra Costa Water-Works Company, and Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, and John W. Coleman, trustees and directors of the company.

The foundation of the complaint is that the city of Oakland claims at the hands of the company water, without compensation, for all municipal purposes whatever, including watering the streets, public squares and parks, flushing sewers, and the like, whereas it is only entitled to receive water free of charge in cases of fire or other great necessity; that the company comply with this demand, to the great loss and injury of the company, to the diminution of the dividends which should come to him and other stockholders, and to the decrease in the value of their stock. The allegation of his attempt to get the directors to correct this evil will be given in the language of the bill.

He says that "on the tenth day of July, 1878, he applied to the president and board of directors or trustees of said water company, and requested them to desist from their illegal and improper practices aforesaid, and to limit the supply of water free of charge to said city to cases of fire or other great necessity, and that said board should take immediate proceedings to prevent said city from taking water from the works of said company for any other purpose without compensation; but said board of directors and trustees have wholly declined to take any proceedings whatever in the premises, and threaten to go on and furnish water to the extent of said company's means to said city of Oakland free of charge, for all municipal purposes, as has heretofore been done, and in cases other than cases of

fire or other great necessity, except as for family uses hereinbefore referred to; and your orator avers that by reason of the premises said water company and your orator and the other stockholders thereof have suffered, and will, by a continuance of said acts, hereafter suffer, great loss and damage."

To this bill the water-works company and the directors failed to make answer; and the city of Oakland filed a demurrer, which was sustained by the Court and the bill dismissed. The complainant appealed.

Two grounds of demurrer were set out and relied on in the Court below, and are urged upon us on this appeal. They are:—

1. That appellant has shown no capacity in himself to maintain this suit, the injury, if any exists, being to the interests of the corporation, and the right to sue belonging solely to that body.

2. That by a sound construction of the law under which the company is organized the city of Oakland is entitled to receive, free of compensation, all the water which the bill charges it with so using.

The first of these causes of demurrer presents a matter of very great interest, and of growing importance in the courts of the United States.

Since the decision of this court in *Dodge v. Woolsey* (18 How. 331), the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the Federal courts by a single stockholder of a corporation who possesses the requisite citizenship, in cases where the corporation whose rights are to be enforced cannot sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

This practice has grown until the corporations created by the laws of the States bring a large part of their controversies with their neighbors and fellow-citizens into the courts of the United States for adjudication, instead of resorting to the State courts, which are their natural, their lawful, and their appropriate forum. It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard, which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a Court of Chancery; namely, one against his own company, of which he is a corporator, for refusing to do what he has requested them to do; and the other against the party which

contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different State, though the real parties to the controversy could have no standing in that court. If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another State, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to the merits. In either event the whole case is prepared for hearing on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction.

That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted; and this is especially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. These are real contests, however, between the stockholder and the corporation of which he is a member.

The case before us goes beyond this.

This corporation, like others, is created a body politic and corporate, that it may in its corporate name transact all the business which its charter or other organic act authorizes it to do.

Such corporations may be common carriers, bankers, insurers, merchants, and may make contracts, commit torts, and incur liabilities, and may sue or be sued in their corporate name in regard to all of these transactions. The parties who deal with them understand this, and that they are dealing with a body which has these rights and is subject to these obligations, and they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation.

The principle involved in the case of *Dodge v. Woolsey* permits the stockholder in one of these corporations to step in between that corporation and the party with whom it has been dealing, and institute and control a suit in which the rights involved are those of the corporation, and the controversy is one really between that cor-

poration and the other party, each being entirely capable of asserting its own rights.

This is a very different affair from a controversy between the shareholder of a corporation and that corporation itself, or its managing directors or trustees, or the other shareholders, who may be violating his rights or destroying the property in which he has an interest. Into such a contest the outsider, dealing with the corporation through its managing agents in a matter within their authority, cannot be dragged, except where it is necessary to prevent an absolute failure of justice in cases which have been recognized as exceptional in their character and calling for the extraordinary powers of a court of equity. It is, therefore, always a question of equitable jurisprudence, and as such has, within the last forty years, received the repeated consideration of the highest courts of England and of this country.

The earliest English case in which this subject received any very careful consideration is *Foss v. Harbottle* (2 Hare, 461), where Vice-Chancellor Wigram gave a very full and able opinion. The case was decided in 1843, on a demurrer to the bill, which was brought by Foss and Turton, two shareholders in an incorporation called the Victoria Park Company, on behalf of themselves and all other stockholders, except those who were made defendants, against the directors and one shareholder not a director, and against the solicitor and architect of the company. The bill charged that the defendants concerted and effected various fraudulent and illegal transactions, whereby the property of the company was misapplied, aliened, and wasted; that there had ceased to be a sufficient number of qualified directors to constitute a board; and that the company had no clerk or office. It prayed for the appointment of a receiver and for a decree against the defendants to make good the loss. After showing that the case was one in which the right of action was in the company, the Vice-Chancellor says: "In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be, whether the facts alleged in this case justify a departure from the rule which *prima facie* would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative." Again, after pointing out that cases may arise where the claims of justice would be found superior to the technical rules respecting the mode in which corporations are required to sue, he adds:—

"But, on the other hand, it must not be without reasons of a very urgent character that the established rules of law and practice are to be departed from,—rules which, though in a sense technical, are founded on the general principles of justice and convenience; and the question is, whether a case is stated in this bill entitling the plaintiffs to sue in their private characters." He then, in an

elaborate argument, holds that the bill is fatally defective because it does not aver that there is no acting or *de facto* board of directors who might have ordered the bringing of this suit; and, secondly, that it was the duty of the plaintiffs — the two shareholders who complain of what had been done — to have called a meeting of the shareholders or attended at some regular annual meeting, and obtained the action of a majority on the matters in issue. The majority, he says, may have been content with what was done, and may have ratified the action of the board, in which case the whole body would have been bound by it.

The demurrer was sustained and the bill dismissed.

In the subsequent case of *Mozley v. Alston* (1 Ph. 790), decided in 1847, Lord Chancellor Lyndhurst says that “the observations of the Vice-Chancellor in *Foss v. Harbottle*, correctly represent what is the principle and practice of the court in reference to suits of this description.”

These cases have been referred to again and again in the English courts as leading cases on the subject to which they relate, and always with approval.

In *Gray v. Lewis*, decided in 1873, Sir W. M. James, L. J., said: “I am of opinion that the only person, if you may call it a person, having a right to complain was the incorporated society called Charles Lafitte & Co. In its corporate character it was liable to be sued and was entitled to sue; and if the company sued in its corporate character, the defendant might allege a release or a compromise by the company in its corporate character, — a defence which would not be open in a suit where a plaintiff is suing on behalf of himself and other shareholders. I think it is of the utmost importance to maintain the rule laid down in *Mozley v. Alston*, and *Foss v. Harbottle*, to which, as I understand, the only exception is where the corporate body has got into the hands of directors, and of the majority, which directors and majority are using their power for the purpose of doing something fraudulent against the minority, who are overpowered by them, as in *Atwool v. Merryweather*, where Vice-Chancellor Wood sustained a bill by a shareholder on behalf of himself and others, and there it was after an attempt had been made to obtain proper authority from the corporate body itself in a public meeting assembled.” Law Rep. 8 Ch. App. 1035.

But perhaps the best assertion of the rule and of the exceptions to it are found in the opinion of the court by the same learned justice in *MacDougall v. Gardiner*, in 1875 (1 Ch. D. 13). “I am of opinion,” he says, “that this demurrer ought to be allowed. I think it is of the utmost importance in all these controversies that the rule which is well known in this court as the rule of *Mozley v. Alston*, and *Lord v. Copper Miners’ Company*, and *Foss v. Harbottle*, should always be adhered to; that is to say, that nothing connected with internal disputes between shareholders is to be made the subject of a

bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent; unless there is something *ultra vires* on the part of the company *qua* company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company, — there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is a wrong to the company a subject-matter of litigation, or whether it will take steps to prevent the wrong from being done.”

The cases in the English courts are numerous, but the foregoing citations give the spirit of them correctly.

In this country the cases outside of the Federal courts are not numerous, and while they admit the right of a stockholder to sue in cases where the corporation is the proper party to bring suit, they limit this right to cases where the directors are guilty of a fraud or a breach of trust, or are proceeding *ultra vires*. *Marsh v. Eastern Railroad Co.* (40 N. H. 548); *Peabody v. Flint* (6 Allen (Mass.), 52). In *Brewer v. Boston Theatre* (104 Mass. 378), the general doctrine and its limitations are very well stated. See also *Hersey v. Veazie*, (24 Me. 9), and *Samuel v. Holladay* (1 Woolw. 400).

The case of *Dodge v. Woolsey*, decided in this court in 1855, is, however, the leading case on the subject in this country.

And we do not believe, notwithstanding some expressions in the opinion, that it is justly chargeable with the abuses we have mentioned. It was manifestly well considered, and the opinion is unusually long, discussing the point now under consideration with a full reference to the decisions then made in the courts of England. The suit — a bill in chancery — was brought in the Circuit Court for the District of Ohio, by Woolsey, a stockholder of the Commercial Bank of Cleveland, and a citizen of Connecticut, against that bank, its managing directors, and Dodge, tax-collector of the county in which the bank was situated, citizens of Ohio. The bill alleged that Dodge had levied upon property of the bank to make collection of a tax, which by the Constitution of the State of Ohio the bank was bound to pay; that in that respect the Constitution, then recently adopted, impaired the obligation of the contract of the State with the bank, contained in its charter. It appeared in the case that Woolsey had, by letter directed to the board of directors, requested them to institute proceedings to prevent the collection of this tax; but the board, by a resolution, declined to take any such action, while expressing their opinion that the tax was illegal. In the opinion of the court,

reciting the circumstances which justified its interposition at the suit of the stockholder, the allegation of the bill is adverted to, that if the taxes are enforced it will annul the contract with the State concerning taxation, and that the tax is so onerous upon the bank that it will compel a suspension and final cessation of its business. The following extract from Angell & Ames on Corporations is cited with approval: "Though the result of the authorities clearly is that in a corporation, when acting within the scope of, and in obedience to, the provisions of its constitution, the will of the majority, clearly expressed, must govern, yet beyond the limits of the act of incorporation the will of the majority cannot make the act valid, and the power of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension or simple negligence on the part of the directors." And the court adds: "It is obvious from this rule that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought."

A very large part of the opinion is devoted to the consideration of the high function of this court in construing the Constitution of the United States, and it is impossible not to see the influence on the mind of the writer of that opinion of the fact that the only question on the merits of the case was one which peculiarly belonged to the Federal judiciary, and especially to this court to decide; namely, whether the Constitution of the State of Ohio violated the obligation of the contract concerning taxation found in the charter of the bank.

As the law then stood there was no means by which the bank, being a citizen of the same State with Dodge, the tax-collector, could bring into a court of the United States the right which it asserted under the Constitution, to be relieved of the tax in question, except by writ of error to a State court from the Supreme Court of the United States.

That difficulty no longer exists, for by the act of March 3, 1875, c. 137 (18 St. pt. 3, p. 470), all suits arising under the Constitution or laws of the United States may be brought originally in the Circuit Courts of the United States without regard to the citizenship of the parties. Under this statute, if it had then existed, the bank, in *Dodge v. Woolsey*, could undoubtedly have brought suit to restrain the collection of the tax in its own name, without resort to one of its shareholders for that purpose.

And this same statute, while enlarging the jurisdiction of the Circuit Courts in cases fairly within the constitutional grant of power to the Federal judiciary, strikes a blow, by its fifth section, at improper

and collusive attempts to impose upon those courts the cognizance of cases not justly belonging to them. It declares, if at any time in the progress of a case, either originally commenced in a Circuit Court, or removed there from a State court, it shall appear to said court "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further, but shall dismiss the suit or remand it to the court from which it was removed."

It is believed that a rigid enforcement of this statute by the Circuit Courts would relieve them of many cases which have no proper place on their dockets.

This examination of *Dodge v. Woolsey* satisfies us that it does not establish, nor was it intended to establish, a doctrine on this subject different in any material respect from that found in the cases in the English and in other American courts, and that the recent legislation of Congress referred to leaves no reason for any expansion of the rule in that case beyond its fair interpretation.

We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization ;

Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders ;

Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders ;

Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction

of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit.

It is needless to say that appellant's bill presents no such case as we have here supposed to be necessary to the jurisdiction of the court.

He merely avers that he requested the president and directors to desist from furnishing water free of expense to the city, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given. No reason for declining. We have here no allegation of a meeting of the directors, in which the matter was formally laid before them for action. No attempt to consult the other shareholders to ascertain their opinions, or obtain their action. But within five days after his application to the directors this bill is filed. There is no allegation of fraud or of acts *ultra vires*, or of destruction of property, or of irreparable injury of any kind.

Conceding appellant's construction of the company's charter to be correct, there is nothing which forbids the corporation from dealing with the city in the manner it has done. That city conferred on the company valuable rights by special ordinance; namely, the use of the streets for laying its pipes, and the privilege of furnishing water to the whole population. It may be the exercise of the highest wisdom to let the city use the water in the manner complained of. The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California may take this view of it, and be content to abide by the action of their directors.

If this be so, is a bitter litigation with the city to be conducted by one stockholder for the corporation and all other stockholders, because the amount of his dividends is diminished?

This question answers itself, and without considering the other point raised by the demurrer, we are of opinion that it was properly sustained, and the bill dismissed, because the appellant shows no standing in a court of equity, — no right in himself to prosecute this suit.

Decree affirmed.

DIMPPELL *v.* RAILWAY COMPANY.

(110 U. S. 209. 1884.)

MR. JUSTICE FIELD delivered the opinion of the court:—

This suit was brought to set aside the contract by which the Ohio and Mississippi Railway Company became the owner of a portion of its road known as the Springfield Division, and to obtain a decree from the court declaring that the bonds issued by the company, and secured by a mortgage upon that division, are null and void. It was commenced by Dimpfell, an individual stockholder in the company, who stated in his bill that it was filed on behalf of himself and such other stockholders as might join him in the suit. Callaghan, another stockholder, is the only one who joined him. The two claim to be the owners of fifteen hundred shares of the stock of the company. The whole number of shares is two hundred and forty thousand. The owners of the balance of this large number make no complaint of the transactions which the complainants seek to annul. And it does not appear that the complainants owned their shares when these transactions took place. For aught we can see to the contrary, they may have purchased the shares long afterwards, expressly to annoy and vex the company, in the hope that they might thereby extort, from its fears, a larger benefit than the other stockholders have received or may reasonably expect from the purchase, or compel the company to buy their shares at prices above the market value. Unfortunately, litigation against large companies is often instituted by individual stockholders from no higher motive.

But assuming that the complainants were the owners of the shares held by them when the transactions of which they complain took place, it does not appear that they made any attempt to prevent the purchase of the additional road, and the issue by the company of its bonds secured by a mortgage on that road. We are not informed of any appeal by them to the directors to stay their hands in this respect, nor of any representation to them of a want of power to make the purchase and issue the bonds, nor of any probable injury which would arise therefrom. The purchase was made in January, 1875, and this suit was not commenced until September 12, 1878. In the mean time the new road purchased was operated as an integral part of the line of the Ohio and Mississippi Railway Company, without objection

from any stockholder. During these three years and eight months the earnings of the new road went into the treasury of the company, and the bonds issued upon the mortgage of that road, executed by the company in payment of its purchase, passed into the hands of parties who bought them on the faith of contracts which had been carried out without complaint from any one. Objections now come with bad grace from parties who knew at the time all that was being done by the company, and gave no sign of dissatisfaction. The purchase and the issue of the bonds were public acts known to them, and presumably to all the stockholders.

A stockholder must make a better showing of wrongs which he has suffered, and also of efforts to obtain relief against them, before a court of equity will interfere and set aside the transactions of a railway company or of its directors. It is not enough that there may be a doubt as to the authority of the directors or as to the wisdom of their proceedings. Grievances, real and substantial, must exist, and before an individual stockholder can be heard he must show, in the language of this court, that "he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity to his wishes." *Hawes v. Oakland* (104 U. S. 450).

In that case the court added that the efforts to induce such action as he desired on the part of the directors, or of the stockholders when that was necessary, and the cause of his failure, should be stated with particularity in his bill of complaint, accompanied with an allegation that he was a stockholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law.

According to the rule thus declared, and its value and importance are constantly manifested, the complainants have no standing in court, and the demurrer was properly sustained for want of equity in the bill.

This view renders it unnecessary to consider whether, as held by the court below, the railway company had the right to acquire the Springfield Division and to execute the mortgage and issue the bonds mentioned by virtue of the legislation of Illinois.

The complainants have not shown any ground which would justify the court, on this application, to inquire into the validity of the transaction.

Decree affirmed.

DUDLEY v. KENTUCKY HIGH-SCHOOL.

(9 *Bush* (Ky.), 576. 1873.)

JUDGE LINDSAY delivered the opinion of the court:—

The order from which this appeal is prosecuted must be regarded as final. The special demurrer to the jurisdiction of the court was sustained, and a judgment rendered against appellant for the costs of the entire proceeding. This is equivalent to dismissing the petition for the want of jurisdiction in the court, and effectually precludes appellant from taking further steps in this litigation to obtain the relief desired.

We are inclined to differ with the circuit court as to its want of jurisdiction to enjoin the collection of so much of appellant's subscription to the high-school as had not been reduced to a judgment in the Franklin Quarterly Court; but this question need not be considered in view of the fact that we feel satisfied, after a careful examination of the petition, that it sets out no cause of action, and that under the facts as presented, and the provisions of the act of the General Assembly incorporating the high-school, it cannot be so amended as to present a cause of action.

The object of the corporation was to establish and maintain a high-school, and not to make money, and it has no legal right to engage in speculations or investments in real estate for the last-named purpose; but it has the expressly delegated power "to receive and hold for the benefit of said high-school any lands, tenements, etc., . . . by gift, devise, donation, contract, or purchase." It is not complained that the house and lands purchased or about to be purchased from Gaines are not to be held for the benefit of the school, but that the corporation is unable to pay the contemplated price, and that the inevitable result of the purchase, if consummated, will be the bankruptcy of the corporation and the failure of the project to establish the school.

It may be conceded that the facts stated in the petition fully authorize this conclusion, and yet it does not follow that a court of equity has the power at the suit of a stockholder to interfere by injunction to prevent the corporation from executing a contract it has the lawful right to make.

It is true that a majority of stockholders, no matter how great, have not the right to divert the funds of a joint-stock incorporated company to any other than the purposes for which it was organized; and if such funds are about to be so diverted, a stockholder may file a bill in equity against the company to restrain it by injunction from such diversion or misapplication. *Bagshaw v. Eastern Counties*

Railway Co. (7 Hare, 114; 1 Beavan, 1); *March v. Eastern Railway Co.* (40 N. H. 548). But relief will not be granted unless the corporation is about to do some act outside of the scope of its authority, or in disobedience to the provisions of its constitution, for so long as it exercises the powers granted by the charter the acts of the company must be treated by the courts as the acts of all the stockholders.

Each and every stockholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation; and in cases involving no breach of trust, but only error or mistake of judgment upon the part of the directors who represent the company, individual stockholders have no right to appeal to the courts to dictate the line of policy to be pursued by the corporation. Angell and Ames on Corporations, sec. 393. Nor does the irregular manner in which the board of directors voted upon the proposition to make the purchase from Gaines authorize the chancellor to interpose to prevent its consummation. In the case of *Foss v. Harbottle* (2 Hare, 461), where the object of the bill in equity was to obtain relief against what was alleged to be a fraud committed by certain of the directors in an incorporated company, which fraud consisted in the sale to themselves, as representatives of the company, of lands in which they were individually interested, Vice-Chancellor Wigram held that although the act might be voidable by the company, yet, inasmuch as a majority of the proprietors might at a general meeting confirm it, he declined to interfere, saying, "While the court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit." So in this case, while it may be that the corporation has the right to avoid the purchase from Gaines, because one of the directors, without whose vote the proposition would have been rejected, was allowed to vote by proxy, yet it may be that Dudley is the only stockholder who disapproves of the purchase, and it might result that, at the time the court was protecting him against the payment of his subscription because of the unauthorized action of the directors, a majority of the stockholders in general meeting might ratify or have already ratified the purchase, and bound Dudley under his contract of subscription to submit to their will thus regularly and legally expressed.

It may be that the price agreed to be paid for the house and lands is greatly more than its value, but about this matter the opinion of the majority of the stockholders as expressed through the directory must control, and so far as the action of the court in this case is concerned it is immaterial whether the corporation acted wisely or unwisely in contracting a debt which possibly it will be unable to pay. The charter empowers it to make purchases of land, to contract

debts, and to issue bonds to an amount not over two thirds of the stock subscribed ; and if these powers are so exercised as to result in loss to the stockholders, it is a misfortune against which the courts can afford no protection.

Judgment affirmed.

DUNPHY v. TRAVELLER ASSOCIATION.

(146 Mass. 495. 1888.)

KNOWLTON, J. : —

The plaintiff brings this bill in equity, filed on December 18, 1886, as a stockholder in the defendant corporation, in behalf of himself and such other stockholders as may join him therein, alleging that Roland Worthington, one of the defendants, is the president and treasurer of said corporation, and is and for a long time has been the owner or controller of a majority of the shares of its capital stock, and by means of his ownership and control has chosen such persons to be directors as he has seen fit; and has improperly used and invested large sums of money of the corporation in certain specified ways and has kept other large sums of its money on hand drawing no interest, and has improperly received large amounts as his salary as president of the corporation, and as rent for a building owned by him and occupied by it, and has prevented the making of dividends upon capital stock, and has otherwise improperly managed the affairs of said corporation, to the great damage of the plaintiff and other stockholders. The plaintiff prays that said Worthington may be directed to render accounts of all his dealings with the assets of the corporation, and to refund all moneys improperly received or paid out by him, and to pay to certain stockholders such sums of money as shall equalize among all the stockholders certain distributions alleged to have been irregularly made among some of them, and to file a correct statement in detail of all the present assets and liabilities of the corporation, and hereafter annually to render accounts of his dealings with it as treasurer so long as he holds that office. He also prays that all funds of the corporation on hand in excess of five thousand dollars be ordered distributed among the stockholders at once, and that the corporation be required hereafter to declare dividends as often as the cash on hand shall equal five per cent of the amount of its capital stock, and for general relief.

Courts of equity are swift to protect helpless minorities of stockholders of corporations from the oppression and fraud of majorities. But the legal relations into which the members of a corporation enter require them to seek redress for supposed wrongs done them as stockholders from its officers, and from the corporation itself, before applying elsewhere. Misconduct in dealing with a corporation, or in management of its affairs, can affect its members only

through the corporation itself. The wrong in such a case is done primarily to the corporation. It is the duty of its directors or other managing officers to protect it from those who would do it injustice, and to seek compensation for any injury which it receives. Stockholders in a corporation impliedly agree, when they join it, to act in the corporate business through officers chosen to represent them, or by vote at meetings of the members regularly called. And so, if they deem themselves aggrieved as shareholders by the dealings of others with it, or by the acts of its managers, they are bound to seek their remedy through corporate channels, first, by application to the officers in charge, and failing there, secondly, to the corporation itself at a meeting of its members. If they can obtain justice at the hands of neither, the courts are open for their relief.

It would be contrary to the fundamental principles of corporate organization to hold that a single shareholder can at any time launch the corporation into litigation to obtain from another what he deems to be due to it, or to prevent methods of management which he thinks unwise. Intelligent and honest men differ upon questions of business policy. It is not always best to insist upon all one's rights; and a corporation acting by its directors, or by vote of its members, may properly refuse to bring a suit which one of its stockholders believes should be prosecuted. In such a case the will of the majority must control. It is only when the action of a corporation in refusing to proceed at the request of a stockholder is fraudulent as against him, or in disregard of his rights, that he can maintain a suit in his own name in the corporate right. The court cannot interfere with the management of corporations in matters which are properly within their discretion, so long as their discretion is fairly exercised, and it is always assumed until the contrary appears, that they and their officers obey the law, and act in good faith toward all their members. Even when their acts are *ultra vires*, or otherwise illegal, a complaining member must first seek his remedy within the corporation. The only exception to the rule that a stockholder must apply to the directors, and also if need be to the corporation, for redress of a wrong done it, before he can sue in the court of equity for himself and in behalf of other stockholders, is when it appears that such application would be unavailing to protect his rights. *Brewer v. Boston Theatre* (104 Mass. 378); *Allen v. Wilson* (28 Fed. Rep. 677); *Hawes v. Oakland* (104 U. S. 450); *Detroit v. Dean* (106 U. S. 537); *Dimpfell v. Ohio & Mississippi Railway* (110 U. S. 209), *Foss v. Harbottle* (2 Hare, 461). That may happen when the directors themselves are the wrongdoers, or in fraudulent combination with them, or when the corporation is controlled by them, or when it is necessary that action should be taken too speedily to leave time for a corporate meeting of stockholders.

In the case at bar there is an averment that Roland Worthington,

the alleged wrongdoer, has for a long time controlled a majority of the stock, and has elected such persons directors as he chose. That states a sufficient reason for not applying to the corporation, at a meeting of its members, for action to redress its wrong. But it is not alleged that the plaintiff ever attempted to move the directors in the interest of the corporation in the matters complained of, or that any good reason existed for his failure so to do. It does not even appear who or how many the directors are. It is said that the defendants Roland Worthington and Roland Worthington the younger are directors, but no others are named. The law provides that there shall be at least three, and it is to be presumed that there are others besides these defendants. Rev. Sts. c. 38, § 3; Pub. Sts. c. 106, § 25. There is no allegation of fraud or of wrongful combination with Roland Worthington, or of other misconduct on the part of any of them. And it cannot be presumed, in the absence of such averments, that they would refuse to do their duty if their attention were called to it. In *Brewer v. Boston Theatre* (*ubi supra*), — a much stronger case for the plaintiff than this, — an allegation was in these words; “a majority of the present board of directors of said defendant corporation are acting in the interest of, and are under the control of, Tompkins and Thayer,” the authors of the alleged frauds; and it was held that this allegation did not set forth a sufficient reason for bringing a suit without first requesting the directors to do it.

For the reasons which we have stated the demurrer must be sustained; but inasmuch as the bill may be amended, it may be well to consider some other objections made by the defendants.

It is contended that the bill is multifarious because it joins a claim for a restitution of property to the corporation with a claim for a payment of a dividend, and it is argued that in one part of his case the plaintiff moves through the equity of the corporation against a wrongdoer, and in the other he moves directly against the corporation itself. Looking at these parts of the case as separate proceedings, the argument has great weight. But we think the relief sought should be more broadly viewed. Upon the plaintiff's theory, he and other stockholders have been wronged by a course of proceeding in which all the defendants have participated. The substance of his complaint is that they have kept from him profits to which he is entitled, and he brings his bill to obtain those profits. He suggests misconduct of the corporation in refusing to make dividends of money which it has on hand, and alleges that Roland Worthington is the author of this misconduct, and has personally joined in it as controller of the corporate action. He suggests that other profits which should have been divided have been kept from him through misconduct of said Worthington in improperly paying out and investing money of the corporation, and in improperly appropriating its money to his own use, and that the corporation has participated in

this wrong in not preventing it nor taking measures to redress it. He prays for a dividend of moneys in the hands of the corporation which it refuses to divide, and of other moneys in the hands of Worthington which it should first obtain and then divide. Both branches of the case are essential to the complete relief of the plaintiff. Worthington and the corporation are parties interested in both, and there is no difficulty in trying both together. We are of opinion that the bill is not multifarious. See *Lenz v. Prescott* (144 Mass. 505); *Pointon v. Pointon* (L. R. 12 Eq. 547); *Coates v. Legard* (L. R. 19 Eq. 56); *Kennebec Railroad v. Portland Railroad* (54 Maine, 173).

It is obvious that the bill cannot be maintained to obtain payments for the stockholders Morss and Spaulding of the sums which it is alleged should have been paid them when distributions were made to other stockholders in 1869, 1870, and 1871. Their rights in relation to these distributions cannot be affected by this suit. They are not made parties to it, and this plaintiff is not in a position to represent their equity before the court.

It is contended that as to most of the matters complained of, the bill shows such knowledge and acquiescence on the part of the plaintiff as precludes him from obtaining equitable relief, and that even if he made objection, he is barred by reason of laches. It is a familiar principle of equity jurisprudence that long continued acquiescence in a course of conduct by one interested in it, especially when the rights of others are affected thereby, will induce the court to refuse him relief upon his subsequent complaint of it. *Dimpfell v. Ohio & Mississippi Railway* (110 U. S. 209); *Allen v. Wilson* (28 Fed. Rep. 677); *Burt v. British Assurance Association* (4 De G. & J. 158); *Ffooks v. South Western Railway* (1 Sm. & G. 142); *Graham v. Birkenhead Railway* (2 Macn. & G. 146).

As to the alleged improper investments, there is no averment that they were fraudulently made or that the plaintiff objected to them or that he was ignorant of them. The presumption is that he knew of them, and did not object; for they all appear upon the books of the corporation, of which he was a director from 1871 to 1879, and the treasurer from 1879 to 1884, and all but the last of them were made as long ago as 1881, and most of them many years before that time. So long as he was a director or the treasurer, it was his duty to know of all the investments of the company's money, and to object to them and endeavor to prevent them if they were illegal or improper. In view of his official position and the lack of any averment or intimation that he objected to these investments until the expiration of more than three years after the last was made and more than thirteen years after the first during his directorship, he can hardly complain if he is held to have so far acquiesced in them as to have lost his right to recover on account of them. If he intended to rely on them as a cause of action he has certainly been guilty of

laches and for that reason he cannot be heard to complain of them at this late day. *Peabody v. Flint* (6 Allen, 52); *Royal Bank of Liverpool v. Grand Junction Railroad* (125 Mass. 490).

These considerations apply also to some of the other matters relied on, especially to the increase of Worthington's salary as president for a term which ended May 15, 1875, to the loan of money obtained from Job E. Worthington in 1874, and to most of the payments of interest upon it.

Demurrer sustained.

DURFEE v. RAILROAD COMPANY.

(5 Allen, 230. 1862.)

BILL IN EQUITY brought by the plaintiff, a minor, by John S. Brayton, his guardian, to restrain the defendants, a railroad corporation established under the law of this Commonwealth, and the directors thereof, from proceeding to act under St. 1861, c. 156, authorizing them to extend their railroad to the line of the State of Rhode Island, or under St. 1862, c. 149, authorizing their union with the Newport and Fall River Railroad Company.

The bill alleged in substance that by sundry acts of the general court the defendant railroad company were established as a corporation and authorized to construct a railroad from Fall River to Boston; that the plaintiff is the owner of three hundred and thirty-nine shares of their capital stock; that they, in and by their business over their road, have accumulated a surplus fund of over \$700,000; that the plaintiff has a vested interest in his proportionate share thereof; that they have no right, without his consent, to divert their income or surplus fund, or employ it in a new and hazardous enterprise and speculation, different from that set forth in the acts establishing them as a corporation, or to lend their funds to or unite with another railroad company; that in conformity with a previous vote, and against his protest, they presented a petition to the Legislature for authority to build a railroad from Fall River to Newport, Rhode Island; that the Newport and Fall River Railroad Company, a corporation established by the Legislature of Rhode Island, were authorized to build a railroad in that State from Newport to the line of Massachusetts, to connect with a railroad which might be constructed in Massachusetts, to the same point; that in May, 1860, the Newport and Fall River Railroad Company were authorized to unite with a corporation which might be empowered in this Commonwealth to build such railroad; that thereafter St. 1861, c. 156, was passed, authorizing the defendant railroad company to extend their railroad to the line of the State of Rhode Island; that this statute was accepted at a special meeting of their stockholders, the plaintiff

protesting and voting against such acceptance; that they have filed the location of the extension of their road, under said statute; that, in conformity with a petition by them, St. 1862, c. 149, was passed, authorizing them to unite with the Newport and Fall River Railroad Company, and providing that if the two corporations should vote to unite and form one corporation, the directors of the defendant railroad company should forthwith cause a meeting to be called of the stockholders in the new corporation, for choice of officers; and that their directors have called a meeting of stockholders to act upon the question of accepting St. 1862, c. 149, and, under a vote of the stockholders, have issued bonds to the amount of \$400,000, and with the proceeds thereof are now building the extension of their railroad not only to the line of Rhode Island, but to Newport, either by assuming the work themselves, or by lending their funds or credit. The prayer was for an injunction restraining the defendant railroad company from applying their funds or pledging their credit for the purposes set forth, and from uniting with the Newport and Fall River Railroad Company, and restraining their directors from causing a meeting of the stockholders of such new corporation to be held for the choice of officers, and for further relief.

The answer of the defendant railroad company alleged that their corporation was formed and created by a number of smaller railroads, chartered for shorter routes, being united for the public good into one, and that these unions were authorized by acts similar to the one now in controversy, and were effected by majority votes merely; that the bulk of the plaintiff's shares were held by him by reason of his having been an owner of shares in one of said smaller railroads and that the purchase of the residue was made with knowledge of the intention of the corporation to extend their road to Newport, and of proceedings pending for that purpose; denied any loan of their credit or funds to any other railroad company, or any intention to employ their funds in any hazardous enterprise, contrary to law, or that the acts of the General Court referred to depend for their validity upon the plaintiff's consent; admitted the accumulation of a surplus fund, and the various corporate and legislative proceedings as alleged, and the issue of bonds to the amount of \$219,000, but not of \$400,000, and denied the alleged use of the proceeds thereof; admitted that they have aided the Newport and Fall River Railroad Company in constructing their railroad, but alleged that such aid has been rendered only in accordance with an indenture entered into between the two corporations, the material parts of which are copied in the margin, in pursuance of which they have advanced the sum of \$200,000.

The railroad company also demurred to the bill for multifariousness, and the directors demurred on the ground that they were improperly joined as parties.

The case was heard upon the bill, answer, and demurrers before

the chief justice, and reserved for the determination of the whole court.

BIGELOW, C. J.:—

We do not deem it necessary to consider the questions raised by the demurrer to the bill, nor to discuss the nature or extent of the jurisdiction of this court in equity over corporations, at the suit of one or more of their stockholders, in cases where there has been an excess or abuse of the power or authority conferred by legislative grants. In the view which we have taken of the merits of the case, these questions become immaterial.

The case for the plaintiff mainly rests on the single proposition of law that a corporation established by the Legislature of this Commonwealth, by acts which, under St. 1830, c. 81, are subject to alteration, amendment, or repeal, at the pleasure of the Legislature, cannot engage in any new enterprise or enter upon any new undertaking, in addition to that contemplated by and embraced in the original charter of the company, against the consent of any one of its stockholders, although such new enterprise or undertaking is of the same kind with that for which the corporation was originally established, and is authorized, sanctioned, and adopted by an express legislative grant, and by a vote of the majority of the stockholders duly ascertained according to law.

In endeavoring to ascertain whether this proposition can be supported on sound legal principles, it does not seem to us to be necessary to enter upon any extended discussion of the extent of the right reserved by the general laws to the Legislature to modify or repeal the charters of corporations without or against their consent. No question arises here between the Legislature and the corporation. The latter have assented, in the mode provided by law, to the change in their rights, powers, and duties which have been created by the act set forth in the bill, and have thereby accepted the modifications of their original contract with the Commonwealth, which result from the new provisions of law which they have thus adopted and sanctioned. Nor are we called on to determine the effect which such a legislative act would have upon a previously existing executory contract entered into with the corporation; as, for instance, an agreement to subscribe for stock and to become a member of a corporate body, created or to be established for certain distinct and designated objects. No such question arises in the present case. The plaintiff had no executory agreement with the defendants at the time the act in question was passed by the Legislature, or when it was approved and accepted by a legal vote of the corporation. He was then the absolute owner of shares, and as such was a constituent member of the body corporate, clothed with all the rights and privileges and subject to all the duties and obligations of a stockholder. These, therefore, constituted the extent and the measure of his responsibility to the corporation, and of their liability and legal obligations

to him. In this view, the gist of the present inquiry seems to us to embrace a much narrower range than that which was taken in the very elaborate and extended argument submitted by the learned counsel for the plaintiff. It appears to us that when we shall have ascertained and defined with precision and accuracy the nature of the contract, which subsists, under the statutes of this Commonwealth, between a corporation and one of its members solely by virtue of his being a proprietor of shares in the capital stock, we shall have gone very far towards a final adjudication of the rights of the respective parties, so far as they are involved in the present controversy.

We suppose it may be stated as an indisputable proposition, that every person who becomes a member of a corporation aggregate by purchasing and holding shares agrees by necessary implication that he will be bound by all acts and proceedings, within the scope of the powers and authority conferred by the charter, which shall be adopted or sanctioned by a vote of the majority of the corporation, duly taken and ascertained according to law. This is the unavoidable result of the fundamental principle that the majority of the stockholders can regulate and control the lawful exercise of the powers conferred on a corporation by its charter. A holder of shares in an incorporated body, so far as his individual rights and interests may be involved in the doings of the corporation, acting within the legitimate sphere of its corporate power, has no other legal control over them than that which he can exercise by his single vote in the meetings of the company. To this extent, he has parted with his personal right or privilege to regulate the disposition of that portion of his property which he has invested in the capital stock of the corporation, and surrendered it to the will of a majority of his fellow corporators. The *jus disponendi* is vested in them so long as they keep within the line of the general purpose and object for which the corporation was established, although their action may be against the will of a minority, however large. It cannot, therefore, be justly said that the contract, express or implied, between the corporation and the stockholders is infringed or impaired by any act or proceeding of the former which is authorized by a majority, and which comes within the terms of the original statute creating and establishing their franchise, and conferring on them capacity to exercise control over rights and property of their members. On the contrary, the fair and reasonable implication resulting from the legal relation of the stockholder and the corporation is, that the majority may do any act either coming within the scope of the corporate authority, or which is consistent with the terms and conditions of the original charter, without and even against the consent of an individual member.

Such being the nature of the contract which subsists between the corporation and each of its members, we have only to inquire, in

the present case, whether it has been in any respect violated by the present defendants. The answer to this inquiry will be found in the interpretation which is put on that clause of the general laws of this Commonwealth already cited, by which a right is reserved to the Legislature to amend, alter, or repeal any act of incorporation which has been established by its authority since the enactment of that provision in St. 1830. Whatever may be the extent of the authority which is thereby retained by the Legislature to modify or change the charters of corporations without or against their consent, there would seem to be no reason to doubt that, with the concurrence of the corporation manifested in the mode pointed out by law, the Legislature may make any alteration in or addition to the power and authority conferred by the original act of incorporation, and not foreign to the purposes and objects for which it was enacted, and which it was designed to accomplish, which may seem to be expedient or necessary. No breach of contract would be thereby occasioned. Such action would be in precise accordance with the terms on which the grant of the franchise was made. In creating a corporation, no contract is made by the Legislature with the individual members or stockholders, any further than they are represented by the artificial body which the act of incorporation calls into being. They have no other rights except those which exist or grow out of the constitution of the body corporate of which they are members. To this only can we look, in order to ascertain whether there has been any breach of contract or violation of chartered rights. It constitutes, of itself, the contract by which the rights of all parties are to be governed. When, therefore, it is expressly provided between the Legislature on the one hand and the corporation on the other, as part of the original contract of incorporation, that the former may change or modify or abrogate it or any portion of it, it cannot be said that any contract is broken or infringed when the power thus reserved is exercised with the consent of the artificial body of whose original creation and existence such reservation formed an essential part. The stockholder cannot say that he became a member of the corporation on the faith of an agreement made by the Legislature with the corporation, that the original act of incorporation should undergo no change except with his assent. Such a position might be asserted with more plausibility, if there was an absence of a clause in the original act of incorporation providing for an alteration in its terms. In such a case it might perhaps be maintained that there was a strong implication that the charter should remain inviolate, and that the holders of shares invested their property in the corporation relying upon a contract entered into between it and the Legislature that the provisions of the act creating it should remain unchanged. But it is difficult to see how such a construction can be put on a contract which contains an express stipulation that it shall be subject to amendment and

alteration. If it be asked by whom such amendment or alteration is to be made, the answer is obvious: by the parties to the contract, the Legislature on the one hand and the corporation on the other; the former expressing its intention by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter. It is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the assent of the other contracting party. In such case, all persons claiming derivative rights or interests under the original contract, with notice of its terms, would be bound by the amendment or alteration to which the parties should agree. Take an illustration, similar to one put by the learned counsel for the defendants. Suppose a copartnership or joint stock company, consisting of shipowners, to be formed for a specific purpose, to carry on, for instance, a series of voyages to India, with a proviso that at any time, by mutual assent of the parties, the terms of the original agreement might be modified or changed; it being also stipulated that owners of merchandise might share in the contemplated enterprise by sending goods to the ports or places to which the ships might be sent in pursuance of the agreement. Can there be any doubt that under such a contract the shipper of goods would be bound by any alteration in its terms to which the original parties should agree, and that if, in pursuance of such alteration, the destination of their vessels should be afterwards changed by the owners, so that the voyages to China were substituted instead of to India, this change in the terms of the agreement would constitute no breach of contract towards the shippers of goods? If it be not so, then it would follow that a sub-contractor would not be bound by a stipulation in the principal contract under which he undertook to act, and of which he had due notice. It is a mistake, therefore, to say that the contract of a stockholder with a corporation established under our statutes binds the latter to undertake no new enterprise and engage in no business or operation other than that contemplated by the original charter. This interpretation puts aside the express provision authorizing an amendment or alteration of the act of incorporation, and gives it no effect as against a stockholder without his assent, although he bought his stock or subscribed for his shares subject to the legal effect of such a stipulation. The infirmity of the argument in behalf of the plaintiff is, that it admits that an amendment may be legal and valid as to the corporation, if they assent to it by a vote of the majority, while at the same time it sets it aside as against the stockholder who refuses to sanction it, on the ground that as to him it is illegal and void. But we cannot see how the amendment can be said to be legal and illegal *uno et eodem flatu*. If it is valid as to the corporation, for the reason that they have accepted and approved it according to the provisions of their charter, it would seem that it must also be binding on

the stockholder, who has agreed that his rights and interests in the corporation shall be regulated and controlled by a vote of a majority, acting in conformity to the original constitution of the corporation, and within the scope of its corporate powers. The real contract into which the stockholder enters with the corporation is, that he agrees to become a member of an artificial body which is created and has its existence by virtue of a contract with the Legislature, which may be amended or changed with the consent of the company, ascertained and declared in the mode pointed out by law. Having, by virtue of the relation which subsists between himself and the corporation as a holder of shares, assented to the terms of the original act of incorporation, he cannot be heard to say that he will not be bound by a vote of the majority of the stockholders accepting an amendment or alterations of the charter made in pursuance of an express authority reserved to the Legislature, and which by such acceptance has become binding on the corporation. Such we understand to be the result of the adjudicated cases. In *Crease v. Babcock* (23 Pick. 342), it was expressly decided that corporators, by accepting a charter, directly agree to adopt the provision reserving to the Legislature the right to amend, alter, or repeal the act of incorporation as a constituent part of their contract; and it has often been decided, under similar provisions in the statutes of other States, that amendments or changes, either abridging the corporate authority or enlarging and extending it so as to embrace new enterprises and to incur additional burdens and liabilities, when duly adopted by the corporation, are valid and binding on a dissenting minority, as well as on those corporators by whose votes the amending act has been accepted and approved. *Buffalo, &c. Railroad v. Dudley* (4 Kernan, 336, 348, 354); *Northern Railroad v. Miller* (10 Barb. 282); *Meadow Dam Co. v. Gray* (30 Maine, 547); *Oldtown, &c. Railroad v. Veazie* (39 Maine, 580); *Banet v. Alton, &c. Railroad* (13 Illinois, 504).

It was urged, as a grave objection against the doctrine above stated, that it puts the minority of the stockholders of a corporation entirely within the control of the Legislature and a majority of the stockholders, and that there would be no limit or restraint placed on the exercise of the power, so that corporations might be diverted to purposes and objects wholly foreign to those for which they were originally established, and stockholders might be made to participate against their will in undertakings which they never contemplated and which they deemed inexpedient or ruinous. If this be so, it is a consequence of which no stockholder can reasonably complain, because it is a result which flows from the contract into which he has voluntarily entered. But we are not prepared to admit the soundness of the objection. A restraint or limit on the power of the Legislature to alter or amend a charter even with the consent of the corporation may perhaps be found in the doctrine recognized in some of the English cases, that the enlargement of corporate

powers shall not be extended so as to authorize enterprises or operations different in their nature and kind from those comprehended within the terms of the original charter, but shall be confined to purposes and objects *ejusdem generis* with those for which the corporation was primarily granted. See *Ware v. Grand Junction Water Works* (2 Russ. & Mylne, 470); *Ffooks v. Southwestern Railway* (1 Sm. & Gif. 142). But however this may be, no such question arises in the present case, inasmuch as the additional acts, the validity of which is called into controversy by the plaintiff, do not empower the defendants to engage in any undertaking essentially different in kind from that which was embraced in the original acts by which their corporate existence under their present name was authorized and established.

So far as any argument against the right of the Legislature to amend or alter the charters of corporations under our statutes is drawn from the peril to which it exposes the property and interests of dissenting minorities of stockholders, we cannot deem it of any practical weight or importance. The good faith of the Legislature and the self-interest of the majority will ordinarily be a sufficient protection against any wanton or oppressive use of their power. Against any dishonest or fraudulent abuses of it, a sufficient remedy can always be had in the courts of justice.

It may be well to add, in order to avoid misapprehension, that we do not intend to say that the Legislature have any power to change or modify an act of incorporation in such a way as to affect in a material particular a contract which they have entered into with a third person. Such an exercise of legislative power would be unconstitutional and invalid, because it would impair the obligation of a contract. It was so decided by this court in *Hamilton Ins. Co. v. Hobart* (2 Gray, 547), where it was held that an act of the Legislature was void which made a new party to an executory contract of insurance without the assent of the assured. All that we mean to determine is, that the obligation of the contract which subsists between the corporation and a stockholder, by virtue of his being a proprietor of shares in the corporate stock, is not impaired by an act of the Legislature which amends and alters the charter and authorizes the corporation to undertake new and additional enterprises of a nature similar to those embraced within the original grant of power, if such act is accepted by a majority of the stockholders in the mode provided by law.

The only other ground on which the plaintiff seeks to maintain his bill is, that the indenture entered into by the defendants with the Newport and Fall River Railroad Company, for the lease of the road belonging to the latter company to the defendants, is a violation of the second section of the Act of 1861, authorizing the extension of the defendants' road, which prohibits them from using any part of their reserved funds to build said extension or any portion

of the road in Rhode Island. But on looking at the terms of the instrument it appears to us to be a lease in regular form for a term of ten years of the road in Rhode Island to the defendants, in consideration of a stipulated rent per annum, payable in advance, and of an agreement by the defendants to perform all the transportation of persons and freight upon and over the road in Rhode Island. Such a contract seems to us to be fully authorized by Gen. Sts. c. 63, § 115; and there being no allegation or proof that it was made collusively, for the purpose of evading the prohibition of the expenditure of the surplus or reserved funds belonging to the defendants, or that such will be the effect of carrying out the stipulations in the indenture, we are of opinion that the plaintiff fails to support this part of his case.

Bill dismissed.

ZABRISKIE *v.* RAILROAD COMPANY.

(18 *N. J. Eq.* 178. 1867.)

THIS case was argued upon a rule to show cause why the defendants should not be enjoined from mortgaging the property of the company, or from expending its funds in the construction of a road not authorized by their charter, but being an extension of the original road authorized by a supplement to their charter.

THE CHANCELLOR:--

The Hackensack and New York Railroad Company was incorporated in 1856, with power to construct a railroad from Hackensack to the Paterson and Hudson River Railroad, with a capital stock of two hundred thousand dollars, and with power to mortgage its road and lands, franchises and appurtenances, to the amount of fifty thousand dollars. Under this act, it laid out, located, and built a road five miles in length, terminating at Essex Street, in Hackensack, within one mile of the court-house, as required by the charter. It borrowed thirty thousand dollars, for which it gave a mortgage upon the road and its equipment, franchises, and other property. By a supplement to this charter, passed March 12, 1861, it was authorized to extend the road northwardly to Nanent, on the Erie railway, in the State of New York, a distance of about twelve miles, to increase the capital stock to any extent required, and to issue bonds to the amount of two hundred and fifty thousand dollars, which, in the words of the act, were "for the construction and equipment of the road to be constructed under this act; and to secure the payment of said bonds, the said company shall have power to mortgage the said road, with its franchises and chartered rights."

In 1861, the company extended its road under this supplement,

to a point on Passaic Street, in the village of Hackensack, more than a mile from the court-house, the length of the extension being about a mile. After this, it executed a new mortgage upon the whole road, as extended, and its equipments, and its franchises and chartered rights, to secure the payment of ten thousand dollars. No new stock was issued for this extension.

The company has recently, under the supplement of 1861, laid out and located another extension for about a mile and a half, north of the present terminus, reaching from Hackensack to New Bridge, and has made contracts for the construction of it, and has, by resolution, determined to make a new mortgage to cover the whole road, as it will be when finished, to New Bridge, with its equipments and appurtenances, and the chartered rights and franchises of the company, to secure one hundred bonds of one thousand dollars each, for the purpose of paying off the two mortgages which are now on the road; for relaying with new rails and ties the road first built, and furnishing it with the necessary equipment, which is now deficient for its business; and for constructing and equipping the extension to New Bridge.

The complainant is a stockholder in the company; and of nine hundred and thirty shares of capital stock issued, for one hundred dollars each, he owns three hundred and twenty-four. He applies for an injunction to restrain the defendants from constructing the extension to New Bridge, and from executing the mortgage proposed.

He opposes the extension, on the ground that it is a different enterprise from that for which his stock was taken and the money paid, and that neither the directors, nor a majority of the stockholders, can compel him to embark his capital in any undertaking but the one for which it was subscribed and paid.

The extension to Nanent, authorized by the Act of 1861, has never been submitted formally to the stockholders, nor has it in any way been approved by them, or a majority of them, except by the assent given in the answer in this suit, to which the directors are made defendants, which is sworn to by the directors, individually, who own together five hundred and seventeen shares of the capital stock. But of this, two hundred shares, held by one of them, Mr. Robert Rennie, is special stock, issued to him to build the Lodi Branch, which is leased to him during the existence of the company, and which he is to operate at his own expense and for his own profit, under an agreement that he shall pay as rent, the dividends that may be declared on these two hundred shares: and under another agreement, indorsed on the certificate of stock issued for these shares, that they are to be entitled to no dividends beyond the rent of the Lodi Branch, or in other words, that he is to pay no rent, and this stock is to receive no dividends. Under these circumstances, this stock can receive no benefit from the extension if it is

profitable, nor sustain any loss from it if it is ruinous. And it would seem that if the consent of a majority of the shareholders was necessary to the new enterprise of the extension, that the assent of the other three hundred and seventeen shares held by the directors, not being a majority of the whole stock held by the complainant, who dissents, is not the consent of the majority of the stockholders. And, if it is necessary to obtain the consent of a majority to make the extension authorized by the supplement of 1861, that consent does not appear in the cause as now presented.

The extension authorized by the Act of 1861 is a radical change in the object of this corporation; it is an enterprise entirely different from that in the charter. That was to construct and operate a railroad from Hackensack to the Paterson Railroad at Boiling Spring, an easy and almost direct route to New York; it was from a thriving village, the county town of Bergen County, over a level country, and only five miles in length, as shown by the return of its location. The extension would be about twelve miles in length, through an uneven country, mostly, if not wholly, agricultural, with no village, except the very small one at New Bridge, on its route, and it runs into the State of New York some distance, and terminates at a point on that part of the Erie railway which the company have abandoned for regular traffic, and on which few trains are run. It is an entirely different enterprise.

The question here is, Can this company, either with or without the consent of a majority in interest of its stockholders, compel the complainant to embark capital subscribed for the first enterprise, in this new one, entirely different?

Since the *Dartmouth College* case, in the Supreme Court of the United States, the doctrine has been considered firmly established, and been confirmed by repeated decisions, both in that court and the State courts, that a charter, granted by the Legislature to a corporation, is a contract between the State and the corporators, and that the State can pass no act to take away or impair any of the franchises or privileges granted by it. The company, or artificial person thus created, and its property, is subject to all general laws and police regulations made by the Legislature after such grant, in the same manner as natural persons and their property are; provided they are not such as to take away or impair any of the franchises plainly granted by the charter. This doctrine did not prevent the Legislature from conferring new privileges upon any corporation, to be accepted at its own election.

It is also settled, upon the principles of the common law, in this State, and most of the States of the Union, that when a number of persons associate themselves as partners, for a business and time specified in the agreement between them, or become members of a corporation for definite purposes and objects specified in their charter, which in such case is their contract, and for a time settled by it,

that the objects and business of the partnership or corporation cannot be changed, or abandoned, or sold out, within the time specified, without the consent of all the partners or corporators; one partner or corporator, however small his interest, can prevent it. And this is so, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter.

This rule is founded on principle, the great principle of protecting every man and his property by contracts entered into, a guiding principle in all right legislation, and incorporated into the Constitution of the United States, and of almost every State in the Union. And the rule is not changed because the new business or enterprise proposed is allowed by law, or has been made lawful since the association was formed.

The leading case on this subject is that of *Natusch v. Irving*, decided by Lord Eldon, in 1824. It is not contained in the regular reports, but may be found in the appendix to *Gow on Partnership*, (3d ed.) 576, or in *Lindley on Partnership*, p. 511. There, a partnership was formed for life insurance, and after it was entered into, an act of Parliament made it lawful for such a firm to enter upon the business of marine insurance, which was prohibited to them before. A majority of the partners determined to embark in the business of marine insurance thus made lawful. Lord Eldon held them barred by the contract of co-partnership, unless every partner agreed to alter it. In England, the same doctrine is applied to corporations rigidly, and is acknowledged in all cases on the subject. And although, from the omnipotent power of Parliament, restrained by no written constitution, they hold that the contract can be changed by act of Parliament, yet the English Court of Chancery will enjoin the directors or the corporation, on application of a single stockholder, from using the common funds to apply to Parliament for a change.

The doctrine of *Natusch v. Irving* was adopted in New York by Chancellor Kent, in the case of *Livingston v. Lynch* (4 Johns. C. R. 573), and in this State, by the decision of Parker, master, sitting to advise the Chancellor, in *Kean v. Johnson* (1 Stockt. 401), and has been recognized and adopted in almost all the States of the Union.

The opinion of Chancellor Bennet, in *Stevens v. The Rutland and Burlington R. Co.* (29 Vt. 548), (also found in 1 Am. Law Reg. 154), contains a very able exposition and application of it. It will also be found in *Ang. & Ames on Corp.*, §§ 391-393, and §§ 536-539; *Lindley on Part.* 515; *Pierce on Railways*, 78; *Hart. and N. H. R. Co. v. Croswell* (5 Hill, 383); *Troy and Rutland R. Co. v. Kerr* (17 Barb. 581); *Macedon Plank Road Co. v. Lapham* (18 Barb. 312); *Buff., Corn., and N. Y. R. Co. v. Pottle* (23 Barb. 21); *Banet v. The Alton and Sangamon R. Co.* (13 Ill. 504); *Graham v. Birkenhead R. Co.* (2 McN. & G. 156).

After the effect of the rule established in the *Dartmouth College* case began to be felt in the States, it was found that by the numerous acts of incorporation, freely and perhaps necessarily granted, great inconveniences resulted, and that provisions incautiously inserted too much restricted the power of future Legislatures, and that the laws which experience showed were necessary to govern corporations in the exercise of their powers, could not be passed. And the Legislature of many States, by degrees and successively, adopted the practice of inserting in acts granting franchises, that they might alter, modify, or repeal the act; and also, by general law, provided that all acts of incorporation thereafter passed should be subject to such alteration and repeal.

The provision is contained in the general act of this State, passed in 1846 (Nix. Dig. 152, § 6), that such charters should be subject to alteration, suspension, and repeal, in the discretion of the Legislature. This and all similar special and general provisions were intended for the purpose specified; to give to the Legislature the clear right, at their pleasure, to alter or repeal the acts of incorporation. The State, without this, could have done it with the assent of the corporators. They could give them property; they could add to their powers or privileges. But they could not take away any power, privilege, or franchise conferred by the act, nor compel them to exercise any new power or franchise conferred.

Besides this general law of the State, the charter of the defendants contains this provision, that "the Legislature may, at any time, alter, modify, or repeal the same."

The object and purpose of these provisions are so plain, and so plainly expressed in the words, that it seems strange that any doubt could be raised concerning it. It was a reservation to the State, for the benefit of the public, to be exercised by the State only. The State was making what had been decided to be a contract, and it reserved the power of change, by altering, modifying, or repealing the contract. Neither the words nor the circumstances, nor apparent objects for which this provision was made, can, by any fair construction, extend it to giving a power to one part of the corporators as against the other, which they did not have before.

It was to avoid the rule in the *Dartmouth College* case, not that in *Natusch v. Irving*, that the change was made. The words limit the power to that object.

On general principles, and the settled rules of construction, I would hold this to be the effect, and only effect, of the provision in the general act and in the charter of the defendants, without any hesitation, were it not for a series of decisions by most respectable courts, which hold that this provision obviates the effect of the rule in *Natusch v. Irving*, and *Kean v. Johnson*, and enables a majority of the corporators in all charters subject to a like provision, to change, by legislative permission, and within certain limits, the

object and purpose of the corporation. They hold that the contract between associate corporators, that they will confine their business to life insurance, is changed by legislative permission to engage in marine insurance, or a contract to join in constructing a railroad from New York to Newark, can be changed to one from New York to Elizabeth by legislative consent. The reasoning is founded on the fact that the subscription for the stock, which is the contract, was made as in this case under a charter which authorizes a road from the Paterson road to Hackensack, and authorizes the Legislature to alter and modify the act. And from this they infer that it is a contract to join in building any road that the Legislature may, by such alteration, authorize the company to build; and that such authority, or additional privilege, may be accepted by a majority of the corporators.

So far as the alteration is made by the Legislature, in a way to be compulsory on the corporation, this is correct; as, if they should require the company to build a double track, or widen the draws in a bridge, or exact less fare or toll; these would be within the contract, or would be annexed to it as a condition, and every stockholder would take his stock subject to the contingency of such alteration.

But if the change in the act is simply offering the corporation the privilege of entering upon another and a different enterprise, it is not within the condition to the subscription. The only construction to be given is, that the Legislature may alter, not that the stockholders may, as between each other. The case of *Natusch v. Irving* was decided upon this very ground. The act of Parliament had given the company the power to embark in marine insurance, but the consent of all the parties was still held necessary. The plain object of the reservation in this case was to give the Legislature, not a bare majority of the stockholders, power.

This view of the case is so clear upon principle that I feel constrained to be guided by it, although the weight of the decisions in other States is against it.

In Maine the decisions of the Supreme Court are in accordance with it. In the case of *The Meadow Dam Co. v. Gray* (30 Maine, 547), the company was incorporated to build a dam across navigable waters. Under the power reserved to alter and repeal, an act was passed requiring it to make in the dam a lock for the benefit of public navigation. This was not increasing the powers or changing the enterprise of the corporation, but requiring, in the work authorized, an accommodation for the public, omitted in the original act. What the change was is not mentioned in the report, but it is stated in the *Oldtown and Lincoln R. Co. v. Veasie*, by Chief Justice Shepley, who delivered the opinion in both cases.

In the case of the *Oldtown and Lincoln R. Co. v. Veasie* (39 Maine, R. 571), the act of incorporation, passed March 8, 1852, author-

ized not less than eleven thousand, nor more than fifteen thousand shares. Veasie, August 13, 1852, subscribed for one thousand shares; only nine thousand five hundred shares were subscribed. A supplement, passed September, 1853, under the power reserved to alter, fixed the capital at not less than eight thousand, nor more than twenty-five thousand shares. This was accepted by the directors. Veasie was sued for his subscription, and objected on the ground that until the supplement was passed, the number of shares required to constitute the company not having been subscribed, he could not be sued for his subscription, and that the Legislature under the power reserved, although they might alter the charter, could not affect the rights of the stockholders between themselves, or change their contract with the company.

The court held that he was not liable under the original act, to be sued until eleven thousand shares were subscribed for, and that the power to amend did not authorize a change in the rights or liabilities of the corporators between themselves.

Chief Justice Shepley says, (p. 280): "The Legislature might as well have attempted to alter a contract between the corporation and one of its members respecting the construction of the road, as a contract respecting any part of its capital. If a corporation, being party to a contract with one of its corporators, might, by the assistance of the Legislature, absolve itself from the performance of any part of the contract it might from the whole, and might require payment of the money subscribed, without allowing the subscriber to derive any benefit from it. It is the charter only, and the rights and liabilities of the corporators as such in consequence thereof, that can be varied by an act of the Legislature, and not the private contracts made between the corporation as one party, and its corporators as the other."

Now in this case, the private contract between the stockholders and the corporation, or between them mutually, on subscribing for the stock, was that their enterprise was the road from the Paterson Railroad to Hackensack, and the power reserved was not to authorize any of the parties to this private contract, at their pleasure to violate it. The supplement of 1861 does not require the extension to be built; it only authorizes it at the option of the corporation. The words are, "it shall be lawful for said company to extend their railroad." And it is held in England, where the courts by mandamus compel a company to construct the road it is incorporated to construct, that an act giving the privilege of extension is not obligatory on the company, and the mandamus is in such case refused, *York and Midland R. Co. v. Regina* (1 Ellis & Bl. 858); in which the Exchequer Chamber reversed the decision of the Common Bench, in 1 Ellis & Bl. 178, in the same case.

In New York a different rule has been established, and it is held that the power to alter will authorize the company, by consent of

the Legislature, to extend its enterprise without the consent of the stockholders. The rule was first adopted to enable companies to subscribe to the stock or bonds of other enterprises that brought business to them, and then was extended to cases where they were authorized to build extensions or branches to their own works. *North R. R. Co. v. Miller* (10 Barb. 260); *White v. Syracuse and Utica R. Co.* (14 Barb. 560); *Sch. and Sar. Plank R. Co. v. Thatcher* (11 New York R. (1 Kern.) 102); *Buff. and N. Y. City R. Co. v. Dudley* (14 New York R. (4 Kern.) 336). The reasoning of the judges in these cases does not satisfy me. The courts which decided the first cases would not have adopted the principles which guided them, if they had been asked to apply it to a case like this, or like the later cases in New York.

In 14 Barb. 570, Judge Edwards, in delivering the opinion of the court, says, that under this reservation the Legislature cannot create a new company with a new and distinct business, but that in the case before them, the company would remain the same as to its character, structure, objects, and business. It would have the same road, the same buildings and property, with the same agents, as it would have if the law had not been passed. But the principle of power to let a majority alter is the same, whether the alteration be great or small, and courts can exercise no discretion as to the extent of change which the company, by permission of the Legislature, may adopt.

In the case of the *Sch. and Sar. Plank R. Co. v. Thatcher* (11 N. Y. 109), the court put their decision on the ground that the change was unimportant, and would not injure the defendant; and seem, by their reasoning, to admit that if the change had been as great as in the case of the *Hartford and New Haven R. Co. v. Croswell*, they would have decided differently.

In *The Buffalo and New York City R. Co. v. Dudley* (14 N. Y. 355), Selden, J., in delivering the opinion of the court places the decision on the ground that it was ruled in the case just quoted "that no mere addition to, or alteration of the charter, however great, could operate to discharge a stockholder from his obligation to the corporation," and he questions the soundness of the decision in the *Hartford and New Haven R. Co. v. Croswell*. These decisions are not sufficiently consistent, or so based upon the principles that should govern this case, as to influence me to depart from the conclusions arrived at.

The Supreme Court of Massachusetts has followed the decisions in New York, and in the well considered and well argued case of *Durfee v. The Old Colony R. Co.* (5 Allen, 230), arrived at the conclusion that the reserved right to alter and repeal authorized a company to engage in a new enterprise, without the consent of all the shareholders. The reasoning of the able counsel who combated this position contains the best exposition of the law that I have found anywhere. The reasoning of Chief Justice Bigelow, in delivering

the opinion of the court, does not convince me. He places the decision upon principles not acknowledged in this State, and relies upon the two cases in Maine, cited above, as well as those in New York, as supporting his view. He assumes (on p. 224) that it is the object of the provision, that an amendment may be made by the consent of both parties, the Legislature on the one side, and the corporation on the other; the former expressing its assent by a legislative act, and the latter by a vote of the majority of stockholders; and observes "that it is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms, with the consent of the other contracting party."

Now in this State it is settled that an alteration made by the Legislature under this reserve power is valid and binding, without the consent, and against the will of the corporation and all its members. The two decisions in the Court of Errors not yet reported, upon the charters of the Morris and Essex Railroad Company, and of the Jersey City and Bergen Railroad Company, settle that the Legislature may, against the will of the companies, change the mode of taxation prescribed in their charter for one more burthensome.

And the rule of the common law as to contracts, adopted here, gives the power to the parties, where both assent, to alter any contract without the stipulation for that purpose, which would seem from the language of the opinion to be ordinarily inserted for it in Massachusetts. Such stipulation is seldom or never made in New Jersey.

This view, that the object of the reserved power was to give the majority of the corporators the power to control the minority, with the consent of the Legislature, has never been adopted in this State. The act of Massachusetts, Statutes 1831, ch. lxxxii., to which reference is made, contains no provision as to consent of the stockholders, but is a pure, simple reservation of power, like the act of New Jersey.

The decisions in the cases of *Banet v. Alton and Sang. R. Co.* (13 Ill. 504); *The Pacific Railroad v. Renshaw* (18 Missouri, 210); *The Pacific Railroad v. Hughes* (22 Missouri, 291), hold that the majority of the stockholders, by authority of the Legislature, may make a change, provided it is not great or a radical one. They, in express terms, say that a change like this would not be warranted, and so far as of authority, are on the side of the complainant.

But the principle on which they are decided is wrong; and if it is once conceded that a majority of the corporators may, by authority from the Legislature, change the object of the enterprise in small things, there is no principle of law by which they can be restrained in any a little larger, or in the character of the whole work. The same principle will lead the courts of Illinois and Missouri, as it did those in New York, to allow radical changes, and must, if consistently applied, allow a charter for a railroad to be used for bank-

ing or insurance business, or for a canal, theatre, brewery, or beer saloon.

There is no other alternative to the proposition, that while the power reserved authorizes the Legislature, within certain limits, to make such alterations as they choose to impose, it gives no authority, when the Legislature does not impose them, for the majority to adopt such alterations or enter upon such enterprises as are allowed by the Legislature.

Again, the power of the Legislature has its limits. It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion-house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind, wholly or chiefly new, substituted for another, is not an alteration; it is a change.

In some cases there might be room for doubts, but in this case there can be no hesitation in saying that a railroad of seventeen miles from the Paterson road to Nanent is a change and substitution of one work for another, and not an alteration of the road to Hackensack. They are substantially two different enterprises.

Again, the power is to alter or modify the act, and the true construction of this I hold to be, an alteration of something contained in or granted by the act. Any of the franchises granted may be altered; the right to take land by condemnation, the right to take tolls or fare, or the amount to be taken. But the Legislature had no right to impose upon the company any other duty, or anything involving any other duty, than that attending the building a railroad from the Paterson road to Hackensack; anything in the manner of doing that they had a right to change. They could not oblige it to dam and drain all the meadows along the Hackensack, or to construct a canal, or to build a road from Hoboken to Newark, nor could they oblige it to extend its road to Nanent. They could as well oblige it to run to the Pacific. We must keep in mind that by the decisions in New Jersey the company need not accept the alterations; they are bound by them without acceptance if within the power reserved.

By a wider construction of this power any of the main lines of railroad running through the State, incorporated since 1846, or by an act which has in it the power of alteration, may be compelled to build and run a branch to any village or place near that route, that the Legislature may direct. It must be held that the power to

alter and modify does not give power to make any substantial additions to the work.

Again, the Act of 1861 does not, in fact, alter or modify the Act of 1856 in any one thing embraced in it. That act, and every power and franchise granted by it, and any duty it imposed, remains the same. And the defendants can now go on under it precisely as if the supplement had not been passed. The company is authorized to construct another road; it is not compelled to do it. If it builds it, or if it does not, its old charter remains with all its franchises and privileges intact, and no new burthens imposed, except so far as it assumes them. This is in no sense of the word an alteration of the charter. It would be as absurd to say that an owner had altered his house who had built a larger one on an adjoining lot. And until the Legislature have made a valid alteration of the charter, the rights of each stockholder are as held in *Kean v. Johnson*, he can prevent all the others from changing or abandoning the work.

The supplement of 1861 is a perfectly valid and constitutional act. It is a grant of privileges that the Legislature have a right to grant, as they could grant to this corporation the right to conduct banking or insurance business, or to run a ferry across the North River; but the company is restrained by the law of corporations and partnerships, from expending the money or using the credit of the corporation in such enterprises, unless every shareholder consents.

The extension to Passaic Street, both because it comes within the grant in the charter, and more especially because every shareholder must be held to have consented to it by acquiescing in its construction and maintenance for years, must be decided to be lawful.

The defendants must be restrained from extending the road beyond its present terminus at Passaic Street, and from expending any money of the company to pay for any such extension, or from giving any mortgage for the cost of such extension.

There is no foundation for an injunction against a mortgage for any lawful object, on either part of the road. There is great doubt whether a mortgage on either of the two parts of the road heretofore constructed, for the costs of the other, would pass the franchises of the company in such mortgaged part, but it would be valid as to the property other than franchises, which the company can mortgage without any special power. And besides, the bonds of the company, or its lawful contracts, would entitle the holder to recover upon them, and under the judgment, by the Act of 1858 (Nix. Dig. 719), the whole road and franchises could be sold. The complainant, therefore, cannot be injured by a mortgage, whether valid or not, upon any part of the road.

SMITH v. HURD.

(12 Metcalf (Mass.), 371. 1847.)

THIS was a special action on the case, by a stockholder of the Phoenix Bank, against those who were directors of the said bank, for several years next before and at the time of the failure of said bank, in October, 1842. There were two counts; one founded in non-feasance of official duty, the other in misfeasance.¹

The said [first] count then averred, that by reason of all the aforesaid negligences and omissions, and the said acts of the president and cashier, so negligently permitted, the bank suddenly failed, on the third of October, 1842, and became unable to redeem its bills and pay its debts; that its capital was wholly lost, and that the plaintiff's shares therein became valueless, and he was made liable, in a large amount, for his proportion of the capital, lost by the official mismanagement of the directors, and further liable, at the expiration of the charter, to pay large sums for the redemption of the bills of said bank, and liable to be harassed by suits of the bill-holders and other creditors of the bank, and to be put to heavy expenses and great losses thereby.

The [second] count concluded with an averment, that the defendants, by "misconducting the business of said bank, as aforesaid, so wilfully, deceitfully, and fraudulently mismanaged the business and property of the said bank, that the whole capital thereof was utterly lost and wasted."

The defendants demurred to the declaration, and the plaintiff joined in demurrer.

SHAW, C. J. : —

This is certainly a case of first impression. We are not aware that any similar action has been sustained in England, or in any of the courts of this country. It is founded on no statute. It is an action on the case, at common law, brought by an individual holder of shares in an incorporated bank, against the directors, not including the president, setting forth various acts of negligence and malfeasance through a series of years, in consequence of which, as the declaration alleges, the whole capital of the bank was wasted and lost, and the shares of the plaintiff became of no value. The circumstance that no such action has been maintained would certainly be no decisive objection, if it could be shown to be maintainable on principle. But the fact, that similar grievances have existed to

¹ Parts of the statement of facts are omitted.

a great extent, and in numberless instances, where such an action would have presented an obvious and effective remedy, affords strong proof, that in the view of all such suffering parties, and their legal advisers and guides, there was no principle on which such an action can be maintained.

If an action can be brought by one stockholder, it may be brought by the holder of a single share ; so that for one and the same default of these directors, thirty-five hundred actions might be brought. If it may be sustained by proof of an act, or series of acts, of carelessness, neglect, and breach of duty in managing the affairs of the bank, by which the whole value of the stock is destroyed, it may, on the same principle, be maintained on any act or instance of such negligence, by which the shares are diminished in value fifty, ten, five, or one per cent. Still, notwithstanding these consequences, if the plaintiff has a good right of action, upon recognized and sound legal principles, his action ought to be sustained.

But the court are of opinion that the action cannot be maintained ; and that on several grounds, a few of the more prominent of which may be alluded to.

1. There is no legal privity, relation, or immediate connection, between the holders of shares in a bank, in their individual capacity, on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents, or trustees of such individual stockholders. The bank is a corporation and body politic, having a separate existence as a distinct person in law, in whom the whole stock and property of the bank are vested, and to whom all agents, debtors, officers, and servants are responsible for all contracts, express or implied, made in reference to such capital, and for all torts and injuries diminishing or impairing it. The very purpose of incorporation is, to create such legal and ideal person in law, distinct from all the persons composing it, in order to avoid the extreme difficulty, and perhaps it is not too much to say the utter impracticability, of such a number of persons acting together in their individual capacities. The practical difficulty would be nearly as great whether it were held that all must join in an action to recover damage for an injury to the common property, or that each might sue separately.

The stockholders do, indeed, ordinarily elect the directors ; but it is as parts and members of the corporation, in their corporate capacity, in modes pointed out by the charter and by-laws, so that the directors are the appointees of the corporation, not of the individuals. Indeed, I believe there is a provision in the bank charters — there certainly was formerly — which is equally to the present purpose ; namely, that the Commonwealth shall be at liberty to add a certain amount to the capital of various banks, and appoint a proportional number of directors. Such directors, so appointed, pursuant to the charter regulating the legal organization of the body,

would stand in all respects on the footing of directors chosen by the stockholders. If these were liable to the action of individual stockholders, those would be in like manner.

2. The individual members of the corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent, or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any security or chose in action; could not collect a debt or discharge a claim, or release damage arising from any default; simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined. They are members of an organized body, and exercise such powers as the organization of the institution gives them. Stockholders in banks have a separate right to dividends, when declared, and to a distributive share of the capital stock, if any remains when the charter of the bank is at an end, and its debts paid.

3. But another important consideration is, that the injury done to the capital stock by wasting, impairing, and diminishing its value, is not, in the first instance, nor necessarily, a damage to the stockholders. All sums which could, in any form, be recovered on that ground, would be assets of the corporation, and when collected and received by directors, receivers, or any other persons entitled to receive the same, they would be held in trust, first to redeem the bills and pay the debts of the bank; and it would be only after these debts were paid, and in case any surplus should remain, that the stockholders would be entitled to receive anything. It is, therefore, an indirect, contingent, and subordinate interest, which each stockholder has, in damages so to be recovered against directors. If, upon such indirect, contingent, and remote interest, individual stockholders could recover for the default of directors, and especially, as is alleged in this case, where these defaults have been so great as to sink the capital, *a fortiori* would the creditors of the bank individually have a right to maintain similar actions; because their claim upon the funds, being prior to that of stockholders, would be somewhat more immediate and direct.

In the same connection, it is obvious to remark, that a judgment in favor of one stockholder would be no bar to an action by a creditor, nor a judgment by both, to an action by the corporation.

4. But it is said, that although the real and personal estate, the securities and capital stock, are, in legal contemplation, vested in the corporation, yet the individual has a separate and distinct property and interest in his particular shares, by any injury to which he may have a separate damage. To some extent, it is true that he has a several interest in his shares; but it is to be taken with some qualifi-

cations. Strictly speaking, shares in a bank do not constitute a legal estate and property; it is rather a limited and qualified right which the stockholder has to participate, in a certain proportion, in the benefits of a common fund, vested in a corporation for the common use; it is a qualified and equitable interest, a valuable interest manifested usually by a certificate, which is transferable. To the extent of this separate and peculiar interest, a stockholder, no doubt, might maintain his separate and special action, according to the nature of the wrong done to him in respect to it; as trover or trespass, for the conversion or tortious taking of his certificate; trespass on the case for refusing to make a transfer on a proper occasion; assumpsit for a dividend declared, and the like. But an injury done to the stock and capital, by negligence or misfeasance, is not an injury to such separate interest, but to the whole body of stockholders in common. It is like the case of a common nuisance, where one who suffers a special damage, peculiar to himself, and distinguishable in kind from that which he shares in the common injury, may maintain a special action. Otherwise, he cannot. Co. Lit. 56 *a*; 3 Steph. N. P. 2372; *Lansing v. Smith* (8 Cow. 146).

But we are pressed with the argument, that for every damage which one sustains, which is caused by the wrongful act of another, he ought to have a remedy. This is far from being universally true. Another maxim in regard to claims for damage is, *causa proxima, non remota, spectatur*. Thousands of instances occur, in which one sustains consequential and incidental damage from the misconduct of another, without a remedy at law. By the misconduct of the officers or agents of a parish, town, county, or even of the State or the Union, defalcations may take place, treasure be squandered and wasted, and all the members of the respective aggregate bodies suffer damage, for which the law, from the nature of the case, can afford no direct remedy. But the true answer to the objection is, that stockholders have a remedy, a theoretic one indeed, and perhaps often inadequate, in the power of the corporation, in its corporate capacity, to obtain redress for injuries done to the common property, by the recovery of damages; and each individual stockholder has his remedy through the powers thus vested in the corporation, for the common benefit.

On the whole, the court are of opinion that the demurrer is well taken, and that the action cannot be maintained.

PEABODY v. FLINT.

(6 Allen, 52. 1863.)

BILL IN EQUITY, brought March 9, 1860, by two stockholders of the Lowell and Salem Railroad Company, for themselves and in behalf of the other stockholders, against certain directors and agents

of said company, and of the Lowell and Lawrence Railroad Company, whose railroad connected with that of the former company, and others, charging various acts of conspiracy and fraud, by which the interest of the stockholders in the Salem and Lowell Railroad Company were prejudiced and sacrificed, for the benefit of the Lowell and Lawrence Railroad Company; and especially in reference to false and fraudulent representations and practices for the purpose of injuring the credit of the Salem and Lowell Railroad, and enabling them to issue and take its bonds, on the 20th of August, 1856, secured by a mortgage of property of the company, at prices below their true value; and also in reference to a contract executed on the 1st of October, 1858, by which the Lowell and Lawrence Railroad Company were to "do and perform all the transportation of persons and freight upon and over the Salem and Lowell Railroad," and to pretended settlements made between said companies. The bill also set forth that, since the plaintiffs had reason to suspect the frauds and conspiracies charged, they have demanded explanations of the defendants, petitioned the general court for an investigation, and endeavored to procure the election of directors who would cause the matters to be investigated, but, being in a minority, have failed to succeed. The defendants filed a general demurrer. The plaintiffs, at the argument, moved to amend their bill by joining the Salem and Lowell Railroad Company as defendants.

CHAPMAN, J. : —

The bill sets forth a very complicated case. A full consideration of the charges of fraud which it contains would involve the necessity of examining the various legislative acts which it recites, and the contracts and dealings which it sets forth. But such a discussion is unnecessary.

The principal ground of demurrer relied on by the defendants is, that the plaintiffs have not, and never had, any remedy for such injuries as they complain of; that, conceding the truth of the allegations that the directors of the Salem and Lowell Railroad Company, either by themselves or with the consent and connivance of a majority of their stockholders, combined, either among themselves or with the Lowell and Lawrence Railroad Company or its directors, or with any of the other defendants, to defraud a minority of the stockholders of the Salem and Lowell Railroad Company, and in pursuance of this combination did the acts alleged, and so dealt and managed as to destroy the value of the stock as set forth, yet the only relief which the minority can have is the very imperfect one of selling out their stock for what it will bring in market. This doctrine is said to result from the nature of corporate property, which, being owned absolutely by the corporation, is under the absolute control of a majority of the stockholders and of such directors as they choose to elect. Their decisions and acts, it is said, are final, and the minority are bound to submit to them.

But this doctrine, if correct, would place the property of stockholders in a corporation in a perilous condition. For it would enable the managers of one corporation to get the control of another by the purchase of a majority of its stock for the purpose, and then to manage its affairs in such subservience to the interests of their own corporation as to render the stock of the minority worthless, and avail themselves of its value without compensation. The demurrer concedes, for the purposes of this discussion, that the managers of the Lowell and Lawrence Railroad Company have thus acted in respect to the minority of stockholders in the Salem and Lowell Railroad Company. It requires no great sagacity to see how similar frauds may be practised in behalf of many other railroads against connecting or rival roads, so that a system of railroad connections may become a system of frauds. If it may be practised with impunity between railroad corporations, it may also be practised between manufacturing corporations, and a managing majority may, at their pleasure, sacrifice the interests of the minority for the benefit of another corporation owned by them. The same remark is true in respect to several other classes of business corporations. The question thus presented is of great importance, because there is no known practicable method of establishing and managing railroads except by means of corporations; and many other great enterprises and branches of business which require, for their successful prosecution, a large and permanent investment of capital, are also usually and most conveniently established and managed by means of corporate organizations.

This doctrine is also said to result from the nature of corporations and corporate property, as stated in *Smith v. Hurd* (12 Met. 371). The views taken in that case are unquestionably correct; and they apply with especial force to that class of corporations whose stockholders have little more power than to elect officers, who, when elected, are invested by law with the sole and exclusive power of managing the concerns and business of the corporation. The corporation itself is regarded as a distinct person; and its property is legally vested in itself, and not in its stockholders. As individuals, they cannot, even by joining together unanimously, convey a title to it, or maintain an action at law for its possession, or for damages done to it. Nor can they make a contract that shall bind it, or enforce by action a contract that has been made with it. The artificial person called the corporation must manage its affairs in its own name, as exclusively as a natural person manages his property and business. The officers, though chosen by vote of the stockholders, are not their agents but the agents of the corporation; and they are accountable to it alone. Therefore one or more of the stockholders cannot maintain an action at law against the officers for any breach of official duty that injures the corporate property as a whole. An injury done by the directors of a company to an individual by in-

ducing him to become a member of the company by means of false representations is actionable, because it is an injury to him and not to the company. *Gerhard v. Bates* (2 El. & Bl. 476). But the interest of stockholders is, as stated in *Smith v. Hurd*, cited above, merely a qualified and equitable interest.

But if there is an equitable interest there must result from it equitable relations and equitable rights; and these rights may be enforced by equitable remedies. As between the corporation itself and its officers, it was long since held that they were trustees, and that a court of equity would hold them responsible for every breach of trust. *Charitable Corporation v. Sutton* (2 Atk. 400). The corporation itself holds its property as trustee for the stockholders, who have a joint interest in all its property and effects, and each of whom is related to it as *cestui que trust*. The corporation may call its officers to account if they wilfully abuse their trust, or misapply the funds of the company; and if it refuses to sue, or is still under the control of those who must be made defendants in the suit, the stockholders who are the real parties in interest may file a bill in their own names making the corporation a party defendant; or a part of them may file a bill in behalf of themselves and all others standing in the same relation, if convenience requires it. *Robinson v. Smith* (3 Paige, 222), and cases there cited. See also the other authorities cited for the plaintiffs on this point; and *Hersey v. Veazie* (24 Maine, 9); and *Smith v. Poor* (40 Maine, 415), cited by the defendants.

If other parties have participated with the officers in such proceedings, they may, according to the established principles of equity pleading, be joined as parties. In the discovery of frauds, and in furnishing remedies to parties defrauded, equity does not suffer technicalities to stand in its way, but seizes upon the substance of the case, and holds all parties to their just responsibility, following trust property into the hands of remote grantees and purchasers who have taken it with notice of a trust, in order to subject it to the trust. The objection, therefore, that a court of equity has no power to furnish a remedy in a case of this character is untenable.

But there is another objection to the bill which must prevail. Equity regards diligence as one of its important elements; and it discountenances laches as inequitable; and unreasonable delay to prosecute an existing claim is a bar to a bill in equity, especially when the parties cannot be restored to their original position, and injustice may be done. *Veazie v. Williams* (3 Story R. 610); *Tash v. Adams* (10 Cush. 252); *Fuller v. Melrose* (1 Allen, 166); Story on Eq. § 1520, and note 3.

In this case there has been unreasonable delay. The bill was sworn to, March 9, 1860. The mortgage complained of was executed August 20, 1856, and the lease to the Boston and Lowell Railroad Company, October 1, 1858. The contracts and dealings to be investigated and readjusted commenced in 1850, and continued till the execution of

the mortgage, and even to the execution of the lease in 1858. Every day's delay increased the complication and the difficulty of making an equitable adjustment of them. In the mean time, the stock in the corporations must have been frequently changing hands, and there are no means of adjusting the equities growing out of such changes. A similar remark is applicable to the holders of the bonds secured by the mortgage. The nature of the case required the utmost diligence, in order to prevent injustice. Yet the plaintiffs delayed more than three years and a half after the making of the mortgage, and until after they had sought aid from the Legislature. It does not appear that they had at that time sufficient knowledge of the facts to enable them to prosecute, or that they have since gained any important information; and a decree such as they now seek may injuriously affect many persons who have become stockholders or bondholders during the period of this delay. For this reason the demurrer is sustained, and the bill is dismissed.

SPERING'S APPEAL.

(71 Pa. St. 11. 1872.)¹

THE opinion of the court was delivered, July 2, 1872, by SHARSWOOD, J.:—

This bill was filed by the appellant as the assignee of the "National Safety Insurance and Trust Company," against the defendants, who were directors of the corporation, alleging fraudulent, illegal, and improper management of its affairs, extending over a period of more than ten years, from 1850 to 1861. The case upon the bill, answers, and proofs was referred to a Master, who reported that the bill should be dismissed, and a *pro forma* decree was entered accordingly.

Upon a careful examination of the record and paper-books, which make up nine hundred and sixty-six printed octavo pages, we have come to the following conclusions of fact, which are supported also by the opinion of the Master. First, that no fraudulent conduct is imputable to any one of the defendants, at any period of time during their administration of the trust. No pecuniary advantage, to the amount of a dollar, was ever realized or sought by any one of them. There was no embezzlement or misappropriation of the funds by any officer or agent of the corporation. There is no pretence that the defendants are liable to account upon either of these grounds. "One fact," says the Master, "is quite clear,—that none of the defendants have made any profit out of their transactions which was not common to all the stockholders." Second, that in regard to

¹ The statement of facts is omitted.

investments, and the mode of transacting the business, — the legality of which under the charter is questioned, — the defendants uniformly acted under legal advice. "It appears in the evidence," says the report, "that the defendants always acted upon legal advice, as to the mode of doing business and making investments. No important step was ever taken without first obtaining the advice of the solicitor." Third, looking at the history of the institution in the light of subsequent events, its direction was unwise and unfortunate. The money of the depositors was not invested in first-rate and perfectly safe securities, as they engaged to do, and as the funds of such a charity unquestionably ought to be. Loans were largely made upon very doubtful collaterals. Their investments in real estate were injudicious. They lost from a failure to insure. They sought to realize large profits at usurious rates of interest. The crash came in 1860, just before the breaking out of the civil war. All doubtful securities fell in the market. Their debtors went to the wall. In the vain attempt to sustain their credit they sacrificed securities and collaterals. Had they stopped and made an assignment at once, a large amount of the loss which subsequently fell upon them would undoubtedly have been prevented. The story might be much amplified by entering into a detail of particulars; but the conclusion would be the same. Such is a brief résumé of the facts. It is not the history of this institution alone, but of many others in the country.

The broad question then is, whether upon such a state of facts, the directors of a corporation can be made to account for losses arising from mismanagement merely.

It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are undoubtedly said in many authorities to be trustees, but that as I apprehend is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries, — persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more. Indeed, as the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill. Ought they to be held responsible for mistakes of judgment or want of skill and knowledge? They have been requested by their co-stockholders to take their positions, and they have given their services without compensation. We are dealing now with their responsibility to stockholders, not to outside parties, — creditors and depositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported

cases, although there are many *dicta* not easily reconcilable, yet I have found no judgment or decree which has held directors to account except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means that their responsibility is limited to these cases, and that there might not exist such a case of negligence or of acts clearly *ultra vires*, as would make perfectly honest directors personally liable. But it is evident that gentlemen elected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentlemen of character and responsibility would be found willing to accept such places. The authorities I think fully indorse these views.

The leading case is *The Charitable Corporation v. Sutton* (2 Atk. 400), which was treated by Lord Hardwicke as a case of fraud entirely. Five of the managers or committee-men entered into a confederacy to loan out money to their own storekeeper, upon whom was devolved the duty of putting an estimate upon the value of the pledges; the others connived at the fraud. "It is such a notorious fraud or at least gross inattention," said the Lord Chancellor, "to suffer him, who was to set a value on all the pledges, to borrow money upon them himself, that I shall direct those who appear to be guilty of it to make good the loss. Committee-men are most properly agents to those who employ them in the trust and who empower them to direct and superintend the affairs of the corporation. If some persons are guilty of gross non-attendance and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others." So accordingly in *The York & North Midland Railway Company v. Hudson* (16 Beavan, 495), the chairman of a railway company appropriated unallotted shares to the use of various persons, whose names he did not mention, in order to secure or reward services which he declined to state, but which it was insinuated was in the nature of "secret service money;" it was held that if the defendant had applied the property of the company in a manner which would not bear the light, he must suffer the consequences, and that being charged with the receipt of the money, he could not discharge himself by the suggestion of such an application. In *Williams v. Page* (24 Beavan, 661), Sir John Romilly said, in treating a director as a trustee: "The trust no doubt is a peculiar one." In *Great Luxembourg Railway Co. v. Magnay* (25 Beavan, 592), he held that if a director enters into a contract for the company he cannot personally derive any benefit from it. So also in *Ex parte Bennett* (18 Beavan, 339), directors of a public company are trustees for the shareholders, and their private interest must yield to their public duty wherever they

are conflicting. In *Turquard v. Marshall* (3 Equity (Law Rep.) 127), which is the last English case on the subject, Lord Romilly, M. R., held directors liable, first, for not calling a meeting of the shareholders under a clause of the charter requiring them to do so, on the exhaustion of their surplus fund, and second, for loaning money to one of themselves without security. He used however this language: that if directors have been guilty of gross and palpable breach of trust, which cannot be set right by a public meeting of the company, they may be made responsible for their misconduct. On appeal, however, the decree of Lord Romilly, holding the directors personally liable, was reversed by Lord Chancellor Hatherley, 5 Chancery Appeals (Law Rep.) 386. He said: "There was no fraud alleged, nor was it alleged that the directors applied the funds of the company to their own use, or in any way except in what they thought was for the benefit of the company, however incorrect their course might have been." Then as to the loan to Higgins (the co-director): "The statement of this in the bill was only as part of the general misconduct of the directors, and the loan was only mentioned as one of the losses incurred. There was no specific allegation of any impropriety in lending the money to him, nor was any specific relief prayed in this respect. It was within the powers of the deed to lend to a brother director, and however foolish the loan might have been, so long as it was within the powers of the directors, the court could not interfere and make them liable. They were intrusted with full powers of lending the money, and it was part of the business of the concern to trust people with money, and their trusting to an undue extent was not a matter with which they could be fixed, unless there was something more alleged, as, for instance, that it was done fraudulently and improperly and not merely by a default of judgment. Whatever may have been the amount lent to anybody, however ridiculous and absurd their conduct might seem, it was the misfortune of the company that they chose such unwise directors; but as long as they kept within the powers of their deed, the court could not interfere with the discretion exercised by them."

To pass now from the English to the American cases: *Koehler v. The Black River Falls Iron Co.* (2 Black S. C. 715), was a case of fraud. Mr. Justice Davis said: "Instead of honestly endeavoring to effect a loan of money advantageously for the benefit of the corporation, these directors, in violation of their duty and in betrayal of their trust, secured their own debts to the injury of the stockholders and creditors. Directors cannot thus deal with the important interests intrusted to their management. They hold a place of trust, and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders of the corporation." In *Scott v. Depeyster* (1 Edw. Ch. Rep. 513), the object of the bill was to make the directors liable for

money embezzled by their secretary, on the ground of their negligence. So, *Robinson v. Smith* (3 Paige, 222), the bill alleged that the directors had engaged in a gambling speculation in stocks, wholly unauthorized by the charter, which was carried on to subserve their own individual interests and purposes. On demurrer to the bill, it was of course held that the directors of a corporation, who wilfully abuse their trust or misapply the funds of the company by which a loss is sustained, are personally liable as trustees to make good that loss, and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust. In the same category is *Taylor v. Miami Exporting Company* (5 Hammond (Ohio), 162); *Verplanck v. Mercantile Insurance Co.* (1 Edw. Ch. Rep. 84); *Bank of St. Mary v. St. John* (25 Ala. N. S. 566); *Butts v. Wood* (38 Barb. 181); s. c. (37 New York, 317). In *The Franklin Fire Insurance Co. v. Jenkins* (3 Wend. 130), which was an action on the case, in which the declaration alleged against directors "want of care and attention," and also "corrupt and wilful mismanagement," a demurrer was sustained, Sutherland, J., remarking: "These are very different allegations and require distinct and different answers." *Lexington & Ohio Railroad Co. v. Bridge* (7 B. Monroe, 556) was a bill by creditors against directors for making a dividend when no profits existed. "We are satisfied," say the court, "that if they were guilty of negligence to any extent it is not of that gross and palpable character that would render their conduct so reprehensible as to subject them to the imputation of a personal or even a legal fraud." In *Godbold v. Branch Bank at Mobile* (11 Ala. 191), it was decided that the directors of a bank are not responsible for an injury to the bank caused by their act, originating in an error of judgment, unless the act be so grossly wrong as to warrant the imputation of fraud or the want of the necessary knowledge for the performance of the duty assumed by them on accepting the agency. In *Hodges v. New England Screw Company* (1 Rhode Island, 312), in dismissing the bill, Greene, C. J., observed: "It does not appear that the directors sought or secured to themselves any benefit or advantage which was not common to all the other stockholders of the Screw Company." See also *Neall v. Hill* (16 California, 145).

It seems unnecessary to pursue this investigation any further. These citations, which might be multiplied, establish, as it seems to me, that while directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement, or wilful misconduct or breach of trust for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers, or co-directors, yet they are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest and provided they are

fairly within the scope of the powers and discretion confided to the managing body.

In regard to the question last adverted to, whether the defendants should be held responsible for any of their acts and investments as *ultra vires*, it might be sufficient to notice the fact that the charter of this corporation was a very complicated one, made up by comparing together no less than sixteen different acts of incorporation or supplements. The ingenuity of the young gentlemen of counsel for the defendants has been exercised in presenting to the court a genealogical map or pedigree, tracing the Acts of Assembly, from one to another. To have mistaken the extent of their powers under such circumstances would not have been matter of surprise even in the most timid and cautious. We may adopt upon this point the language of C. J. Greene in *Hodges v. New England Screw Co.* (1 Rhode Island, 312). "In considering the question of the personal responsibility of the directors we shall assume that they violated the charter of the Screw Company. The question then will be, was such violation the result of mistake as to their powers, and if so did they fall into the mistake from want of proper care, such care as a man of ordinary prudence practises in his own affairs? For, if the mistake be such as with proper care might have been avoided, they ought to be liable. If, on the other hand, the mistake be such as the directors might well make, notwithstanding the exercise of proper care, and if they acted in good faith and for the benefit of the Screw Company, they ought not to be liable." We may say in this case, conceding that the directors did violate the charter, it was a question upon which with all due care they might have made an honest mistake; and moreover, it appears by the evidence, and is so reported, that they acted throughout by the advice of their counsel. It is well settled that trustees will be protected from responsibility under such circumstances. *Lewin on Trusts*, 595; *Vez v. Emery* (5 Ves. 141); *Calhoun's Estate* (6 Watts, 189).

The view which we have thus taken of the facts and the principles of law applicable to them, renders it unnecessary to consider whether there is anything in the case of the defendant Brewster to distinguish his liability from that of the others. It also dispenses with the necessity of discussing the operation of the bar of the Statute of Limitations, except in the cases of the defendants Churchman and Smith, who having raised their defence by demurrer the bill was separately dismissed as to them. Upon the point as made in their case, each of them having entirely ceased to be a director more than six years before the bill was originally filed, we entirely concur in the opinion of the Chief Justice in *Churchman's Case*.

Decree affirmed, and appeal dismissed at the costs of the estate in the hands of the appellants.

CHAPTER XVII.

LIABILITIES OF STOCKHOLDERS: IN GENERAL.

WOOD v. DUMMER.

(3 *Mason*, 308. 1824.)

STORY, J. :—

The Hallowell and Augusta Bank was incorporated in March, 1804, by the Legislature of Massachusetts, with a capital stock of \$200,000, divided into shares of \$100 each, for a term which expired on the first Monday of October, 1812, with the usual rights and privileges belonging to the banks in the same State. In June, 1812, the Legislature passed an act (act of 1812, ch. 57) continuing all the banks whose charters would expire on the first Monday of October, 1812, as corporate bodies, until the first Monday of October, 1816, "for the sole purpose of enabling said banks gradually to settle and close their concerns, and divide their capital stock." And by a further act, passed in December, 1816 (act of 1816, ch. 110), the term was prolonged for three years from the passing of this last act. In January, 1813, at a meeting of the stockholders of the Hallowell and Augusta Bank, a vote was passed, ordering a dividend to be made among the stockholders of the bank of fifty per cent of the capital stock thereof; and in October in the same year, a vote was passed for a further dividend of twenty-five per cent of the capital stock, making in the whole a dividend of seventy-five per cent of the whole capital stock, among the stockholders. The notes of the bank continued to circulate in good credit until after November, 1814; and the plaintiffs were, in October and November, 1814, owners in their several rights of notes of the same bank to a sum in the aggregate amounting to more than \$29,000, which were presented for payment to the bank, and payment refused. The plaintiffs received certain notes of the directors as collateral security, but these were never paid. In fact one-quarter part of the capital stock of the bank had never been paid in, but was secured by the notes of the stockholders, called stock notes; and about \$90,000 of debts (beside stock notes) were due from certain directors of the bank, who became insolvent and utterly unable to pay the same. So that nearly three-quarters of the stock was lost or unpaid, either from insolvency or some other cause, and left the bank involved, after the division of the stock, in

deep insolvency. In June, 1812, another and new bank was incorporated, composed in part of the same persons, with the same corporate name. The new bank for a considerable time continued to give credit to and circulate the notes of the old bank; and the bill asserted the new bank to have become possessed of the funds of the old bank to a very large amount.

Such are the principal facts; and the claim of the plaintiffs is to be reimbursed by the defendants (who are owners of three hundred and twenty shares) out of the dividends of the capital stock received by them, the amount of the debts so due to the plaintiffs respectively, for the bank notes above stated.

The case is full of difficulties. The bill is drawn in a very loose and inartificial manner. It proceeds principally upon the grounds of a gross overissue of bank notes, and other violations of the charter, and of a fraudulent dividend by the stockholders with a knowledge of their insolvency; grounds which are denied by the answers, and are not in the slightest degree established in the proofs. It does not directly proceed upon the ground that the defendants hold a trust fund applicable to the payment of the debts of the corporation, but leaves this to be picked up in fragments by a minute analysis of the bill. I pass, however, over these objections, for the purpose of considering that which is the principal point argued in the cause, whether the capital stock in the hands of the stockholders is liable to the payment of the debts of the bank.

It appears to me very clear upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the Legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead. Credit is universally given to this fund by the public as the only means of repayment. During the existence of the corporation it is the sole property of the corporation, and can be applied only according to its charter, that is, as a fund for payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? If the stock may, the next day after it is paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholder so diligently required? To me this point appears so plain upon principles of law, as well as common sense, that I cannot be brought into any doubt that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The billholders and other creditors have the first claims upon it; and the stockholders have no rights until all the other creditors are satisfied. They have the full

benefit of all the profits made by the establishment, and cannot take any portion of the fund until all the other claims on it are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid. On a dissolution of the corporation the billholders and the stockholders have each equitable claims, but those of the billholders possess, as I conceive, a prior exclusive equity. The same doctrine has been recognized by the supreme court of Massachusetts in *Vose v. Grant* (15 Mass. 505, 517, 522), and *Spear v. Grant* (16 Mass. 9, 15).

If I am right in this position, the principal difficulty in the cause is overcome. If the capital stock is a trust fund, then it may be followed by the creditors into the hands of any persons having notice of the trust attaching to it. As to the stockholders themselves, there can be no pretence to say that both in law and fact they are not affected with the most ample notice.

The doctrine of following trust funds into the hands of any persons who are not innocent purchasers, or do not otherwise possess superior equities, has been long established. Lord Redesdale, in *Adair v. Shaw* (1 Sch. & Lef. 243, 262), lays it down in very broad terms. He says: "If we advert to the cases on this subject, we shall find that trusts are enforced not only against those persons who rightfully are possessed of the trust property as trustees, but also against all persons who come into possession of the property bound by the trust with notice of the trust; and whoever comes so into possession is considered as bound with respect to that special property to the execution of the trust." And a very strong recognition, as well as application, of the principle will be found in *Taylor v. Plumer* (3 Maule & Selw. 562, 574), even in a court of common law. Upon this ground, assets disposed of by executors by misapplication, or existing in the hands of debtors, where the executor is insolvent or there is collusion, are often reached in favor of creditors as a trust fund. *Hill v. Simpson* (7 Ves. 152), and the cases there cited fully illustrate this position.¹ The cases of partnership furnish also a pretty strong analogy. There, in equity, partnership funds will be followed in favor of creditors into the hands of third persons. It is true, that as the Master of the Rolls said in *Campbell v. Mullett* (2 Swanston, 550, 575), the equities of creditors are to be worked out through the medium of the partners. They have no lien, but something approaching to a lien, which courts of equity will regard and enforce, in all cases where superior rights, which ought to be protected, do not intervene.² It is not, however, necessary to search

¹ See, also, *Moses v. Murgatroyd* (1 Johns. Ch. 119); *Dexter v. Stewart* (7 Johns. Ch. 52); *Shepherd v. McEvers* (4 Johns. Ch. 135); *Long v. Majestre* (1 Johns. Ch. 305); *Riddle v. Mandeville* (5 Cranch, 322); *Russell v. Clark's Executors* (7 Cranch, 69).

² See, also, *Ex parte Ruffin* (6 Ves. 119, 127); *Ex parte Fell* (10 Ves. 347); *Ex parte Williams* (11 Ves. 3); *Ex parte Harris* (1 Madd. 583); *Ex parte Kendall* (17

for analogous cases; for upon the plain import of the charter, the capital stock is a trust fund for creditors, and the stockholders, upon the division, take it subject to all equities attached to it. They are, to all intents and purposes, privies to the trust, and receive it *cum onere*.

Another consideration is, whether the suit is well founded in point of jurisdiction. The eleventh section of the Judiciary Act of 1789, ch. 20, provides that no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. It has been objected that this section prohibits the present suit. But my opinion is that it is wholly inapplicable. In the first place, the bank notes were payable to bearer, and the bearer does not claim by any assignment. He is an original holder. Bank notes pass in and out of the bank many times, and the property in them vests by mere delivery in the person who comes fairly in possession of them. In the next place the plaintiffs do not found their title to relief solely upon their right as holders of these notes. Their present cause of action is collateral to that right. Their demand against the defendants is original in themselves upon the non-payment and insolvency of the bank, and is not derived under the title of any other person. It never vested in any other person, and has never come to them by any assignment.¹

The next consideration is whether the bill makes out a case, which, upon the facts proved or admitted, entitles the plaintiffs to relief. I have already adverted to the loose structure of the bill. It primarily charges the case as a case of fraud; that is now abandoned. If it can stand at all, it must be simply on the fact that the defendants have the funds in their possession. That alone could not entitle the parties to relief, without allegations of insolvency on the part of the corporation or of the non-existence of other funds. Now the bill does not allege that the corporation is insolvent, nor that it is dissolved, nor that there is no other corporate property out of which the debts can be paid. These are extraordinary omissions; and if there had been a demurrer to the bill, it would be difficult for the court to have strained hard enough to support it. But these defects are in some degree helped by the answers, which admit the insolvency of the corporation, and show that in fact no sufficient funds for payment of its debts are in existence, independent of the capital stock.

Then, again, the bill (notwithstanding the intimations thrown out

Ves. 514, 526); *Murray v. Murray* (5 Johns. Ch. 60); *Ex parte Lodge and Fendall* (1 Ves. Jr. 166); *Taylor v. Fields* (4 Ves. 396); *Young v. Keighly* (15 Ves. 557).

¹ See *Bean v. Smith* (2 Mason, 252).

by the court on a former hearing of the cause) does not charge that the capital stock is a trust fund, appropriated by law and the charter to the payment of the debts, and that the surplus only, after such payment, belongs to the stockholders. Such an allegation was most fit to have been made upon the grounds on which ultimately the plaintiffs concluded to rest their case at the hearing. The court is therefore compelled to thread it out by inference and intendment and exposition of the charter, as made part of the pleadings.

Then, again the bill charges the new Hallowell and Augusta bank to be possessed of large funds of the old bank which ought to be applied to the payment of the debts of the latter; and without attempting to bring the new bank to a hearing, the bill has, by the plaintiffs, been dismissed as against the new bank, leaving all the inferences deducible from the charge in the bill in full force against the plaintiffs. This ought to have been cured by an amendment of the bill.

I advert to these defects not in the spirit of censure (for I am well aware that an apology is found in the fact that chancery proceedings have hitherto but in a slight degree engaged the attention of the bar in this district), but in a spirit of regret, because they have been most embarrassing to the court in every step of its progress, and distressed it by creating a perpetual struggle between the desire to do justice to the parties, after so prolonged and expensive a controversy, and the difficulty of overcoming technical principles.

The exception as to parties ranges itself under this head. There is no allegation in the bill that the old corporation is defunct, so as to dispense with its being made a party. The answers do not deny that it yet has a legal existence, and therefore afford no help to cure the defect. Now, if in existence, nothing can be more clear than that it ought to have been made a party to the bill. It is the original debtor; its funds are to be applied in payment of debts, and it would be wrong to touch those funds without the most plenary proofs that the debts were due and the corporation had no defence.

There is a case very much like the present in many of its circumstances. It is *Curson v. African Company*, reported in 1 Vernon, 121, and somewhat more fully as to the facts in *Skinner*, 84. The plaintiff was a creditor on bond of the old African Company, which became insolvent, but did not surrender its charter, and a new company was incorporated, consisting for the most part of the old members, to which the old company assigned its effects for payment of its debts. The suit was against the new company, for payment of the plaintiff's debts out of these effects as a trust fund. The difficulty was that the old company was not made a party to the bill. Lord Keeper North had some hesitation about the necessity of issuing process against the old company, because they had no property on which a distringas could issue to compel them to appear. But

he seems to have had no doubt of proceeding, if the company was dissolved, nor of operating on the fund itself. He said, "If an executor convey over all the estate, and go to the Indies, or elsewhere not to be found, the estate shall be liable to satisfy the creditors; but this shall be after he hath stood out all process." Skinner, 84, 85. The objection, however, was finally waived, and the plaintiff had a decree for forty per cent, being the same amount as the other creditors had received.

This difficulty, in point of averment and proof (for the fact of dissolution is notorious to all), may, however, as I think, be overcome. The acts of the Legislature creating the bank, and continuing its existence for a limited time, are made part of the bill; and as a prolonged existence cannot be presumed, and is not asserted in the answers, the court must take it to be true that the corporation expired by the legislative limitation, antecedent to the filing of the bill. Upon the clearest principles it cannot be necessary to make a non-existing corporation a party.

But then it is argued that no decree ought to be made without making all the stockholders parties to the bill, for all are liable to contribution. I agree that if proper parties are not made, the defendant may demur to the bill, or state it by plea or answer, or may object to a decree at the hearing, or even obtain a reversal, in some cases, after a decree. Whenever taken, either by demurrer, or plea, or answer, or at the hearing, the court, if the objection is well founded, is not bound to dismiss the bill, but may retain it, giving leave to make new parties.¹ The subject as to who are necessary parties and when they may be dispensed with was a good deal discussed by the court in delivering its judgment in *West v. Randall* (2 Mason, 181, 190, etc.). The principal cases are there collected and commented on. The general rule is that all persons materially interested, either as plaintiffs or defendants, are to be made parties. There are exceptions just as old and as well founded as the rule itself. Where the parties are beyond the jurisdiction, or are so numerous that it is impossible to join them all, a court of chancery will make such a decree as it can without them. Its object is to administer justice, and it will not suffer a rule, founded in its own sense of propriety and convenience, to become the instrument of a denial of justice to parties before the court, who are entitled to relief. What is practicable to bring all interests before it will be done. What is impossible or impracticable, it has not the rashness to attempt, but it contents itself with disposing of the equities before it, leaving, as far as it may, the rights of other persons

¹ Cooper, Eq. Pl. 33, 289; Mitf. Pl. 144, 145; *Jones v. Jones* (3 Atk. 110); *Pract. Reg. Wyatt*, 299; 1 P. Will. 428, 599; 3 P. Will. 333; *Palk v. Clinton* (12 Ves. 48, 58); *Bishop of Winchester v. Beaver* (3 Ves. 314); *Attorney-General v. Jackson* (11 Ves. 365); *Milligan v. Mitchell* (3 Cranch, 220); *Cockburn v. Thompson* (16 Ves. 321, 325); *Madox v. Jackson* (3 Atk. 406).

unprejudiced. In respect to the exception on account of the numerousness of parties, the question has been discussed and acted upon in many cases, particularly in *Chancey v. May* (Prec. Ch. 592); *Leigh v. Thomas* (2 Ves. 312); *Lloyd v. Loaring* (6 Ves. 773); *Adair v. The New River Company* (11 Ves. 429); *Good v. Blewitt* (13 Ves. 397); and *Cockburn v. Thompson* (16 Ves. 320).¹ The result of the whole cases is that where the parties are so numerous that it is inconvenient or impracticable to bring all before the court, the rule, which is founded on the consideration of public good, shall not be applied, since it would defeat the purposes of justice.

Now, no case could afford a stronger illustration for the application of the principle than the present. Here the capital stock is divisible into two thousand shares of \$100 each. Every share is transferable, and may be unlimitedly assigned to any persons whatsoever, whether citizens or aliens, residents or non-residents. It is obviously impracticable in such a case to bring all the stockholders before the court. Many of them may reside, and probably do reside, in other States; and the court must presume that the shares are very variously distributed. There is no complaint that the defendants now before the court do not represent effectually the interests adverse to the plaintiffs, or that the struggle is not maintained with all due legal pertinacity. Nor is it pretended that the other stockholders have means of affording a more effectual defence to the defendants in respect to their own particular interests. The objection is now made upon dry technical principles of strict right, and upon these it cannot and ought not to be sustained. The case of *The City of London v. Richmond et al.* (2 Vern. 421; s. c. 2 Eq. Ca. Abr. 86; s. c. Preced. Ch. 156; 1 Bro. Par. Cas. 516), is in point. There the city had granted a lease of certain water to one A., who afterwards assigned over the lease to trustees in trust for the holders of the shares (nine hundred shares), into which it was divided. The rent being unpaid, the bill was brought against the assignees and some of the shareholders, and, upon an objection that all ought to have been joined, it was expressly overruled, upon the ground of its impracticability. There is an anonymous case in 2 Equity Cas. Abr. 166, pl. 7, to the same effect. Certain persons became subscribers to a bank, to be authorized by Parliament, and £6,000 was expended in endeavoring to effect the object. The persons who had advanced the £6,000 brought their bill for repayment against sixteen out of two hundred and fifty subscribers. The court overruled the objection taken for want of all the subscribers, because the plaintiffs sought to recover only their proportion of the loss from the defendants.

Upon the whole, my opinion is, that the objection of the want of

¹ See, also, *Wendell v. Van Rensselaer* (1 Johns. Ch. 344); *Wiser v. Blachly* (1 Johns. Ch. 437); *Executors of Brasher v. Vancortlandt* (2 Johns. Ch. 242); *Van Vechten v. Terry* (2 Johns. Ch. 197).

sufficient parties cannot be maintained. We may then proceed to the merits of the defence, as disclosed in the answers. One ground there taken is, that the demands of the plaintiffs respectively are barred by the statute of limitations. But this bar to a decree cannot, upon the facts, be sustained. The rights of the plaintiffs accrued as against the defendants within six years; for until a refusal of payment by the bank of its notes, followed by an inability to discharge them, there was no cause of proceeding in equity against the defendants. There is no positive bar to suits in equity, but whenever any limitation is adopted, it is ordinarily regulated by analogy to the common law. Here the claim is against a trust fund in the hands of the defendants; and in cases not of constructive but of express trusts, so long, at least, as they are not encountered by an adverse possession and denial of right, the statute of limitations does not begin to run. I should have very great difficulty in allowing a bar of the statute of limitations to operate in a case of this nature, unless where the circumstances of negligence on one side, and of positive denial of right on the other, were very cogent. Here the capital stock was actually divided, to the amount of \$150,000, in January and October, 1813, at a time when it was perfectly well known, or ought to have been known, that a very large number of bank notes, amounting, I believe, to more than \$90,000, were due and outstanding against the bank. If what has fallen from the bar be correct, this large amount remains yet unpaid. How was its payment provided for? Simply by the notes due to the bank, then outstanding, the productiveness of which could not be then ascertained; and the utter insolvency of the debtors has been since fully established. These notes, indeed, to an amount of more than \$140,000 (including the stock notes for the unpaid quarter part of the capital stock), were due almost entirely from the directors of the bank, from whose official misconduct the stockholders ought certainly to derive no benefit, if they are not to be affected with any private responsibility.

The only other ground suggested as a defence by the defendants is that they have been guilty of no fraud, and that the division of the capital stock was an act authorized by law, and there is no equity to relieve the plaintiffs by throwing the loss on the stockholders. The answer to this argument, for such it is, has already been given. The stockholders have no right to anything but the residuum of the capital stock after payment of all the debts of the bank. The funds in their hands, therefore, have an equity attached to them in favor of the creditors, which it is against conscience to resist. To be sure the plaintiffs might, if their bill had been properly framed, have shown a much stronger case for equity, and might have shown due diligence in attempting to enforce their rights. I allude to the known facts of the various suits at common law, some of which have been cited at the bar and others brought to this court for deci-

sion, in which great efforts have been made to obtain a remedy at law by the billholders, without success.

The next question is what sort of decree the plaintiffs are entitled to. Are they entitled to a decree to the full amount of the dividends received by the defendants respectively, towards payment of the debts due from the bank to them, or are they entitled only to a *pro rata* payment out of that dividend in the proportion which the stock held by the defendants bears to the whole capital stock? The bill does not allege that the other stockholders who have received dividends are insolvent or out of the jurisdiction of the court. Nor does it state what the amount of the debts due from the bank to billholders or others is. It would have been desirable, as far as it was practicable, that all the other creditors, who had a common interest, might have been brought before the court. But neither party has urged it or waived any formal objection to the introduction of them. The court, therefore, in proceeding to do equity to those before it, must take care that it is not the instrument of injustice to others who are not represented. *Non constat*, if the whole fund is taken from the defendants in favor of the plaintiffs, that there will remain any solvent stockholders from whom the other creditors can claim any share. It is true, in the case of *The City of London v. Richmond* (2 Vern. 421; 1 Bro. Par. Cas. 518), that though all the parties in interest were not before the court the full rent was decreed, but that case furnishes no rule for the present, for there the trustees of all the shareholders were before the court, and they were the assignees of the estate, and therefore held it liable to the rent. In the anonymous case in 2 Eq. Ca. Abr. 166, pl. 7, the decree was only for a proportion of the money expended, but there the bill asked for no more. I rather incline to think that the judges in the cases in 15 Mass. 505, and 16 Mass. 9, meant to indicate an opinion in favor of the billholders only for a proportion, unless special circumstances were made out, such as insolvency, etc.

What would be the effect of the introduction of an averment of the insolvency of the other stockholders, or their being out of the jurisdiction, or of other circumstances denoting a peculiar equity, in a bill of this nature, it is not now necessary to decide.¹ Taking into consideration the manifest defects of the present bill, the long delay in instituting the present suit (which is not accounted for in any averments framed for this purpose), the possible, nay, probable, intermediate insolvencies of some of the stockholders, the injustice which may arise to other creditors of the bank, not before the court, by any other course, I have come to the conclusion that our duty is best performed by holding the plaintiffs entitled to a decree that the defendants pay out of the dividends of the capital stock received by them so much of the debts due to the plaintiffs as the number of

¹ See *Madox v. Jackson* (3 Atk. 405); *Attorney-General v. Jackson* (11 Ves. 365).

shares held by them in the same capital stock (viz., three hundred and twenty shares) bears to the whole number of shares in the capital stock (viz., two thousand shares).

There is much force in the suggestion that the corporation books have been withdrawn and secreted, so that the plaintiffs were unable originally to ascertain who the other stockholders were. But this difficulty might, in some measure, have been overcome by apt averments in the bill, and the disclosure of the names of several stockholders in the answers puts the plaintiffs in possession of facts by which, at their choice, they might by an amendment have brought those persons before the court, or have assigned a sufficient reason for the omission.

My judgment accordingly is, that the defendants are to pay the plaintiffs in the proportion already intimated, and no further.

Decree accordingly, with costs.

OGILVIE v. KNOX INSURANCE COMPANY.

(22 Howard (U. S.), 380. 1859.)

THIS was an appeal from the Circuit Court of the United States for the District of Indiana.

MR. JUSTICE GRIER delivered the opinion of the court:—

The complainants in this case are judgment creditors of the Knox Insurance Company. The numerous other defendants are stockholders of the company, and are severally charged as debtors to it, for the unpaid portion of the stock subscribed by them.

The company is insolvent, or at least is unable to pay its creditors, without calling in the capital subscribed and secured, but not actually paid in cash. This it has failed or refused to do. This bill is filed to compel these stockholders or debtors to the corporation to pay the amount of their debts in order that the creditors of the company may obtain satisfaction.

The bill was taken *pro confesso* as against the corporation. The other defendants, being corporators, are consequently concluded as to the averments of the bill affecting them as such. As stockholders who have not paid in the whole amount of the stock subscribed and owned by them, they stand in the relation of debtors to the corporation for the several amounts due by each of them. As to them, this bill is in the nature of an attachment, in which they are called on to answer as garnishees of the principal debtor.

Where a number of special partners are incorporated to carry on the business of insurance, the stock subscribed and owned by the several stockholders or partners constitutes the capital or fund publicly pledged to all who deal with them. Insurance companies or corpora-

tions, unless they have the privilege of using their capital for banking purposes, seldom require the actual payment of it all in cash. Contracts of insurance or indemnity, though not literally "gaming contracts," are nevertheless in the nature of wagers against the happening of a certain event. The calculation of chances is greatly in favor of the insurer. In a large number of policies it is but reasonable to expect that the amount of premiums will exceed that of the losses. The insured are thus made to pay one another, and with common good fortune afford an overplus to make a dividend for the insurers. Hence the Knox Insurance Company, like others of the same description, did not require their stockholders to pay in cash more than ten per cent of their several shares. They were allowed to retain the remaining ninety per cent in their own possession, substituting therefor their bonds or other securities. Thus every stockholder became a borrower from, and debtor to, the capital stock of the company. If in the course of events the chances were favorable, a dividend of twenty per cent on capital would give a profit of two hundred on the money actually paid out by them. On the contrary, if they were adverse, the capital represented by securities must necessarily be paid in to satisfy the just debts of the company.

The ninety per cent retained by the stockholders is as much a part of the capital pledged as the cash actually paid in. When that portion of the capital represented by these securities is required to pay the creditors of the company, the stockholders cannot be allowed to refuse the payment of them unless they show such an equity as would entitle them to a preference over the creditors, if the capital had been paid in cash.

Let us now examine their defence and see if they have established such an equity.

They do not deny that they paid the ten per cent, gave their securities for the balance, and have received their certificates for their several shares of stock; but they contend that they are not bound to pay these securities, because the agent of the corporation, who took the subscriptions of stock, made certain representations concerning the state of the affairs of the corporation, which were not true; and, as a consequence thereof, they are not bound to pay these securities.

The numerous defendants, with some immaterial variations and qualifications, adopt the answer of their co-defendant, Collum, which we shall give verbatim from the record, to show that we have not misstated or mistaken the nature of the defence set up:—

"And, by the way of defence to said suit, said Collum alleges that just before he gave said note, accepted said first bill, Robert N. Carnan, an agent of said insurance company, came to Jeffersonville to procure persons there to give notes and bills for stock in said insurance company; and in order to induce said Collum to give his said note, and accept said first bill for such stock, said Carnan, as such agent, then and there falsely and fraudulently said and represented to said

Collum, and in his hearing, that stock in said insurance company to the amount of \$75 [seventy-five thousand ?] had then been subscribed for at Vincennes, and on the Wabash River, and all of said amount had then been paid or secured, as the charter of said insurance company required. Said Collum did not then know, nor then have the means of knowing, to the contrary of said representations, and he fully believed them to be true, and with that belief he gave his said note and accepted said two bills for stock in said insurance company; and if he had not fully believed said representations, he would not have given said note nor accepted said bills, or either of them. At the time said representations were so made, and said note given, and said first bill accepted, there had not been more than \$25,000 of stock in said insurance company subscribed for and paid and secured, as said charter required, at Vincennes, on the Wabash River, which said Carnan then well knew. Said Carnan also, at and just before said Collum made his said note and accepted his said first bill, represented to him that said insurance company then had \$40,000 of funds on hand, mostly in eastern exchange, which they could not dispose of at Vincennes, and they wished to get stockholders at Jeffersonville, so as to have an officer of said insurance company there, and they would then send those funds there to be sold and used. Said Collum did not then know, and had no means of knowing, to the contrary of said representation, but he believed it, and it was a strong inducement with him to make his said note and accept his said bills; yet he is now informed and believes said representation was grossly false, and that said insurance company did not at that time have and had not at any time had that sum or anything like that sum of money on hand, and mostly in eastern exchange, which they could not dispose of at Vincennes."

Carnan, who was examined as a witness, denies the charges made in this answer, and declares that he was not authorized by the company to make such representations, and did not make them.

To establish their defence, several of the defendants themselves were called as witnesses, alleging that, as their responsibility was several and not joint, each one may be called as a witness for all the rest. Much of the argument of this case has been expended on the question of the competency of these witnesses to testify in their own case; but we do not think it necessary to decide it, as there are other facts in the case which show clearly that the matter pleaded cannot affect the relative rights of the parties in the case, assuming it to be true.

Those who seek to set aside their solemn written contracts, by proving loose conversations, should be held to make out a very clear case; and when they charge others with fraud, founded on such evidence, their own conduct and acts (which speak louder than words) should be consistent with such a hypothesis. Assuming the fact that Carnan did make the representations charged, what was the conduct of these Jeffersonville stockholders, who now seek to repudiate their contracts on the allegation of fraud? After having a full oppor-

tunity to examine for themselves into the affairs of the company, they alleged no fraud, nor expressed any desire to withdraw their subscriptions; on the contrary, when fully informed that the amount of stock subscribed at Vincennes did not equal that taken at Jeffersonville, and when an offer was made to increase the Vincennes subscriptions, so as to equal those at Jeffersonville, the defendants and those who acted with them objected, and insisted that the lower the amount of stock the higher would be the dividend, and consequently it had better not be increased till after the first dividend of twenty-five per cent had been made.

After the defendants had a full opportunity to know the situation of the company, its funds and its property, they organized at Jeffersonville a branch of the corporation, having resident directors at that place. This board met from time to time, through the months of April, May, June, July, and up to 13th August, 1850. While there was a prospect of a dividend of two hundred and fifty per cent on the amount of cash paid in, their eyes were shut to the deceit supposed to have been practised on them. In the month of May, a fire at Owensville, Kentucky, was reported, in which the company lost about \$50,000. This seemed to injure the prospect of the large dividend; yet even then it was not so clearly perceived that the defendants were defrauded.

The directors at Jeffersonville, who represented their interests, continued to meet till the middle of August, and till a succession of losses made it apparent that the capital of the company would be nearly all required to pay for the losses incurred. When these facts became patent, the directors at Jeffersonville, at their last meeting in August, "after taking time to consider what was best to be done," concluded to consider themselves defrauded and withdraw their capital from the company.

We need not cite authorities to show that this discovery was made too late, and that a court of equity cannot receive such a pretence as a valid defence against the creditors of this corporation.

The objection made to the bill for want of proper parties is equally untenable. The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders or partners, incorporators or debtors. If A. is bound to pay his debt to the corporation in order to satisfy its creditors, he cannot defend himself by pleading that these complainants might have got their satisfaction out of B. quite as well. It is true, if it be necessary to a complete satisfaction to the complainants that the corporation be treated as an insolvent, the court may appoint a receiver, with authority to collect and receive all the debts due to the company and administer all its assets. In this way, all the other stockholders or debtors may be made to contribute.

For these reasons, we are of opinion that the decree of the Circuit Court should be reversed, with costs, and that the record be remanded, with instructions to that court to enter a decree for the complainants against the respondents severally for such amount as it shall appear was due and unpaid by each of them on their shares of the capital stock of the Knox Insurance Company, and to have such other and further proceedings as to justice and right may appertain.

SAWYER v. HOAG.

(17 Wall. 610. 1873.)

APPEAL from the Circuit Court for the Northern District of Illinois; the case being thus: —

About the 1st of April, 1865, and prior, therefore, to the passage of the Bankrupt Act of 1867, the directors of the Lumberman's Insurance Company of Chicago — a company then recently incorporated and authorized to begin business on a capital of \$100,000, of which not less than one-tenth should be paid in, the residue to be secured — invited subscriptions to the capital stock of the company; stating, in most instances, to those whom they invited to subscribe, that only 15 per cent would be required to be paid down in cash, and that the remaining 85 per cent would be lent back to the subscriber, and a note taken therefor, payable in five years, with 7 per cent interest, payable semi-annually, secured by collateral security satisfactory to the directors of the company.

In this state of things one Sawyer, about the said 1st of April, 1865, at the solicitation of one of the directors, subscribed for fifty shares of stock. When called upon to close his subscription, he was informed, as indeed all the subscribers were, that the matter would be closed on the plan above mentioned.

Sawyer accordingly complied with the requirements, and gave his check to the company for \$5,000, the full amount of his stock, and his note payable to it in five years from date, for \$4,250, that is to say, for 85 per cent of the par value of the stock, with interest, payable as aforesaid, and delivered to the company as collateral security for the payment of his note satisfactory securities, and received from the company a check for \$4,250, or 85 per cent of the par value of the stock, by way of, and as for a loan thereof from the company. At the same time Sawyer gave a written authority to the company to sell the securities at public auction for cash, in case default should be made in the payment of the note and the interest thereon.

Sawyer subsequently took up this note and gave in substitution therefor another note, and new securities as collateral, with power, as

in the case of the former ones, to sell them on default of payment of the note or interest.

At the time when the said original and substituted notes were made, money was worth and could have been lent in Chicago at from 8 to 10 per cent interest per annum, payable semi-annually, on good security.

The original transaction was regarded and treated by the company, and by Sawyer as a loan by the company to him, and his stock was treated as fully paid for. At various times after the giving of the original note, the company reported to the authorities of the State of Illinois and of other States that its capital stock was fully paid.

On the 8th and 9th day of October, A. D. 1871, a great fire devastated the city of Chicago, and rendered the Lumberman's Insurance Company insolvent; and on the 25th of January, 1872, — it being at that time a notorious fact, one well understood by the public, and one which Sawyer had good reason to believe, that the said company was insolvent and unable to pay its liabilities, — Sawyer purchased of a certain Hayes a certificate of an adjusted loss for \$5,000 against the company for 33 per cent of its par value.

In June, 1872, after Sawyer had purchased this certificate of adjusted loss, a petition in bankruptcy was filed against the company, and it having been adjudicated a bankrupt, one Hoag was appointed its assignee.

The thirteenth section of the Bankrupt Act enacts "that after the adjudication in bankruptcy the creditors shall choose one or more assignees of the debtor." And the fourteenth section, under the marginal head of, "What is to be vested in the assignee by the adjudication of bankruptcy," etc., enacts that —

"All the property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action . . . all debts due him or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, . . . and for any cause of action which the bankrupt had against any person, . . . with the like right, title, power, and authority to sell, manage, dispose of, sue for and recover the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee be at once vested in such assignee; and he may sue for and recover the said estate, debts, and effects, and may prosecute and defend all suits at law and equity . . . in the same manner and with the like effect as they might have been prosecuted or defended by such bankrupt."

The fifteenth section of the act enacts: —

"That the assignee shall demand and receive from any and all persons holding the same all the estate assigned or intended to be assigned under the provisions of this act."

The sixteenth section enacts: —

"That the assignee shall have the like remedy to recover all said estate, debts, and effects, in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made."*

Among the effects of the company which came into Hoag's hands as assignee, was the already-mentioned note of Sawyer for \$4,250, with the securities assigned as collateral. Hoag demanding of Sawyer payment of this note, Sawyer produced his certificate of adjusted loss for \$5,000, and insisted on setting it off against the demand; asserting a right to do this under the twentieth section of the Bankrupt Act, a section in these words:—

“In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate :

“Provided, That no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition.”

Hoag refused to allow the set-off, and was about to sell the collateral securities in accordance with the power given to him. Hereupon Sawyer filed a bill in the court below to enforce the set-off; in which he alleged, among other things, that the note given by him to the insurance company was for money lent to him.

The assignee, in his answer, denied that the note was for money lent, and averred that it was in fact for a balance due by Sawyer for his stock subscription, which had never been paid, and insisted that such balances constituted a trust fund for the benefit of all creditors of the insolvent corporation, which could not be made the subject of a set-off against an ordinary debt due by the company to one of its creditors. After the general replication, the case was submitted to the court below on an agreed statement of facts. That court decreed against the complainant, and from that decree the case was brought by the present appeal to this court.

MR. JUSTICE MILLER delivered the opinion of the court:—

The first and most important question to be decided in this case is whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription.

The charter under which the company was organized authorized it to commence business upon a capital stock of \$100,000, with \$10,000 paid in, and the remainder secured by notes with mortgages on real estate or otherwise. The transaction by which the appellant professes to have paid up his stock subscription is, shortly, this: He gave to the company his check for the full amount of his subscription, namely, \$5,000. He took the check of the company for \$4,250, being the amount of his subscription less the 15 per cent required of each stockholder to be paid in cash, and he gave his note for the amount of the latter check, with good collateral security for its payment, with interest at 7 per cent per annum. The appellant and the

company, by its officers, agreed to call this latter transaction a loan, and the check of the appellant payment in full of his stock; and on the books of the company, and in all other respects as between themselves, it was treated as payment of the subscription and a loan of money. It is agreed that at this time the current rate of interest in Chicago was greater than 7 per cent, and it is not stated as a fact whether these checks were ever presented and paid at any bank, or that any money was actually paid or received by either party in the transaction. It must, therefore, be treated as an agreement between the corporation, by its officers, on the one part, and the appellant, as a subscriber to the stock of the company, on the other part, to convert the debt which the latter owed to the company for his stock into a debt for the loan of money, thereby extinguishing the stock debt.

Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually as far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other, if it was found to be mutually convenient to do so. And in any controversy which might or could grow out of the matter between the insurance company and the appellant, we are not prepared to say that the company, as a corporate body, could deny that the stock was paid in full.

And on this consideration one of the main arguments on which the appellant seeks to reverse the decree stands. He assumes that the assignee in bankruptcy is the representative alone of the corporation, and can assert no right which it could not have asserted. The weakness of the argument is in this assumption. The assignee is the representative of the creditors as well as the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property, rights, and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt himself would be bound. All this, of course, is in the interest of the creditors of the bankrupt.

Had the creditors of this insolvent corporation any right to look into and assail the transaction by which the appellant claims to have paid his stock subscription?

Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.

The principle is fully asserted in two recent cases in this court, namely, *Burke v. Smith* (16 Wallace, 390), and in *New Albany v.*

Burke (11 Id. 96). Both these cases turned upon the doctrine we have stated, and upon the necessary inference from that doctrine, that the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing, and for a valuable consideration.

In the latter case, a judgment creditor of an insolvent railroad company, having exhausted his remedy at law, sought to enforce this principle by a bill in chancery against the stockholders. The court, by affirming the right of the corporation to deal with the debt due it for stock as with any other debt, would have ended the case without further inquiry. But asserting, on the contrary, to its full extent, that such stock debts were trust funds in their hands for the benefit of the corporate creditors, and must in all cases be dealt with as trust funds are dealt with, it was found necessary to go into an elaborate inquiry to ascertain whether a violation of the trust had been committed. And though the court find that the transaction by which the stockholders had been released was a fair and valid one, as founded on the conditions of the original subscription, the assertion of the general rule on the subject is none the less authoritative and emphatic.

In the case before us the assignee of the bankrupt, in the interest of the creditors, has a right to inquire into this conventional payment of his stock by one of the shareholders of the company; and on that inquiry we are of opinion that, as to these creditors, there was no valid payment of his stock by the appellant. We do not base this upon the ground that no money actually passed between the parties. It would have been just the same if, agreeing beforehand to turn the stock debt into a loan, the appellant had brought the money with him, paid it, taken a receipt for it, and carried it away with him. This would be precisely the equivalent of the exchange of checks between the parties. It is the intent and purpose of the transaction which forbids it to be treated as valid payment. It is the change of the character of the debt from one of a stock subscription unpaid to that of a loan of money. The debt ceases by this operation, if effectual, to be the trust fund to which creditors can look, and becomes ordinary assets, with which the directors may deal as they choose.

And this was precisely what was designed by the parties. It divested the claim against the stockholder of its character of a trust fund, and enabled both him and the directors to deal with it freed from that charge. There are three or four of these cases now before us, in which precisely the same thing was done by other insurance companies organized in Chicago, and we have no doubt it was done by this company in regard to all their stockholders.

It was, therefore, a regular system of operations to the injury of the creditor, beneficial alone to the stockholder and the corporation.

We do not believe we characterize it too strongly when we say that it was a fraud upon the public who were expected to deal with them.

The result of it was that the capital stock of the company was neither paid up in actual money, nor did it exist in the form of deferred instalments properly secured.

It is said by the appellant's counsel that conceding this, it is still a debt due by him to the corporation at the time that he became the owner of the debt due by the corporation to Hayes, and, therefore, the proper subject of set-off under the twentieth section of the Bankrupt Act. That section is as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: Provided, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.

The debts must be mutual; must be in the same right.

The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim.

It is unnecessary to go into the inquiry whether this claim was acquired before the commission of an act of bankruptcy by the company, or the effect of the bankruptcy proceeding. The result would be the same if the corporation was in the process of liquidation in the hands of a trustee, or under other legal proceedings. It would still remain true that the unpaid stock was a trust fund for all the creditors, which could not be applied exclusively to the payment of one claim, though held by the stockholder who owed that amount on his subscription.

Nor do we think the relation of the appellant in this case to the corporation is without weight in the solution of the question before us. It is very true that by the power of the Legislature there is created in all acts of incorporation a legal entity which can contract with its shareholders in the ordinary transactions of business as with other persons. It can buy of them, sell to them, make loans to them, and in insurance companies make contracts of insurance with them, in all of which both parties are bound by the ordinary laws of contract. The stockholder is also relieved from personal liability for

the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that when the interest of the public, or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him.

These principles require the affirmation of the decree in the present case, and it is accordingly *Affirmed.*

MR. JUSTICE HUNT dissented, holding that the transaction was a loan by the company to the appellant.

UPTON v. TRIBILCOCK.

(91 U. S. 45. 1875.)

ERROR to the Circuit Court of the United States for the District of Iowa.

MR. JUSTICE HUNT delivered the opinion of the Court:—

Two points are presented in this case. Upon the first point, the facts are as follows: The plaintiff, as assignee of the Great Western Insurance Company, a corporation organized under the statute of the State of Illinois, brought his action against the defendant, alleging that he was a stockholder of said corporation to the amount of \$10,000; that twenty per cent only had been paid upon his stock; alleging also the bankruptcy of the company, the appointment of the plaintiff as assignee, and the demand of the amount claimed, and seeking to recover the \$8,000 remaining unpaid. The complaint averred that the defendant did verbally agree to become such stockholder, and, with intent to become such, did accept a certificate for the same, whereby he became bound to pay the full amount thereof, as follows: Five per cent upon delivery of the certificates; five per cent in three months; five per cent in six months; five per cent in nine months; and the residue whenever called for by the company, according to the charter of the company and the laws of the State of Illinois.

The defence is that the subscription was obtained by the fraudulent

representations of the agent of the company, to the effect that the defendant would only be responsible for twenty per cent of the subscription made by him; that afterwards he executed his promissory note for the twenty per cent, and secured the same by a mortgage of real estate; "and that thereupon," in the language of the answer, "and pursuant to agreement, said subscription contract was surrendered and delivered up to defendant;" and also, in the language of the answer, "that said note was a full payment and discharge of all obligations and personal liabilities of all kinds whatsoever by reason of his contract so made and the relations created by the delivery to him of said certificate, and said note was received in full payment." In his third amended answer, the defendant avers that he did subscribe for stock on the conditions mentioned; that after that contract was made, and before a certificate was delivered to him, and before executing his note, an agreement was made with Overton on behalf of the company to the effect before stated; and thereupon he made and delivered the note and mortgage, which was received by Overton in full discharge and payment of the amount due on his said subscription.

The evidence contained in the bill of exceptions leaves the case substantially as is averred in the pleadings. The defendant offered evidence tending to prove representations that twenty per cent only was required to be paid; that eighty per cent was non-assessable, and created no personal liability; that the agent, Overton, exhibited a blank form of certificate with the word "non-assessable" printed across the face, "being a copy similar to that subsequently filled up and delivered to defendant by Overton." It appears that, before the defendant made his subscription, a copy of the charter and by-laws had been furnished to him by Overton; and that, in returns made by the company to the auditor of the State of Illinois of the amount of "unpaid subscribed capital for which the subscribers were liable," the amount of the defendant's note was included.

The case standing in this position upon the pleadings and the evidence, the plaintiff requested the court to charge the jury as follows: 2d. That any contract between the company or its agents and the stockholders, limiting their liability as to unpaid instalments of stock, is void as to creditors of the company, and as to the rights of the assignee who represents the creditors in this action. 3d. That if the jury find from the evidence that the defendant, J. D. Tribilcock, became a stockholder of the Great Western Insurance Company in the month of August, 1870, and that he continued to own and hold said stock until after the insolvency of the company in February, 1873, that any representations by any agent of the company at the time defendant became such stockholder as to the matter of his liability for eighty per cent of the stock, or any indorsement on the stock of the word "non-assessable," are wholly immaterial and constitute no defence to this action. This request was refused.

It is hardly necessary to argue the proposition, that if the defendant became a holder of shares of the capital of this insurance company to the amount of \$10,000, and had paid but twenty per cent thereof, its creditors were entitled to require of him the payment of the eighty per cent remaining unpaid. The acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder. *Brigham v. Mead* (10 Allen, 245); *Buff. City R. R. Co. v. Douglas* (14 N. Y. 336); *Seymour v. Sturges* (26 id. 134). The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a foot-ball to be thrown into the market for the purposes of speculation, and that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted, but never successfully. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received. *Sawyer v. Hoag* (17 Wall. 610); *Tuckerman v. Brown* (33 N. Y. 297); *Ogilvie v. Knox Ins. Co.* (22 How. 380); *Osgood v. Laytin* (3 Keyes, 521; 37 How. Pr. 63, affg. 48 Barb. 463); Gross, Ill. Stat., p. 356, § 16. We are of opinion that the alleged representation of the non-assessability of the stock held by him was quite immaterial. It was so held in *Ogilvie v. Knox Ins. Co.* (22 How. 380).

Again; if full effect is given to the evidence of the defendant and to his claim in this respect, it shows this, and nothing more: He became a stockholder under a certificate signed by the president and secretary that he was entitled to one hundred shares of the stock of \$100 each, payable five per cent on receipt of the certificate; five per cent in three months; five per cent in six months; five per cent in nine months from date; the time or manner of the payment of the residue not being specified. Upon the face of this certificate were stamped in red ink the figures "\$100," and in another place was stamped the word "non-assessable." This certificate he held until the insolvency of the company in 1873 was known to him. The legal effect of this instrument was to make the remaining eighty per cent payable upon the demand of the company. We see no qualification of this result in the word "non-assessable," assuming it to be incorporated into and to form a part of the contract. It is quite extravagant to allege that this word operates as a waiver of the obligation created by

the acceptance and holding of a certificate to pay the amount due upon his shares. A promise to take shares of stock imports a promise to pay for them. The same effect results from an acceptance and holding of a certificate. *Palmer v. Lawrence* (3 Sand. S. C. 761); *Brigham v. Mead* (10 Allen, 245). At the most, the legal effect of the word in question is a stipulation against liability to further taxation or assessment after the holder shall have fulfilled his contract to pay the one hundred per cent in the manner and at the times indicated. We cannot give to it the consequence of destroying the legal effect of the certificate.

Still, again, the representations relied upon as a defence, it will be noticed, were as to the legal effect of the defendant's subscription and certificate. It is alleged that the agent represented that by the laws of the State of Illinois, and by the charter of this company, the defendant might become a subscriber to the amount of \$10,000, and, by means of a certificate to be given to him like that exhibited, he would really be liable only to the extent of one-fifth of his said subscription, and that good lawyers had given their advice to this effect.

There was here no error, mistake, or misrepresentation of any fact. The defendant made the subscription he intended to make, and received the certificate he had stipulated for; and, as there is no evidence to the contrary, it is to be presumed the good lawyers advised as was stated; but, in law, the defendant incurred a larger liability than he anticipated. *Leavitt v. Palmer* (3 N. Y. 19).

He had received, several days before this time, a copy of the charter and by-laws of the company, and then had them in his possession. The twenty-fifth section of the by-laws was as follows: "Every person who shall subscribe for \$10,000 of stock, and pay twenty per cent thereof, shall be constituted a director of this company, and shall continue such director so long as he shall retain of such stock an amount equal to \$10,000, but such \$10,000 shall not be reckoned in the election of other directors."

It was under this section and the succeeding one, authorizing the establishment of a branch in any place where such subscription was made, and by which the defendant became a director and might be president thereof, that the transaction took place.

That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract, and when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission. *Jackson v. Croy* (12 Johns. 427); *Leis v. Stubbs* (6 Watts, 48); *Farly v. Bryant* (32 Me. 474); *Coffing v. Taylor* (16 Ill. 457); *Slafyton v.*

Scott (13 Ves. 427); *Alvanley v. Kinnaid* (2 Mac. & G. 7; 29 Beav. 490).

That a misrepresentation or misunderstanding of the law will not vitiate a contract, where there is no misunderstanding of the facts, is well settled.

In *Fish v. Cleland* (33 Ill. 243), the principle is expressed in these words: "A representation of what the law will or will not permit to be done is one on which the party to whom it is made has no right to rely; and if he does so it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such." See *Starr v. Bennett* (5 Hill, 303); *Lewis v. Jones* (4 B. & C. 506); *Rashall v. Ford* (Law Rep. 2 Eq. 750).

The law is presumed to be equally within the knowledge of all parties. That a stockholder may relieve himself from his liability by proof that he was misinformed as to the effect of his contract when he made it, would be a disastrous doctrine. That a defendant, who could not by contract lawfully relieve himself from liability as a stockholder, can accomplish that result by proof that it was fraudulently represented to him that he could so relieve himself, would be strange indeed. *Ogilvie v. Knox Ins. Co.* (22 How. 380). The rule, that a mistake of law does not avail prevails in equity as well as at common law. *Bank of U. S. v. Daniel* (12 Pet. 32); *Hunt v. Rousman* (1 Id. 1; 8 Wheat. 174); *Mellech v. Robertson* (25 Vt. 603); *Leant v. Palmer* (3 Comst. 19).

"If ignorance of law was admitted as a ground of exemption, the court would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impossible; for in almost every case ignorance of law would be alleged, and the court would, for the purpose of determining this point, be often compelled to enter upon questions of fact insoluble and interminable." Austin's Jur., vol. ii. p. 172; Kerr, 397.

A statement that the insurance company had consulted with good lawyers, and that their opinion was as stated, should have been clear proof to the defendant that a representation of the law was a matter of opinion only.

We think the judge erred in not charging as was requested.

The facts upon which the second point arises are these: Assuming that fraudulent representations had been made to the defendant respecting his non-liability for the eighty per cent, and that they were of a character that might relieve him from his contract, it was objected that he had not used proper diligence in discovering the fraud and in repudiating his contract. The transaction took place in August, 1870; and the defendant himself gave evidence "that he never suspected any liability as to said eighty per cent, or that the said representation as to the laws of Illinois were false, until the

agent of the assignee made a demand upon him for the eighty per cent in the year 1873; and that, as no claim had been made upon him, he never made any investigation as to the truth of such representations until after said demand in 1873." In February, 1871, the defendant did ask for a rescission of his contract, on the untenable ground that it had been fraudulently represented to him that his note should be retained and held in Bloomfield, Iowa; which representation had been violated by a sale of the same, and a removal thereof to the city of Chicago. The defendant is explicit and emphatic in his evidence that this attempted repudiation "was based wholly on what was represented" as to the intended disposition of the notes and mortgage.

The plaintiff, thereupon, requested the court to charge the jury as follows:—

"7. That if he, defendant, offered to surrender his stock to the officers of the company, but not upon the ground that he had been induced to subscribe for the stock upon a fraudulent representation as to his liability for the eighty per cent, but upon another ground,—to wit, that the company had sold and assigned his note and mortgages,—then such offer is immaterial, and the evidence of fraud in such misrepresentations as to his liability for the eighty per cent cannot be made available in this suit, and constitutes no defence in this action."

"12. That if defendant was induced, in August, 1870, to become a stockholder of the Great Western Insurance Company by a representation of the agent of the company that eighty per cent of the stock was non-assessable, and that the laws of the State of Illinois allowed the company to make such contract with those who took stock, then it was a duty of the defendant to use reasonable diligence to ascertain the truth of such representations, and to ascertain what the law of Illinois was on that subject; that if he did not do so within a reasonable time, and did not ascertain the truth of said matter until after the insolvency of the company in 1873, then he cannot, as to the creditors of the company, maintain any defence by means of such representations. The court instructs you, as matter of law, that the defendant could have ascertained the truth of such representations within a few months from the time they were made, and that not doing so is negligence on the part of the defendant that bars such defence as to the assignee."

The defence arising from the alleged promissory representations that the note and mortgage of the defendant should not be removed from Bloomfield, but should be retained in charge of the branch of the company at that place, was frivolous, and was practically abandoned on the trial. The case was submitted to the jury solely on the question arising upon the representations of the non-assessability of the eighty per cent. The attempted rescission on account of the representation as to non-removal and its violation was, however, unfortunately introduced into the charge in a manner that prejudiced the right of the plaintiff. The requests, as above stated, were declined; but the judge charged the jury as follows: That, "as respects creditors, the law requires of one who has been drawn by

fraud into the purchase of stock, that he shall be guilty of no negligence or want of reasonable care in discovering the fraud, and, on discovering it, promptly repudiating the purchase. If you find from the evidence, that, within a few months after receiving the stock certificate, the defendant, discovering that he had been deceived in some respects, procured the agent who had obtained his certificate to go to Chicago, delivering to such agent his stock certificate, and instructed the agent to surrender up the stock and demand back the note for twenty per cent; and if the agent accordingly went to Chicago, and offered to the company to surrender the stock and rescind the contract, which the company refused; and if you find that the defendant never afterwards acquiesced in being a member of the company; that in September, 1871, he brought an action of replevin for the note, based on the ground of fraud; and if afterwards he refused to receive any dividend; and if all this took place before bankruptcy or insolvency of the company, — I instruct that, in point of law, this is a sufficient repudiation of the contract to become a stockholder to enable defendant, living in another State, to resist an action for the payment of the eighty per cent, provided you find that defendant was induced to become a stockholder by fraud, as before explained; and also further find, in view of all the circumstances, that defendant was not unreasonably negligent in discovering the fraud, and was guilty of no want of reasonable diligence in taking steps to repudiate the transaction." To this charge the plaintiff excepted.

The general principles set forth in this charge are no doubt sound. If the alleged promissory representation as to the non-removal of the note had been available, and had the question been submitted to the jury, the charge would have been well enough. But that question was not before them. The question submitted to them related exclusively to the representations that the eighty per cent should not be required to be paid. That was the fraud before the jury, and the question involved in the seventh and twelfth requests was this: Assuming that representation to be a fraud which would avoid the contract, had the defendant discharged his duty in discovering that fraud, and repudiating the contract on account of that fraud, and not on account of another fraud not now in question? We think the plaintiff was entitled to the opinion of the jury on that precise question. The charge refused him this right. The jury were charged that if, within a few months after receiving the certificate, the defendant, discovering that he had been deceived in some respects, sent an agent to Chicago, to surrender his certificate and demand his note; if he never afterwards acquiesced in being a member of the company; if he brought an action of replevin for the note; and if he refused to receive a dividend, this was sufficient evidence of repudiation. This was well enough as to the abandoned fraud which was not before the jury, but was entirely inapplicable to the fraud that was before them. As to that fraud, the defendant testified that he had no

knowledge or suspicion of its existence until after the demand made upon him in 1873 by the assignee, and that he never made any investigation as to the truth of the representation as to the eighty per cent liability until after said demand in 1873. On this point there was no contradictory evidence. It should have been ruled as a question of law. *Pettibone v. Stevens* (15 Conn. 19); *Beers v. Bottsford* (13 Id. 146). The submission should have been made, if not ruled as a question of law, on these facts only, as requested; and the failure to do so, and the introduction of the facts tending to show a repudiation on the ground of another fraud, could not fail to confuse the jury, and was error on the part of the judge.

Wright's Case (Law Rep. 12 Eq. 1871, pp. 331-351) is an authority on the point. It was there held, first, that under the English act, a surrender and cancellation of shares did not relieve the holder from his liability to creditors of the bank; and second, that a surrender by Wright of his shares in November, on the ground of an apprehended difficulty in the affairs of the bank, did not enable him to claim a rescission of his subscription on account of a fraudulent representation in the prospectus of the company, which fraud was then unknown to him. *Henderson v. Royal British Bank* (7 E. & B. 356); *Parris v. Harding* (1 C. B. (N. S.) 533); *Oakes v. Turquand* (L. R. 2 Ap. Cas. 325).

The principle laid down in the charge of the judge, that one who claims to have been drawn into a fraudulent purchase must exercise care and vigilance to discover the fraud, and must be prompt in repudiating his contract on the ground of such fraud, is a sound one. *Thomas v. Barton* (48 N. Y. 193).

The defendant sought to become a member of a corporation of the State of Illinois, and to obtain the benefits and advantages of its special privileges. If he is not held to be bound to know and accept all the consequences of this connection, he certainly is bound to use care and attention to ascertain his position, and promptly to make his choice of retaining it, with its advantages and responsibilities, or of abandoning it. To subscribe for stock in a corporation in August, 1870; to rest quietly until the year 1873, never making any investigation as to the position in which he stood until that time, and until after the assignee in bankruptcy had made a demand upon him, falls very far short of what the law requires. Especially is this the case when it is shown that he lived in an adjoining State; that he sent an agent to Chicago, and himself went to that city in 1871 to obtain his note and mortgage from that very company for an alleged misconduct in another respect. It was his plain duty to have inquired and to have ascertained his position long before he did. "A party must use reasonable diligence to ascertain the facts." *Buford v. Brown* (6 B. Mon. 553).

Mere lapse of time, where a party has not asserted his claim with reasonable diligence, is a bar to relief. Relief is not given to those

who sleep on their rights. *Beckford v. Wade* (17 Ves. 87-97); *Jones v. Tuberville* (2 Ves. Jr. 11). Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person. *Duke of Beaufort v. Neald* (2 Cl. & F. 248-286). Parties who are shareholders, and claim to be relieved on the ground of fraud, must act with the utmost diligence and promptitude. *Smith's Case* (L. R. 2 Ch. Ap. 613); *Denton v. MacNeil* (L. R. 2 Eq. 532); *Peel's Case* (L. R. 2 Ch. Ap. 684).

The judgment must be reversed and a new trial had.

MR. JUSTICE MILLER (with whom concurred MR. CHIEF JUSTICE WAITE and MR. JUSTICE BRADLEY) dissenting:—

I am of opinion, that, where an agent of an existing corporation procures a subscription of additional stock in it by fraudulent representations, the fraud can be relied on as a defence to a suit for the unpaid instalments, when suit is brought by the corporation; and that if the stockholder has in reasonable time repudiated the contract, and offered to rescind before the insolvency or bankruptcy of the corporation, the defence is valid against the assignee of the corporation.

I also think there was evidence of such fraud in this case, and that the question of reasonable diligence in the offer to rescind was fairly put to the jury by the Circuit Court.

HATCH v. DANA.

(101 U. S. 205. 1879.)

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

On April 12, 1871, Charles A. Dana recovered judgment in the Circuit Court of the United States for the Northern District of Illinois, against the Chicago Republican Company, a corporation organized and existing under the laws of the State of Illinois, for the sum of \$6,419.17 and costs.

An execution issued upon this judgment was by the marshal of the United States for that district returned *nulla bona*.

Thereupon, on August 23, 1871, Dana, on behalf of himself and all other creditors of the company who might come in and seek relief by and contribute to the expense of the suit, exhibited in the Circuit Court of the United States for the Southern District of Illinois his bill in equity against the company, Hatch, Williams, and other resident stockholders, averring the incorporation of the company in February, 1865, with a capital stock of \$500,000, divided into shares of

\$100 each; that at a meeting of the incorporators, held in Chicago in April, 1865, certain stock subscriptions were made, Hatch and Williams each subscribing for one hundred shares; that a complete organization of the company was effected, and an assessment of twenty per cent declared upon the stock subscribed, the company thereupon commencing business; that eighty per cent of the subscriptions to stock so made still remains unpaid; that in October, 1870, the company so organized sold and transferred all its tangible property, credits, and subscription lists to a corporation of a very similar name, and thereupon ceased to do business; that the company is wholly insolvent; avers the recovery of the judgment aforesaid, the issue and the return unsatisfied of an execution thereon; that there are no other unpaid creditors than the complainant. It prays that, upon an accounting of the amount unpaid upon the stock subscriptions of the stockholders, named as defendants, they may be decreed to pay so much of the balance found unpaid on their respective subscriptions as will be sufficient to pay the ascertained debts of the corporation, including the judgment aforesaid; and for general relief.

The complainant dismissed the bill as to all of the defendants except Hatch and Williams. They, in their answer, admit the incorporation and organization of the company, as alleged in the bill; do not deny that they were of the original stockholders therein to the amount alleged in the bill, but aver that they paid in thirty per cent of the amount subscribed by them; admit the sale of its property in October, 1870, and that since then it has done no business; do not know whether it is indebted to the complainant or any other person, or whether or not it is insolvent; deny the recovery of the said judgment and call for full proof thereof, but admit that, if such judgment was lawfully rendered, it still remains in full force and unsatisfied; aver that about August 1, 1866, the company determined to reduce its capital stock from \$500,000 to \$200,000, and did so, calling in all existing certificates, and reissuing to the holders thereof new certificates for two-fifths of the amount which they originally held, since which time various transfers of portions of the new or substituted stock have been made, but the respondents do not know to whom or by whom they have been made; state the names of certain persons who, together with the defendants, are holders and owners of portions of the stock; and ask that all said persons be made parties, and that an accounting be had, in conformity with the prayer of the bill.

A replication to the answers was filed.

The facts of the case are set out in the complainant's bill. A decree was rendered January 6, 1879, that the complainant, Charles A. Dana, recover of Hatch and Williams the sum of \$9,398.72, being the amount due on that day upon the said judgment, and that they pay the costs of the suit to be taxed; it being provided, however,

that of the sum so decreed to be paid not more than \$7,000 together with interest thereon from the date of the decree, at the rate of six per cent per annum, shall be made and collected from either said Hatch or Williams, the said sum of \$7,000 being the amount the court finds each of them to owe and be indebted to the Chicago Republican Company.

From this decree Hatch and Williams appealed.

MR. JUSTICE STRONG delivered the opinion of the court:—

This bill is an ordinary creditor's bill, the sole object of which is to obtain payment of the complainant's judgment. It is true it is brought on behalf of the complainant and all other creditors of the corporation who might choose to come in and seek relief by it, contributing to the expense of the suit. But no other creditors came in; and it does not appear that there is any other creditor, unless it be one of the stockholders, who was made a defendant, and who filed a cross-bill which he afterwards dismissed. All the stockholders were not made defendants.

The bill was not a bill seeking to wind up the company. It sought simply payment of a debt out of the unpaid stock subscriptions.

That unpaid stock subscriptions are to be regarded as a fund which the corporation holds for the payment of its debts is an undeniable proposition. But the appellants insist that a creditor of an insolvent corporation is not at liberty to proceed against one or more delinquent subscribers to recover the amount of his debt, without an account being taken of other indebtedness, and without bringing in all the stockholders for contribution. They insist, also, that by the terms of the subscriptions for stock made by these appellants they were to pay for the shares set opposite their names respectively, "as called for by the said company;" that the company made no calls for more than thirty per cent; that, therefore, this company could not recover the seventy per cent unpaid without making a previous call; and that a court of equity will not enforce the contract differently from what was contemplated in the subscription.

These positions, we think, are not supported by the authorities,—certainly not by the more modern ones,—nor are they in harmony with sound reason, when considered with reference to the facts of this case. The liability of a subscriber for the capital stock of a company is several and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they

can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property, that is, out of its unpaid stock, there is not the same reason for requiring all the stockholders to be made defendants. In such a case no stockholder can be compelled to pay more than he owes.

In *Ogilvie v. Knox Insurance Company* (22 How. 380), the question was considered. That was a case in which several judgment creditors of a corporation had brought a creditor's bill against it and thirty-six subscribers to its capital stock. The bill alleged that the complainants had recovered judgments against the company, upon which executions had been issued and returned "no property;" that the other defendants had severally subscribed for its stock; and that the subscriptions remained unpaid, payment not having been enforced by the company. The prayer of the bill was that these other defendants might be decreed to pay their subscriptions, and that the judgments might be satisfied out of the sum paid. It was objected, as here, that the bill was defective for want of proper parties; but the court held the objection untenable. In delivering the opinion of the court, Grier, J., said: "The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders, corporators, or debtors. If A. is bound to pay his debt to the corporation in order to satisfy its creditors, he cannot defend himself by pleading that these complainants might have got their satisfaction out of B. as well. It is true, if it be necessary to a complete satisfaction of the complainants that the corporation be treated as an insolvent, the court may appoint a receiver, with authority to collect and receive all the debts due to the company, and administer all its assets. In that way all the other stockholders or debtors may be made to contribute." The court, therefore, directed a decree against the respondents severally for such amounts as appeared to be due and unpaid by each of them for their shares of the capital stock.

This case is directly in point, and it does not stand alone. In *Bartlett v. Drew* (57 N. Y. 587), it was ruled that when the property of a corporation had been divided amongst its stockholders before all its debts had been paid, a judgment creditor, after the return of an execution unsatisfied, might maintain an action, in the nature of a creditor's bill, against a stockholder to reach whatsoever was so received by him, and that he was not required to make all the stockholders parties to the action; that he had nothing to do with the

equities between the stockholders, unless he chose to intervene to settle them. This is much beyond what the complainant needs in this case. It is enforcing against stockholders in severalty what the corporation could not enforce, without any regard to the equities of one against the others.

So in *Pierce v. The Milwaukee Construction Co.* (38 Wis. 253), which was a proceeding analogous to a creditor's bill, and brought to enforce payment to a judgment creditor of the company of unpaid subscriptions to its capital stock, it was ruled that the complaint was not bad because all the stockholders were not made defendants. This, it is true, was a proceeding under a statute, but it was a statute enacting substantially this equity rule.

In *Marsh v. Burroughs* (1 Woods, 468), a bill of certain creditors who had recovered judgments against a bank, to recover from some stockholders who had not paid in full their subscriptions, non-joinder of parties was set up in defence. Mr. Justice Bradley said: "A judgment creditor who has exhausted his legal remedy may pursue in a court of equity any equitable interest, trust, or demand of his debtor, in whosoever hands it may be. And if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defence to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate share of the liability, he might never get his money."

The case of *Wood v. Dummer* (3 Mas. 308), upon which the appellants largely rely, was not an attempt to reach unpaid stock subscriptions. It was sought to follow the property of a corporation paid over to its shareholders before its debts were paid. But even in this case the bill was sustained, though all the shareholders were not made defendants. Those not sued appear to have been treated only as convenient, not as necessary parties.

The cases of *Pollard v. Bailey* (20 Wall. 520), and *Terry v. Tubman* (92 U. S. 156) are not in conflict with *Ogilvie v. Knox Insurance Company*. They arose under statutory provisions imposing upon the stockholders of banks a liability for the debts of the corporation, "in proportion to their stock held therein." It was this liability beyond the stock subscription which was sought to be enforced, and as it was only a proportional liability, its extent could be ascertained only when the obligation of the other shareholders was taken into consideration. Hence it was ruled that the proper mode of proceeding was by bill in equity, in which an account of the debts and stock could be taken, and a *pro rata* distribution could be made. Not a hint was given that the latter case was intended to be questioned or qualified. Indeed, *Pollard v. Bailey* and *Terry v. Tubman* have little analogy to it, or to the case we have now before us. They were both suits at law. The debt due by these appellants to the corporation of which they are members is a fixed and definite one,

and it is neither more nor less because other debts may be due to the company from other stockholders.

We hold, therefore, that the complainant was under no obligation to make all the stockholders of the bank defendants in his bill. It was not his duty to marshal the assets of the bank, or to adjust the equities between the corporators. In all that he had no interest. The appellants may have had such an interest, and, if so, it was quite in their power to secure its protection. They might have moved for a receiver, or they might have filed a cross-bill, obtained a discovery of the other stockholders, brought them in, and enforced contribution from all who had not paid their stock subscriptions. Their equitable right to contribution is not yet lost.

That the appellants are not protected by the fact, if such was the fact, that their subscriptions for stock were payable "as called for by the company," we think is clear. Assuming that such a clause in the subscription meant more than an agreement to pay on demand, and that it contemplated a formal call upon all subscribers to the stock of the company, the subscriptions were still in the nature of a fund for the payment of the company's debts, and it was the duty of the company to make the calls whenever the funds were needed for such payment. If they were not made, the officers of the company violated their trust, held both for the stockholders and the company. And it would seem to be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their own agents. But in this case the company went out of business before the complainant obtained his judgment, and it does not appear that since that time it has had any officers who could make the calls. Before that time its president was dead. However this may be, it is well settled that a court of equity may enforce payment of stock subscriptions, though there have been no calls for them by the company. In *Henry v. Railroad Company* (17 Ohio, 187), a suit brought by a judgment creditor of a corporation to enforce payment by its stockholders of their unpaid subscriptions, for which calls had not been made, it was held that when a company ceases to keep up its organization, and abandons all action under the charter, a proceeding at the instance of the creditor becomes indispensable. It was further said: "When a company, becoming insolvent, as in this case, abandons all action under its charter, the original mode of making calls upon the stockholders cannot be pursued. The debt, therefore, from that time must be treated as due without further demand." This means, of course, as between the debtor and the creditor of the corporation. After all, a company call is but a step in the process of collection, and a court of equity may pursue its own mode of collection so that no injustice is done to the debtor.

In the English courts a mandamus is sometimes awarded to compel the directors to make the necessary calls. *Queen v. The Victoria Park Co.* (1 Ad. & El. N. S. 544); *Queen v. Ledgard* (Id. 616); *The*

King v. Katharine Dock Co. (4 Barn. & Ad. 360). But this remedy can avail only when there are directors. The remedy in equity is more complete, and it is well recognized. *Ward v. The Griswoldville Manufacturing Co.* (16 Conn. 593). In such cases it is nowhere held, so far as we know, that a formal call must be made before a bill can be filed. Indeed, the filing of the bill is equivalent to a call. Before it is filed, the court has no jurisdiction of the matter. In bankruptcy, an assessment or a call may be made, for the assignee of a bankrupt corporation succeeds to its rights and becomes the legal owner. Not so in equity.

In *The Dalton, &c. Railroad Co. v. McDaniel* (56 Ga. 191), a creditor's bill very like the present was filed. It was objected by the stockholders, who were defendants, that it was for the directors of the company, and not for the court, to call in the stock subscriptions, and that their contract only obligated them to obey a call emanating from the company; but it was ruled that "principle and sound reason accord with authority that equity will grant relief in all such cases."

In view of these considerations we think none of the assignments of error are sustained.

Decree affirmed.

HAWLEY v. UPTON.

(102 U. S. 314. 1880.)

ERROR to the Circuit Court of the United States for the District of Iowa.

This is an action brought July 25, 1873, by Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company of Chicago, Ill., to recover from Theodore Hawley the unpaid instalments alleged to be due on his contract to subscribe to the capital stock of that company.

The court, the case having been submitted to it upon the pleadings and proofs, without the intervention of a jury, found the following facts:—

"The plaintiff is assignee in bankruptcy, as alleged in the petition.

"On the second day of January, 1871, Rossitur, agent of the Great Western Insurance Company, requested the defendant to take stock in said company.

"The defendant, on certain representations by Rossitur, signed the following paper or bond:—

[No.—] The Great Western Insurance Company. [\$200.]
[Stamp.]

Capital Stock \$500,000, with liberty to increase to \$5,000,000. Stock non-assessable.

Organized July 20, 1857, under Act of Legislature approved March 4, 1857.

Know all men by these presents, that for and in consideration of ten shares of

the capital stock of the Great Western Insurance Company of Chicago, Ills., received by me, I am held and firmly bound, and agree to pay the Great Western Insurance Company of Chicago, the sum of two hundred dollars in instalments, as follows: Twenty-five per cent thereof upon receipt of stock certificate twenty-five per cent in three months from date hereof, twenty-five per cent six months from date hereof, twenty-five per cent nine months from date, with interest ten per cent after due.

Chicago, 7th Jan'y, 1871.

THEO. HAWLEY. [Seal.]

Signed and delivered in presence of —

"At the time the said bond or paper was issued to Hawley, the latter paid Rossitur twenty-five dollars, and delivered to him the bond. It was not delivered on any particular conditions. It was delivered to an agent of the company's, namely, the said Rossitur.

"The company afterwards came into possession of the bond, and entered Hawley's name on their books as a stockholder, and published him in their publications as one of their stockholders, Hawley having no knowledge of the publications. Hawley paid no other money, and no calls were made upon him prior to the bankruptcy.

"No certificate of stock was ever sent or delivered to Hawley, and he made no demand on the company for any certificate of stock.

"The bankruptcy of the insurance company was caused by fire in October, 1871.

"The defendant signed no subscription paper, or any other paper than the bond above set out.

"On the foregoing facts and the pleadings, judgment was rendered for the plaintiff. The judges were opposed in opinion on the following questions:—

"1st, Whether the delivery of a stock certificate under the above circumstances was necessary to constitute the relation of stockholder between the defendant and the insurance company.

"2d, Whether the above facts constitute a defence to the action.

"The judges, being divided in opinion on the above questions, hereby certify such division to the Supreme Court, pursuant to the statute in such case made and provided."

MR. CHIEF JUSTICE WAITE delivered the opinion of the court:—

It cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation must pay his subscription if required to meet the obligations of the corporation. A certificate in his favor for the stock is not necessary to make him a subscriber. All that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock of the corporation represents. If such an obligation exists, the courts can enforce the contribution when required. After having bound himself to contribute, he cannot be dis-

charged from the obligation he has assumed until the contribution has actually been made or the obligation in some lawful way extinguished. These are elementary principles. *Upton, Assignee, v. Tribilcock* (91 U. S. 45); *Webster v. Upton* (Id. 65).

The only question we have to consider is whether, from the facts found, it appears that Hawley, the plaintiff in error, had become an accepted subscriber to the stock of the company before the bankruptcy. There can be no doubt that he was approached by an agent of the company with a view of securing him as a subscriber. It is equally true that after the representations made to him he was willing to become a stockholder. The result was that he executed the paper set out in the findings, by which he acknowledged the receipt from the company of ten shares of its stock, and agreed within the time named to pay to the company \$200, or twenty per cent of its par value. As the company could not sell its stock at less than par, what was done amounted in law to a subscription for the stock, and nothing else. It is true the stock he took purported to be non-assessable; but that in law could only mean that no assessment would be made beyond the percentage he had specially bound himself to pay, unless the legal liabilities of the company required it. *Upton, Assignee v. Tribilcock* (*supra*).

The paper he signed was delivered to the company by the agent who got it. That it was accepted by the company as a subscription is shown conclusively by the fact that his name was entered on the books as a stockholder, and publication made accordingly. It matters not that he had no knowledge of such a publication. His receipt for the stock was an acknowledgment, so far as he was concerned, that he had become a stockholder, and, after an acceptance by the company, his liability was fixed whether any publication was made or not. The publication is only important as a means of showing that his subscription made to an agent had been accepted and ratified by the company. The entries on the books had the same effect. The publication only made it more notorious. The ultimate fact to be established is that a subscription had not only been made by Hawley, but accepted by the company.

Both in the pleadings and the argument the defence was put principally on the fact that no certificate of stock had been issued. It may be conceded that if a suit had been brought by the company on the express promise to pay the twenty per cent, there could have been no recovery without a tender of the certificate; but that is not this case. Here the creditors of the bankrupt company are proceeding against Hawley as a stockholder, to compel him to contribute to the fund which the law had provided for their security, what he by his subscription agreed he would pay. The suit is not brought on his special agreement to pay the twenty per cent, but on his general liability as a subscriber to pay for his stock whenever it was wanted to meet the liabilities of the company. As the certificate

was not needed to perfect the subscription, its non-delivery cannot stand in the way of a recovery in this action.

We have no hesitation in answering each of the questions certified in the negative, and the judgment is consequently

Affirmed.

FLINN v. BAGLEY.

(7 Fed. Rep. 785. 1881.)

IN EQUITY.

This was a bill in equity by the assignee of the Detroit Novelty Works to compel the payment of the balance due upon certain unpaid subscriptions to the capital stock of the company. The material facts were that the company was organized in 1859, with a capital stock of \$50,000, divided into 2,000 shares of \$25 each. In 1871 it was proposed to increase the stock of the company to \$100,000, and the following agreement was entered into by the defendants in this suit, or by those from whom the defendants hold their stock:—

“The undersigned subscribe hereby the amount set opposite our respective names, and agree to pay the same towards the increased stock of the Detroit Novelty Works, in three equal instalments, on April 3, 1871, May 3, 1871, and June 3, 1871 (without grace), it being understood that stock shall be issued to subscribers for such subscriptions at 66 $\frac{2}{3}$ cents upon the dollar, and that a total amount of the subscriptions hereto shall be \$20,000; and further, that negotiations upon the basis proposed by T. W. Misner, under date of March 31st, shall be completed before these subscriptions shall be of binding force.

Detroit, April 1, 1871.

This agreement was assented to by all the existing stockholders of the company, and was carried out by the payment of the money, \$20,000, and the issuance of the stock, \$30,000. The corporation having gone into bankruptcy, and its assets proving insufficient to pay its liabilities, the complainant in the suit, who had been chosen its assignee, filed this bill to compel the defendants, who are stockholders of the company under the above subscription, to pay one-third of the par value of the increased stock taken under that agreement. On July 29, 1874, a majority of the directors of the company filed with the Secretary of State the annual report required by the statute, in which it was stated that the amount of capital paid in was \$75,000; and also set forth the names of the stockholders and the number of shares held by each, the aggregate being 4,000 shares, which at \$25 each would be \$100,000.

BROWN, D. J.:—

That the capital stock of a corporation is a trust fund for the payment of its debts, and that the law implies a promise by the sub-

scribers of stock to pay its par value, which in this instance was \$25 per share, when called for, and that no subsequent release of their original contract or subscription by the corporation will avail against the claims of creditors, are propositions too clearly established to admit of question. But whether a court can not only compel a subscriber to live up to a bargain he has made, but can make another bargain for him and compel him to live up to that, is a different question. In the case under consideration it is clear that no actual fraud was intended. The Novelty Works found itself embarrassed for means, and resolved to raise money by increasing its capital stock. As its existing stock, however, was worth only two-thirds of its par value, it was obviously impossible to sell its new stock at par, since all the stock would stand upon an equal footing, and no one could be found to pay a dollar for that which was worth but $66\frac{2}{3}$ cents. There was, therefore, no recourse but to issue new stock at its real value. All the stockholders of the corporation having assented to this arrangement, it was evidently no fraud upon them, and the corporation itself would be estopped to claim more than the agreed price. Neither was it a fraud upon the existing creditors, since the assets of their debtor were increased by the amount of money actually paid in, and, to that extent, they were benefited by the subscription.

It is, then, only as a fraud upon future creditors that exception can be taken to the transaction. While the statute (Comp. Laws, § 2841) requires the capital stock of such corporations to be divided into shares of \$25 each, there is no express prohibition against stock being issued for less than its par value. But conceding, upon the authority of *Hawley v. Upton* (102 U. S. 314), and *Sturgis v. Stetson* (1 Bissell, 246), that the directors of a corporation have no right to issue stock at less than its par value, that the subscription was void, and that an action will lie by the assignee of the corporation against the contributories to compel a surrender of the stock or payment for the same at its real value when the subscription was made, does it follow that a court can compel the subscribers to pay the par value of the shares? Subscriptions to the stock of a corporation are purely a matter of contract. *Sturgis v. Stetson*, (1 Biss. 248); *Parker v. North Cent. Mich. R. Co.* (33 Mich. 24). And where there is an express contract the law will not permit one to be implied. *Cutter v. Powell* (6 T. R. 324); *Pittsburgh & Connorsville R. Co. v. Stewart* (41 Pa. 54-58). Undoubtedly, when a subscriber originally agrees to take so many shares, the law will imply that he is to pay at the rate of \$25 per share, and no subsequent release or modification of that agreement by the corporation will prevent creditors from insisting upon full payment. But the English cases hold that if for any reason the subscription be void at all, it is void *in toto*, and that the assignee cannot treat it as void to compel a return of the stock, and valid to obtain the payment of its par value. It follows from this that if the

contributory agrees only to take paid-up shares, he cannot be compelled to take unpaid shares.

In *Currie's Case* (3 De G. J. & S. 367), directors of a company took a transfer of paid-up shares from an allottee, who had them allotted to him by the company in part payment of purchase-money in respect of certain property purchased by the company. The same directors were also holders of other paid-up shares, taken by them for attendance fees. The validity of the purchase in the one case, and the allowance of attendance fees in the other, were impugned. *Held*, that the transactions could not be affirmed in part and repudiated in part, and that consequently the directors, if treated as shareholders at all, must be treated as paid-up shareholders, and not placed on the list of contributories in either case. In delivering the opinion of the court of chancery, Lord Justice Turner observed: "These shares were allotted to Butcher under the authority given by the articles as paid-up shares, in part of the consideration of the purchase made by the directors from him. The purchase was either valid or invalid. If valid, it is clear that neither he nor his alienees can be called upon to contribute in respect to these shares. If invalid, I cannot see my way to hold that either a court of law or a court of equity could do more than treat the purchase as void, and undo the transaction altogether. It could not, as I apprehend, be competent either to a court of law or to a court of equity to alter the terms of a purchase, and treat as shares not paid up shares which were given as paid-up shares, in part consideration of the purchase. Fraud, assuming there was fraud, would of course warrant the court in treating the purchase as void, or in undoing it; but it could not, as I conceive, authorize any court to substitute other terms."

In *Carling's Case* (L. R. 1 Ch. Div. 115), an agreement was entered into with the trustee of an intended company for the sale to the company of a property for a certain sum in cash, and a certain number of fully-paid-up shares. The vendor applied to the appellants to become directors, which they agreed to do upon his promising to transfer to them fully-paid-up shares to qualify them. They acted as directors, and adopted the agreement for sale. Appellants were entered on the register as holders each of 30 fully-paid-up shares, and received certificates to that effect. An order was afterwards made for winding up the company, and the Master of the Rolls put them on the list of contributories for 30 unpaid shares each. It was held that, as there was no contract between them and the company that they would take shares independently of their accepting certificates, stating them to be the holders of fully-paid-up shares, they could not be placed on the list of contributories as holders of unpaid shares. In delivering the opinion, Lord Justice James said: "Now, beyond all question, they never made themselves liable to take any shares at all. They never contracted to take shares or to pay for shares. The only contract between them and the company was the contract that arises from the

fact that certificates of the shares as paid-up shares were sent to them, and they accepted these certificates. If, therefore, the case depends upon a contract between them and the company, the contract must be either approbated or reprobated. If the contract was a contract that they would take paid-up shares, we cannot convert that into a contract to take unpaid shares."

Lord Justice Mellish used the following language: "It appears to me that the only contract entered into by these gentlemen with the company being that they became members of the company by accepting certificates of paid-up shares, that contract must either be adopted or rejected in its entirety. If it is rejected, they are not shareholders at all. If it is adopted, the company is entitled to say 'they are not your shares, but ours,' but that does not make them hold unpaid shares."

This intimation would tend to show that the assignee in this case might bring an action against the defendants for the value of the shares they agreed to take; but as there is no evidence that the shares were worth any more than the defendants paid for them, such action would probably be fruitless.

In *De Ruvigne's Case* (5 Ch. Div. 306), it was held that an arrangement with a subscriber by which he was to take 200 shares of stock was fraudulent and *ultra vires*, but as there was no agreement to take any but paid-up shares, he could not be placed on the list of contributories in respect of the 200 shares. The court held that the company must either throw over the agreement altogether, or they must take it altogether. "They cannot adopt it as to one part, and reject it as to the rest."

In *Anderson's Case* (7 Ch. Div. 94), similar language was used, and the Master of the Rolls observed: "I am not going to alter men's contracts unless the provisions of an act of Parliament compel me to do so. If a man contract for paid-up shares with a company, and there is no other contract,—that is to say, if there is no previous contract to take shares at all,—and the company allots the paid-up shares, . . . it is quite evident that neither party can alter the contract. . . . It may ask to set aside the contract altogether, and in that case the shares would not be treated as allotted at all, and the consideration would have to be returned to the director or other person holding a fiduciary position; or the company may adopt another course, and may treat the director or other person holding a fiduciary position as trustee for the company of the profit made by the contract, and may take away the profit from him. . . . But you cannot alter the contract to such an extent as to say, though you have bargained for paid-up shares, we will change that into a bargain to take shares not paid up, and to put you on the list of contributories on that ground."

In *Foreman v. Bigelow* (18 N. B. R. 457), these cases were cited with approval by Mr. Justice Clifford, although the case cannot be

considered as a direct authority here, as the action was brought against an innocent purchaser of such shares.

These cases appear to be decisive in favor of the position assumed by the defendants here. There is, however, a series of opinions of the Supreme Court of the United States, beginning with the cases of *Upton v. Tribilcock* (91 U. S. 45), and culminating in *Hawley v. Upton* (102 U. S. 314), which put the obligation of a subscriber to stock in an entirely different light. While none of these cases except the last are necessarily inconsistent with the views expressed by the English courts, or with the position assumed by the defendants here, the general drift of the opinions is to the effect that the acceptance of a certificate of stock, not fully and actually paid up, *ipso facto*, obligates the holder to make up its par value if the duty of the corporation to its creditors requires it, although he originally agreed to take the stock as fully paid up.

In *Upton v. Tribilcock* (91 U. S. 45), the defendant agreed to become a stockholder, and, with intent to become such, accepted a certificate for stock whereby he became bound to pay the full amount thereof as follows: Five per cent upon the delivery of the certificate; 5 per cent in three months; 5 per cent in six months; 5 per cent in nine months; and the residue whenever called for by the company, according to the charter of the company and the laws of the State of Illinois. The defence was that the subscription was obtained by the fraudulent representations of the agent of the company, to the effect that the defendant would only be responsible for 20 per cent of the subscription made by him, and that he delivered his note in full payment of this amount. He received a certificate with the word "non-assessable" printed across the face. It was held that the legal effect of the instrument was to make the remaining 80 per cent payable upon the demand of the company, and that the word "non-assessable" was no qualification of this result. "At the most, the legal effect of the word in question is a stipulation against liability to further taxation or assessment after the holder shall have fulfilled his contract to pay the 100 per cent in the manner and at the times indicated." In other words, the court adopted the view that the original contract of the subscriber was to pay the par value of the stock, and that the word "non-assessable" did not vary this contract.

While there is nothing in *Chupp v. Upton* (95 U. S. 666), irreconcilable with the position assumed by the defendants here, Mr. Justice Hunt, in delivering the opinion, observes that when a stockholder receives a certificate of stock for a certain number of shares at a given sum per share, he thereby becomes liable to pay the amount thereof when called upon by the corporation or its assignees. The cases of *Pullman v. Upton* (96 U. S. 328), and *Hatch v. Dana* (101 U. S. 205), contain little more than a repetition of the principles laid down in the former cases, and have no especial bearing upon the case under consideration.

The case of *Hawley v. Upton* (102 U. S. 314) is very nearly, if not directly, in point here. In this case the defendant signed an agreement to the effect that for a consideration of 10 shares of the capital stock of the Great Western Insurance Company, received by him, he agreed to pay one-fifth of the par value thereof in instalments. His name was entered on the books as a stockholder, but no certificate of stock was ever delivered to him, and no demand ever made upon the company for such certificate. The Supreme Court held him liable, upon the theory that the company could not sell its stock at less than par, and that his agreement amounted in law to a subscription for the stock and nothing else, and that the receipt of the certificate was not necessary to complete his obligation as against the creditors of the company. I have sought to find a tenable ground upon which to base a distinction between this case and the one under consideration, but it seems to me that there is no substantial difference between them. Here is an agreement, literally, to subscribe a certain sum, and to take in payment therefor a certificate, the par value of which was fixed by law, representing a sum one-third larger than the amount of the subscription. How does this differ from the agreement in *Hawley v. Upton*, by which the defendant acknowledged the receipt of 10 shares of stock, the par value of which was also fixed by law, and, in consideration thereof, promised to pay one-fifth of such par value? The whole contract in each case must be taken together. In the one the promise to pay precedes the statement of the consideration; in the other the acknowledgment of the receipt of the consideration precedes the promise to pay; but in legal effect both are agreements to take stock, and to pay therefor only a percentage of its par value. In neither case does the party agree to pay no more if the necessities of the company require, though in the light of these decisions it would seem to make no difference as against creditors whether he did or not. If, as was said by the Chief Justice in *Hawley v. Upton*, "all that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock of the company represents," it is difficult to see why the defendants in this case have not done all that is necessary to make themselves liable for the payment of the amounts claimed. The statement of the court that the suit was not brought on the special agreement of the defendant to pay 20 per cent, but on his general liability as a subscriber to pay for his stock whenever it was wanted to meet the liabilities of the company, is equally applicable when it is made to appear that the defendants received certificates of stock for which they paid only two-thirds of its par value.

This case is certainly a hard one upon the defendants. Finding the company embarrassed for the want of funds, they agreed to subscribe a certain sum, and take in payment stock at what it was really worth. It is clear that no fraud was intended, and that they

must be held liable upon an implied agreement to pay more for the benefit of the creditors than they had expressly agreed to pay for the benefit of the corporation. It is a hardship, however, from which I see no way of relieving them consistent with the views of the Supreme Court in *Hawley v. Upton*, and a decree must therefore be entered for the complainant.

COIT v. GOLD AMALGAMATING COMPANY.

(119 U. S. 343. 1886.)

THIS was a bill in equity against a corporation and its stockholders to enforce a debt due from the former against the latter.

MR. JUSTICE FIELD delivered the opinion of the court:—

The defendant, the North Carolina Gold Amalgamating Company, was incorporated under the laws of North Carolina, on the 30th of January, 1874, for the purpose, among other things, of working, milling, smelting, reducing, and assaying ores and metals, with the purpose to purchase such property, real and personal, as might be necessary in its business, and to mortgage or sell the same.

The plaintiff is the holder of a judgment against the company for \$5,489, recovered in the Court of Common Pleas of Philadelphia, on the 18th of May, 1879, upon its two drafts, one dated June 1, 1874, and the other August 15, 1874, each payable four months after its date. Unable to obtain satisfaction of this judgment upon execution, and finding that the company was insolvent, the plaintiff brought this suit to compel the stockholders to pay what he claims to be due and unpaid on the shares of the capital stock held by them, alleging that he had frequently applied to the officers of the company to institute a suit for that purpose, but that under various pretences they refused to take any action in the premises.

By its charter the minimum capital stock was fixed at \$100,000, divided into one thousand shares of \$100 each, with power to increase it from time to time, by a majority vote of the stockholders, to two million and a half of dollars. The charter provided that the subscription to the capital stock might be paid "in such instalments, in such manner and in such property, real and personal," as a majority of the corporators might determine, and that the stockholders should not be liable for any loss or damages, or be responsible beyond the assets of the company.

Previously to the charter, the corporators had been engaged in mining operations, conducting their business under the name and title which they took as a corporation. Upon obtaining the charter, the capital stock was paid by the property of the former association, which was estimated to be of the value of \$100,000, the shares being

divided among the stockholders in proportion to their respective interests in the property. Each stockholder placed his estimate upon the property; and the average estimate amounted to \$137,500. This sum they reduced to \$100,000 inasmuch as the capital stock was to be of that amount.

The plaintiff contends, and it is the principal basis of his suit, that the valuation thus put upon the property was illegally and fraudulently made at an amount far above its actual value, averring that the property consisted only of a machine for crushing ores, the right to use a patent called the Crosby process, and the charter of the proposed organization; that the articles had no market or actual value, and, therefore, that the capital stock issued thereon was not fully paid, or paid to any substantial extent, and that the holders thereof were still liable to the corporation and its creditors for the unpaid subscription.

If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company, from a belief that its stock was fully paid, there would undoubtedly be a substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the instalments has been paid. In that case there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors, as a trust fund liable to the payment of their debts. But where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud. *Boynnton v. Hatch* (47 N. Y. 225); *Van Cott v. Van Brunt* (82 N. Y. 535); *Carr v. Le Fevre* (27 Penn. St. 413).

But the allegation of intentional and fraudulent undervaluation of the property is not sustained by the evidence. The patent and the machinery had been used by the incorporators in their business, which was continued under the charter. They were immediately serviceable, and therefore had to the company a present value. The incorporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item, the value of the chartered privileges, which is at all liable to any legal objection. But if that were deducted, the remaining amount would be so near to the aggregate capital, that no implication could be raised against the entire good faith of the parties in the transaction.

In May, 1874, the company increased its stock, as it was authorized to do by its charter, to \$1,000,000, or ten thousand shares of \$100

each. This increase was made pursuant to an agreement with one Howes, by which the company was to give him two thousand shares of the increased stock for certain lands purchased from him. Of the balance of the increased shares, four thousand were divided among the holders of the original stock upon the return and delivery to the company of the original certificates, — they thus receiving four shares of the increased capital stock for one of the original shares returned. The other four thousand shares were retained by the company. The land purchased was subject to three mortgages, of which the plaintiff held the third; and the agreement was that under the first mortgage, a sale should be made of the property, and that mortgages for a like amount should be given to the parties according to their several and respective amounts, and in their respective positions and priorities.

The plaintiff was to be placed by the company, after the release of his mortgage, in the same position. Accordingly he made a deed to it of all his interest and title under the mortgage held by him, the trustee joining with him, in which deed the agreement was recited. The company, thereupon, gave him its mortgage upon the same and other property, which was payable in instalments. The plaintiff also received at the same time an accepted draft of Howes on the company for \$1,000. When the first instalment on the mortgage became due, the company being unable to pay it, he took its draft for the amount, \$3,000, payable in December following. It is upon these drafts that the judgment was recovered in the Court of Common Pleas of Philadelphia, which is the foundation of the present suit. It is in evidence that the plaintiff was fully aware, at the time, of the increase in the stock of the company, and of its object. Six months afterwards, the increase was cancelled, the outstanding shares were called in, and the capital stock reduced to its original limit of \$100,000. Nothing was done after the increase to enlarge the liabilities of the company. The draft of Howes was passed to the plaintiff and received by him at the time the agreement was carried out upon which the increase of the stock was made; and the draft for \$3,000 was for an instalment upon the mortgage then executed. The plaintiff had placed no reliance upon the supposed paid-up capital of the company on the increased shares, and, therefore, has no cause of complaint by reason of their subsequent recall. Had a new indebtedness been created by the company after the issue of the stock and before its recall, a different question would have arisen. The creditor in that case, relying on the faith of the stock being fully paid, might have insisted upon its full payment. But no such new indebtedness was created, and we think, therefore, that the stockholders cannot be called upon, at the suit of the plaintiff, to pay in the amount of the stock, which, though issued, was soon afterwards recalled and cancelled.

Judgment affirmed.

FIRST NATIONAL BANK v. GUSTIN MINING COMPANY.

(42 Minn. 327 1890.)

THIS action was brought in the district court for Rice County against the defendant corporation and certain of its stockholders resident in this State, and was tried by Buckham, J., who ordered judgment against the corporation for the amount of plaintiff's claim (\$22,091.84), but in favor of the other defendants. The plaintiff appeals from the judgment.

MITCHELL, J.:—

This action was brought upon a debt of the defendant company, a corporation organized under the laws of Dakota Territory, and against the other defendants, citizens of this State, as stockholders, to obtain judgment against the company for the amount of the debt, and against the other defendants for the respective amounts alleged to be due and unpaid on the stock held by them, so far as necessary to satisfy the judgment against the corporation. To dispose of certain preliminary questions raised by the defendants, it may be stated at the outset that it is elementary law that, where a person becomes a stockholder in a corporation organized under the laws of a foreign State, he must be held to contract with reference to all of the laws of the State under which the corporation is organized and which enter into its constitution, and the extent of his individual liability as a shareholder to the creditors of the company must be determined by the laws of that State, not because such laws are in force in this State, but because he has voluntarily agreed to the terms of the company's constitution. It is equally clear, upon both principle and authority, that this liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary parties. This does not depend upon any principle of comity, but upon the right to enforce in another jurisdiction a contract validly entered into. The remedy, however, does not enter into the contract itself; and for this reason the individual liability of shareholders can only be enforced by the remedies provided by the laws of the forum. Hence the question of the liability of the defendants' shareholders must be determined by the laws of Dakota, and that of remedy by the laws of Minnesota.

That the remedy resorted to by plaintiff in this case is a proper one is well settled. *Merchants' Nat. Bank v. Bailey M'f'g Co.* (34 Minn. 323; 25 N. W. Rep. 639). Upon the trial the judge considered it to be one triable by the court, but, on his own motion, submitted a specific question of fact to a jury; but subsequently, considering the verdict as immaterial, he proceeded without regard to it,

and found the facts upon all the issues in the case. As neither party claims anything from this special finding of the jury, and as there is no exception which raises the question whether the action was triable by the court or by a jury, the whole case is reduced to the single question whether the conclusions of law are justified by the findings of fact.

Section 413 of the Civil Code of Dakota provides that "each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him." This is but declaratory of the common law.

The findings of fact, so far as here material, are, in substance, as follows: Prior to November 13, 1886, there had been organized, and were at that date in existence, under the laws of Dakota, two mining corporations, viz., the Gustin Belt Gold Mining Company, and the Minerva Mining Company, of the latter of which the plaintiff, a national banking association of Deadwood, Dak., was a creditor. On the date named the defendant corporation was organized for the purpose and with intention of consolidating the other two companies, acquiring their property, and with the property so acquired carrying on a general mining business. "At the time of the organization of the defendant company, and as the scheme on which the same was based, it was agreed by the parties so incorporating, and by those representing and having authority to act for the two existing companies, that all the mines and mining property of such two corporations should, upon its organization, be transferred and conveyed to the new, or defendant company, and constitute its entire capital stock and resources for the prosecution of its enterprise, and be represented in such organization by a nominal capital stock of \$2,500,000, divided into 250,000 shares of \$10 each, which should all be deemed and held as represented by the properties so conveyed to it; that 50,000 of said shares should be issued to the former shareholders of each of the two old companies, and the remaining 150,000 shares belong to and constitute the working capital of the new corporation, and be sold under its authority, and on such terms as it should direct; and the proceeds of such sales constitute a fund to pay off the debts on the properties, and develop the mines thereon, and be used generally in the prosecution of the business of the new corporation, for the benefit of all its stockholders. That it was never expected or intended by such corporation, or by those to whom its stock was issued, that any subscription to the capital stock of the new company should ever be made, or that any capital stock should ever be taken, or any capital subscribed for or paid in, except by conveyance to it of the mining properties referred to, and the sale of the stock reserved for its working capital, in open market, for such sum as could be obtained therefor." This scheme was carried into effect by the conveyance to the new or defendant

corporation of the properties of the two old corporations, and the issue to their stockholders, according to their respective holdings, of 100,000 shares of the stock of the new company (called in the findings "Old Company Stock") as paid-up stock, and by placing the remaining 150,000 in charge of the board of directors, to be by them sold in the open market for such price per share (not less than 50 cents) as could be obtained therefor. The mining properties of the two old companies conveyed to the new company were not worth to exceed \$50,000 cost, and were at the time of this scheme of consolidation considered and estimated as of the aggregate value of \$100,000. The new and defendant company assumed payment of the indebtedness of the Minerva Mining Company to the plaintiff, which consented to a novation of its debt, accepting the notes of the defendant company in place of those of the old Minerva Company. This is the claim upon which this action is brought. The court also finds "that the payees in said notes named, and the general managing officer of the plaintiff, well knew, at the time of the execution of said notes and of their indorsement and delivery to the plaintiff, all the facts hereinbefore stated, relating to the organization of the defendant corporation and the understanding and plan of its organization, and so dealt with the defendant knowing such matters, and were parties to and interested in the original scheme of the incorporation of the defendant company as in the findings set forth." This must be construed as meaning that the "general managing officer" referred to is the person who transacted the business with the defendant company in taking these notes, and of the benefit of whose action in that regard the plaintiff has availed itself. Notice to him must be deemed notice to the plaintiff.

Returning, now, to the subsequent management of the affairs of the defendant company, the board of directors, pursuant to the scheme of organization, offered for sale in the open market the 150,000 shares remaining in the treasury, as fully-paid-up stock, and some of it was bought as such by the other defendants in good faith, for a price exceeding its fair market value (but not exceeding one dollar per share), believing it to be fully-paid-up stock. This is called in the findings "Treasury Stock." The holders of the old company stock also placed their stock in the market, some of which the defendants also bought, under like circumstances and in the same belief. In March, 1887, the board of directors, pursuant to a resolution adopted by them, distributed *pro rata* among the individual shareholders all the stock remaining unsold in the treasury. Of this the individual defendants received their respective shares, for which they paid nothing. This is called in the findings "Pro rate Stock." The court also finds that none of such defendants ever contracted, promised, or in any manner agreed, or intended to contract, promise, or agree, to pay, on account of such stock, any other or different or greater sum or consideration, unless

the law would impose or imply such promise, contract, or agreement from the foregoing facts. The holdings of the defendants consist, in part, of old company stock, in part of treasury stock, and in part of pro rate stock.

The contention of the plaintiff is that the defendant shareholders are individually liable, as for unpaid stock subscriptions, for amounts equal to the amount of their stock, less the value of what they have actually paid therefor, viz., nine dollars per share on the old company and treasury stock, for which they paid in value only one dollar per share, and ten dollars per share on the pro rate stock, for which they paid nothing. If these stockholders were indebted to the corporation for unpaid instalments on stock, this debt would be an asset of the corporation which, in case it became insolvent, any creditor might always enforce for the purpose of satisfying his claim. But it is very clear from the facts that the defendant company has no claim against the defendant stockholders. They owe it nothing. As between them and it, the arrangement by which this stock was issued and sold, or given away, as fully-paid stock, is entirely valid. But the plaintiff bases its claim upon the familiar doctrine that the capital stock of a corporation is a trust fund for the benefit of its creditors, and that, if shares are not in fact paid up, an arrangement between the corporation and the shareholders that they shall be deemed paid up, although valid between the company and the stockholder, will be ineffectual as to creditors, and that equity will hold the shareholder liable for the amount not in fact paid on his stock, to the extent necessary to satisfy the demands of creditors. We waive consideration of the question (which may, at least, admit of doubt) whether plaintiff's complaint is sufficient to entitle it to such relief. See *Phelan v. Hazard* (5 Dill. 45); *Cook, Stocks*, § 47; *Scovill v. Thayer* (105 U. S. 143).

The general proposition advanced by plaintiff cannot be controverted, but the principle upon which this trust in favor of creditors rests and is administered must not be overlooked. The whole doctrine that the capital stock of corporations is a trust fund for the payment of creditors rests upon the equitable consideration that the distribution of the capital among stockholders without making adequate provision for the payment of debts, or the issue of fictitiously paid-up stock, is a fraud upon creditors who contract with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full. But when the reason for the rule does not exist the rule itself ceases to apply. This trust does not arise absolutely in every case, in favor of every and any creditor. It is not true, and no case can be found which holds, that it is in the power of a creditor in every and all cases, as a matter of right, to institute an inquiry as to the value or amount of the consideration given for stock issued as fully paid up, any more than that it would be his right, in any and every case, to inquire into

the distribution of the capital among the shareholders. It is only those creditors who can fairly allege that they have relied, or whom the law presumes to have relied, upon the amount of capital stock of the company, who have a right to make such inquiry, or in whose favor equity will impress a trust upon the subscription to the stock, and set aside a fictitious arrangement for its payment. For example, to distribute the capital among the shareholders without provision for paying corporate debts would be a fraud on existing creditors, as well as on such subsequent creditors as deal with the corporation in reliance upon the assumption that its professed capital remains intact. An illustration of this kind is to be found in the very first case in which what is now called the "American doctrine" was announced by Justice Story. We refer to the case of *Wood v. Dummer* (3 Mason. 308), where a banking association distributed three-fourths of its capital among its shareholders without providing for the payment of billholders, and the court impressed a trust in their favor upon the capital in the hands of the shareholders. So, again, where corporations have organized and engaged in business, with a certain amount of ostensible and professed paid-up capital, but which was not in fact paid in, there are numerous cases in which the courts have set aside the arrangement by which the stock was called "paid-up," and impressed a trust upon the subscription of the shareholder in favor of subsequent creditors who relied upon, or whom the law would presume to have relied upon, the apparent and professed amount of capital. To this class belong many of the cases cited by plaintiff, as, for example, *Sawyer v. Hoag* (17 Wall. 610); *Wetherbee v. Baker* (35 N. J. Eq. 501).

While the courts have not always had occasion to state the limitations upon the doctrine that "the capital is a trust fund for the benefit of creditors," yet we think that it will be found that in every case where they have impressed a trust upon the subscription of the shareholders, it has been in favor of creditors becoming such afterwards, and hence fairly to be presumed as relying upon the amount of capital which the company was represented as having. We are referred to none, and have found none, where any such trust has been enforced in favor of creditors who have dealt with the corporation with full knowledge of the facts. The reason is apparent, for in such cases no fraud, actual or constructive, has been committed on such creditors. If a corporation issue new shares after the claim of a creditor arose, it is clear that the latter could not have dealt with the company on the faith of any capital represented by them. Whatever was contributed as capital in respect of the new shares was a clear gain to the creditor's security. So, too, if a party deals with a corporation with full knowledge of the fact that its nominal paid-up capital has not in fact been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in, and has no equitable right to insist

on the contribution of a greater amount of capital by the shareholders than the corporation itself could claim as part of its assets. *Coit v. Gold Amalgamating Co.* (14 Fed. Rep. 12, same case 119 U. S. 343, 7 Sup. Ct. Rep. 231). This doctrine with respect to trusts has no application to a case where a party, like the plaintiff, was cognizant of the whole arrangement under which the stock of the defendant company was issued and of what was paid or intended to be paid for it, and who accepted a novation of its debt with full knowledge of these facts, and received as great or greater security for it than it had before. To hold otherwise would be to perpetrate a fraud on the stockholders, and not on the creditors.

These views effectually dispose of the question of the liability of the defendants, at least on account of their old company and treasury stock. We think it also logically follows from what we have said that the defendants are not liable to the plaintiff upon their "pro rate" stock as for unpaid stock subscriptions. This stock had not been issued when plaintiff's debt was contracted. It could not have dealt with the company on the faith of any capital represented by these shares. In fact, it knew that no such capital had been paid in, unless the mining properties of the two old companies can be considered as represented in part by them; and the value of these properties remained the same, and they were equally available to creditors, whether represented by 100,000 shares or 250,000 shares of stock. Under such circumstances, the plaintiff has no equitable right to insist on the contribution of a greater amount of capital by the holders of these shares than the corporation itself could insist on. 2 Mor. Priv. Corp. §§ 832, 833.

Judgment affirmed.

HANDLEY v. STUTZ.

(139 U. S. 417. 1891.)

THIS was a bill in equity, filed by Sebastian Stutz, of Pittsburg, Pa., by certain other persons composing the firm of Ragon Brothers, of Evansville, Indiana, and by others composing the firm of Louis Stix & Co., of Cincinnati, Ohio, on behalf of themselves and such other creditors of the Clifton Coal Company as should come in and contribute to the expenses of the suit against the Clifton Coal Company and certain of its stockholders, to compel an assessment upon certain shares of stock held by the individual defendants, and payment of the same as a trust fund for the satisfaction of the debts of the company. The bill averred in substance that the Clifton Coal Company was incorporated under the laws of the State of Kentucky, in July, 1883, with power to purchase, lease, and operate coal mines in the State of Kentucky, a copy of the articles of incorporation

being annexed to the bill; that by said articles the capital stock of such corporation was fixed at \$120,000, divided into shares of \$100 each, with power to increase the same to \$200,000, by a majority vote of the stockholders; that all the stock was then taken and paid for by the subscribers in some manner agreed upon between them; that, pursuant to the authority contained in the articles of incorporation, the stockholders, all of them being present and voting, "at a meeting duly held for the purpose in May, 1886, unanimously resolved and ordered that the capital stock of said company be, and in fact it was, then increased to \$200,000, in shares of \$100 each, being an increase of 800 shares of stock of said company;" that of the 800 shares then created, the defendant Handley subscribed for 86 $\frac{2}{3}$ shares, two of the other defendants for 15 shares each, and two others for 75 shares each, certificates of which were issued by the company, and delivered to, and received by, said subscribers, as they were respectively entitled; but that neither one of them ever paid to the company any part of the said shares, and they each, respectively, owe the said company the full par value of the shares of the said capital stock subscribed for and issued to them.

The bill also averred that on December 30, 1886, it having been previously resolved to issue bonds to the amount of \$50,000, and to secure the payment thereof by a mortgage upon its property, and said mortgage having been executed to trustees and recorded, a contract was executed and delivered to the company by certain others of the defendants, whose names were subscribed thereto, in the following terms: "We, the undersigned, subscribe for the amount set opposite our names, respectively, to bonds of the Clifton Coal Company, aggregating \$50,000. It is agreed that \$50,000 capital stock be distributed *pro rata* among the subscribers to the above bonds;" that several of the defendants subscribed to this contract, and agreed to take bonds in different amounts; that said subscribers paid the coal company for the bonds, and that with the money thus received, to the extent of \$30,000, the company paid its debts to certain of its officers and managers, who had become liable by indorsement for the company, and that nothing was or ever had been paid for or upon any of the shares of capital stock thus subscribed for, and to be distributed among them; that is to say, \$50,000 of said capital stock, equivalent to 500 shares thereof, was in fact subscribed for and distributed among certain of the defendants, to whom, in May, 1887, there were issued and received by them respectively certificates for shares.

The bill further averred that the plaintiffs were judgment creditors of the company, by judgments obtained in the courts of Kentucky; that their debts were created before all of the capital stock of said company was paid in; and that all of said \$80,000 increase of the capital stock, and each and all of the amounts due to the company for any part of its capital stock, constituted a trust fund for their

benefit, which they were entitled to have administered in a court of equity to the satisfaction of their said debts, the company being insolvent.

It further appeared from the testimony that the company was organized soon after its articles of incorporation were filed; that its chief office was at Mannington, Kentucky; and that it began business at once and made large outlays and expenditures for machinery, buildings, materials, and labor. In the early part of the year 1886, the company was led to believe that its coal would coke, and, therefore, its products could be profitably extended from grate and steam purposes to iron-making coke. To embark in the manufacture of coke, however, money was needed, and a meeting of the stockholders was held March 31, 1886, at which a resolution was passed, reciting that \$50,000 was needed with which to erect coke ovens, buildings, improvements, etc., to further develop the property, and it was unanimously resolved to issue \$50,000 of bonds of the company, in sums of \$1,000 each, due thirty years from April 1, with 6 per cent interest, and secured by a trust mortgage upon the property of the company, and the president was authorized to dispose of such bonds as in his discretion seemed best. The mortgage was executed to the designated trustee and recorded. It was found, however, that the bonds could not be sold, and to meet the demands upon the company for money, it borrowed a large amount upon its notes, indorsed by its directors and stockholders, and to secure the lenders and indorsers, the \$50,000 of bonds were deposited in two banks in Nashville, Tennessee, as additional collateral security for the loans. Finding, that no one would purchase the bonds, and being advised that in order to effect their sale it would be better to add an equal amount of stock to the bonds, and propose to the purchasers of such bonds to give as a gratuity \$1,000 of stock with each \$1,000 bond, a meeting of the stockholders of the company was held at Nashville, May 31, 1886, at which all the stockholders were present in person or by proxy, although without any call or previous notice, and "it was unanimously resolved that the capital stock of the company be increased to \$200,000, as authorized by the charter." This resolution was not then entered upon the records of the corporation, but was formulated in the shape of a pencil memorandum, and adopted unanimously, although no vote appeared to have been taken, and no formal record was made of the meeting until the summer of 1888. No notice of such change in the amount of its capital stock was recorded or published, as required by the laws of Kentucky. The subscribers to the bonds subsequently executed the agreement set forth in the bill, and bonds to the amount of \$45,000 were delivered to the subscribers with equal amounts of certificates of "paid up" stock, the receipts reciting that it "was issued with bonds for the same amount, as per agreement." The certificates on their face recited that the shares of stock were fully paid up "and were non-

assessable," or language to that effect. Five thousand dollars of the bonds were left in one of the national banks at Nashville as collateral security for a loan to the company, no one having subscribed for them. The remaining \$30,000 shares of increased stock, which were not needed to secure the subscribers to the bonds, appeared to have been distributed *pro rata* among the old stockholders. In the latter part of 1887, and in the early part of the following year, plaintiffs obtained judgments against the company, which were unsatisfied, and in September, 1887, by an order of the Circuit Court of Hopkins County, Kentucky, the entire property of the company was placed in the hands of a receiver, and its operations stopped.

On February 8, 1889, this bill was filed against the coal company, and the holders of this increased stock, to compel payment therefor, and to recover the amounts of the judgments against the company. The court dismissed the bill as to three of the defendants not served with process, and as to the rest held them liable to all the creditors of the company whose debts originated after the alleged increase of stock, and fixed May, 1886, as the date of such increase. As to debts contracted prior to that date, they were excluded because, as between the company and the stockholders, the latter held such stock properly, and without liability to the company, and all creditors who dealt with the company prior to such increase, and not upon the faith of such stock, had no equity to demand more than the company itself could. Five of the defendants against whom decrees were rendered in excess of \$5,000 appealed to this court, and the Circuit Court suspended the execution of the decree as to those who could not appeal, until this court should determine the rights of the appellants. The opinion of the Circuit Court is reported in 41 Fed. Rep. 531.

MR. JUSTICE BROWN delivered the opinion of the court: —

1. Although the resolution of May 31, 1886, increasing the stock of the company from \$120,000, to \$200,000 was not formally entered at that time upon the books of the company, and nothing but a pencil memorandum was then made of the proceedings of the meeting, no objection can be taken to its validity by reason of such omission. The testimony shows clearly what took place at this meeting. It appears from the memorandum made by Mr. Allen, the acting secretary, to have been "unanimously resolved that the capital stock of the company be increased to \$200,000 as authorized by the charter, the purposes for which said stock is issued being the betterment of the present plant, and the construction of a new plant for coking purposes." This resolution was subsequently, and in 1888, when the omission to record the same appears to have been first discovered, formally entered upon the minute book of the corporation. The failure to enter this resolution at the time it was adopted did not affect its validity, as most corporate acts can be proved as well by parol as by written entries. *Moss v. Averell* (10 N. Y. 449).

2. Nor were the proceedings of such meeting any less binding upon those participating in it by reason of the fact that it was held without call or notice, and outside of the boundaries of the State under the laws of which the company was incorporated. By an act of the Legislature of Kentucky of March 3, 1876, General Statutes, page 769, "all elections for directors and other officers, by private corporations, etc. shall be held within the territorial limits of the State of Kentucky. . . . Any such elections held outside of Kentucky shall be void." Beyond the election of officers, however, there is no statutory restriction of corporate action to the limits of the State, and in the absence of such inhibition the proceedings of such meeting would, within the rule laid down by this court in *Galveston Railroad v. Cowdrey* (11 Wall. 459), with regard to directors' meetings, be binding upon all those participating in it, as well as upon those acting upon the faith of its validity, or receiving stock authorized to be issued at such meeting. It is true there are cases holding that stockholders' meetings cannot be legally held outside of the home State of the corporation, but the question has generally arisen where a majority present at such meeting had attempted by their action to bind a dissenting minority, or had taken action prejudicial to the rights of third persons. *Ormsby v. Vermont Copper Mining Co.* (56 N. Y. 623); *Hilles v. Parrish* (14 N. J. Eq. (1 McCarter) 380). Indeed, so far as we know, the authorities are uniform to the effect that the action taken at such meetings is binding upon those who participate in or take the benefit of them. *Heath v. Silverthorn Lead Mining Co.* (39 Wisconsin, 146). In this case the meeting was attended by all the stockholders but two, who were represented by proxy, the vote increasing the stock was unanimous, and it does not lie in the mouth of those who participated in this act, or received the stock voted at this meeting, to question its validity.

3. It is further claimed that this issue of stock was invalid by reason of the fact that there was no amendment of the charter authorizing such increase ever recorded or published, as required by the law of Kentucky. The proceeding for the organization of incorporated companies is found in chapter 56 of the General Statutes of Kentucky, the fifth section of which requires a notice to be published for at least four weeks in some newspaper as convenient as practicable to the principal place of business, specifying several particulars, among which is the amount of capital stock authorized, and the times when, and the conditions upon which, it is to be paid in. Section six is as follows: "The corporation may commence business as soon as the articles are filed for record in the office of the county court clerk, and their acts shall be valid if the publication in a newspaper is made, and the copy filed in the office of the Secretary of State, when such filing is necessary, within three months from such filing in the clerk's office. No change in any of the foregoing particulars shall be valid, unless recorded and published as the

original articles are required to be; nor shall any change be made at any time or in any manner which would be inconsistent with the provisions of this act." Reliance is placed upon the final clause of this section, for the position assumed by the defendants, that the increase in the capital stock, never having been recorded or published as required by this clause, was void, and the case of *Scovill v. Thayer* (105 U. S. 143) is cited in support of this contention. That was also an action to recover unpaid assessments upon stock. The statutes of Kansas provided that any corporation might increase its capital stock to any amount, not exceeding double the amount of its authorized capital. The corporation in question had increased its capital stock, as it was authorized to do, by doubling it, and it subsequently increased it by doubling it again, thus quadrupling the original amount, the defendant in the case having attended by proxy the meeting at which such illegal increase was voted, and received a quantity of the stock thus issued. It was held that such increase was *ultra vires* and void, and that the defendant was not estopped from denying the validity of the over-issue, or his obligation to pay for it.

In the case under consideration, however, the articles of incorporation did provide that the capital stock should be \$120,000, with power to increase to \$200,000 by a majority vote of the stockholders, and there was no statutory inhibition, as in Kansas, against any such increase as it might be thought advisable to make. Here, then, was the power to increase the capital stock to the precise amount fixed by the stockholders, at their meeting at Nashville, and the defect was merely in the failure to record and publish such change, as required by section six of the statute in question.

It is insisted by the appellees, that the learned judge of the Circuit Court so held that the failure to record and publish this increase of the capital stock, which was in fact, if not in name, an amendment to the original articles, which had fixed the capital stock at \$120,000, was a mere irregularity and informality in the proceedings to effect the increase; such a one, as was said by this court, in *Chubb v. Upton* (95 U. S. 665, 667), to constitute no defence to a subscriber to such increased stock. In that case it appeared only that objection was made to the proceedings by which the company increased its stock, on the ground of irregularity and informality in the papers filed in the public offices; and it was held that one who contracted with an acting corporation, by purchasing stock in the same, could not defend himself against a claim upon such contract, in a suit by the corporation, by urging the illegality of its organization. In *Veeder v. Mudgett* (95 N. Y. 295, 310), which was also an action by directors against the stockholders of a corporation to enforce the liability imposed upon them because of an alleged failure to pay in the full amount of the capital stock, it appeared that the meeting at which the increased stock was voted was not formally called, nor was a

certificate of the increase of capital made and filed as prescribed by the State statute. The stock was, however, all issued to stockholders who voted for the increase. These holders subsequently received dividends thereon, voted at stockholders' meetings and in all respects were treated and acted as stockholders. The court held the attempted increase illegal, but that the defendant stockholders, as against the creditors of the company, by accepting their proportions of the increased stock, by voting for its increase, by taking dividends upon it, and by holding it out to those dealing with the company as an actual component of its capital, were estopped from denying the validity of the increase. It was argued in that case, as it is in this, that an act absolutely and wholly void, because incapable of being performed, could not be made valid by estoppel. But this was held to be true only where there was an entire lack of power to do the act so brought in question, and the case of *Scovill v. Thayer* was cited. "But where," says the court, "as in the present case, the abstract power did exist, and there was a way in which the increase could lawfully be made, and the creditors could, without fault, believe that the increase had been lawfully effected, and the necessary steps had been taken, there the doctrine of estoppel may apply, and the increased stock be deemed valid as against the creditors who have acted upon the faith of such increase."

It is true that in neither of those cases was the court embarrassed by a statute declaring that certain conditions must be observed or the increase would not be valid. But we think that the clause of section 6, upon which reliance is placed, must be read in connection with section 18 of the same act, which provides that "no persons acting as a corporation under the provisions of this act shall be permitted to set up or rely upon the want of legal organization as a defence to an action brought against them as a corporation; nor shall any person who may be sued on a contract made with such corporation, or sued for an injury done to its property, or for a wrong done to its interests, be permitted to rely upon such want of legal organization in his defence." It is true that this section seems to apply rather to a want of an original legal organization of the company; but we think it should be regarded as applying as well to amendments to such organization, and that no defence connected with the original organization, which a party contracting with the corporation would be disqualified to set up, can be made available in connection with an amendment to the original articles.

So far as the question of liability to the proposed assessments is concerned, these defendants, with respect to their relations to this corporation, are divisible into two distinct classes: First, those of the original stockholders who received the \$30,000 increased stock as a gift; second, those who subscribed to the \$50,000 bonds, and received an equal amount of stock, as a bonus or inducement to make the subscription.

4. With regard to the first class, namely, the original stockholders, who voted for this increase of 800 shares, and then distributed among themselves 300 of those shares, without the shadow of right or consideration, it is difficult to see why they should not be called upon to respond for their value. The only claim made upon their behalf is that they never agreed to contribute or pay for the same; that the stock was expressly declared to be "fully paid" and "free from all claims or demands upon the part of the company;" that there was no evidence that the creditors of the company knew of, or relied upon, this increase, in their dealings with the company; and that they had a right to return and surrender the same, which they offered to do. There is no reason to suppose that these stockholders did not act in good faith, and in the belief that they were entitled to this stock. The fact that they did not subscribe for it or agree to take it until the receipt of the certificates, is immaterial, as the acceptance of the certificates is sufficient evidence of an agreement to pay their par value. *Sanger v. Upton* (91 U. S. 56, 64); *Chubb v. Upton* (95 U. S. 665); *Brigham v. Mead* (10 Allen, 245).

Ever since the case of *Sawyer v. Hoag* (17 Wall. 610), it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation, that the stock shall be treated as fully paid and non-assessable, or otherwise limiting their liability therefor, is void as against creditors. The decisions of this court upon this subject have been frequent and uniform, and no relaxation of the general principle has been admitted. *Upton v. Tribilcock* (91 U. S. 45); *Sanger v. Upton* (91 U. S. 56); *Webster v. Upton* (91 U. S. 65); *Chubb v. Upton* (95 U. S. 665); *Pullman v. Upton* (96 U. S. 328); *County of Morgan v. Allen* (103 U. S. 498); *Hawkins v. Glenn* (131 U. S. 319); *Graham v. Railroad Co.* (102 U. S. 148, 161); *Richardson v. Green* (134 U. S. 30).

It is simply in affirmance of this general principle that section 14, chapter 56, of the General Statutes of Kentucky declares that nothing in the act conferring corporate franchises, or permitting the organization of corporations, "shall exempt the stockholders of any corporation from individual liability to the amount of the unpaid instalments on stock owned by them." If the corporation has no right, as against creditors, to sell or dispose of this stock with an agreement that no further assessment shall be made upon it, much less has it the right to give it away, or distribute it among shareholders, without receiving a fair equivalent therefor, and thereby induce the public to deal with it upon the credit of such shares, as representing the assets of the corporation. *Union Mut. Life Ins. Co.*

v. *Frear Stone Mfg. Co.* (97 Illinois, 537). The stock of a corporation is supposed to stand in the place of actual property of substantial value, and as being a convenient method of representing the interest of each stockholder in such property, and to the extent to which it fails to represent such value it is either a deception and fraud upon the public, or an evidence that the original value of the corporate property has become depreciated. The market value of such shares rises with an increase in the value of the corporate assets, and falls in case of loss or misfortune, whereby the value of such assets is impaired. And the increase of value of such stock is taken to represent either an appreciation in value of the company's property beyond the par value of the original shares, or so much money paid to the corporation as is represented by such shares. If it be once admitted that a corporation may issue stock without receiving a consideration therefor, and where it does not represent actual or substituted value in corporate assets, there is apparently no limit to the extent to which the original stock may be "watered," except the caprice of the stockholders. While an agreement that the subscribers or holders of stock shall never be called upon to pay for the same may be good as against the corporation itself, it has been uniformly held by this court not to be binding upon its creditors.

5. Somewhat different considerations apply to those who subscribed for the bonds of the company, with the understanding that they were to receive an amount of stock equal to the bonds as an additional inducement to their subscription. The facts connected with this transaction are substantially as follows: Some three years after the company was organized it became apparent that the enterprise, as originally contemplated, namely, the mining and selling of coal for steam and domestic purposes, was not likely to be a success, owing to the inferior character of the product; and the only hope of the company lay in the manufacture of the coal into an iron-making coke, that is, a coke containing a percentage of sulphur low enough to admit of the manufacture of merchantable pig-iron. To embark in this, however, money was needed, and as the stock of the company was not worth more than 50 cents on the dollar, it was evident this could not be effected simply by the issue of new stock. It was proposed at the meeting in March that money should be raised by the issue of \$50,000 of bonds, with which to add the requisite structures to the plant. But it was soon evident that the bonds could not be negotiated without the stock, and, acting upon the suggestion of a Nashville banker, it was resolved at the meeting in May that the stock should be increased 800 shares, 500 of which should be turned over to the subscribers to the bonds, as a bonus or an additional consideration. The evidence is uncontradicted that the bonds could not have been negotiated without the stock; that they were both sold as a whole; that the transaction was in good faith, and, considering the risk that was taken by the subscribers, the price paid

for the stock and bonds was fair and reasonable. The directors appear to have done all in their power to obtain the best possible terms, and there is no imputation of unfair dealing on the part of any one connected with the transaction. At that time the mines and property of the company were in good condition, and the prospects of success were fair.

The case then resolves itself into the question whether an active corporation, or, as it is called in some cases, a "going concern," finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market, and sell it for the best price that can be obtained. The question has never been directly raised before in this court, and we are not, consequently, embarrassed by any previous decisions on the point. In the *Upton Cases*, arising out of the failure of the Great Western Insurance Company; in *Hatch v. Dana* (101 U. S. 205), and in *Hawkins v. Glenn* (131 U. S. 319), the defendants were either original subscribers to the increased stock, at a price far below its par value, or transferees of such subscribers; and the stock was issued, not as in this case to purchase property or raise money to add to the plant, and facilitate the operations of the company, but simply to increase its original stock in order to carry on a larger business, and the stock thus issued was treated as if it formed a part of the original capital. In *County of Morgan v. Allen* (103 U. S. 498), the same principle was applied to a subscription by a county to the capital stock of a railroad company, for which it had issued its bonds, although such bonds had been surrendered to the county with the consent of certain of its creditors.

To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and so long as the transaction is *bona fide*, and not a mere cover for "watering" the stock, and

the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. Of course no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value. While, as before observed, the precise question has never been raised in this court, there are numerous decisions to the effect that the general rule that holders of stock, in favor of creditors, must respond for its par value, is subject to exceptions where the transaction is not a mere cover for an illegal increase.

Thus in *New Albany v. Burke* (11 Wall. 96), a city subscribed to the stock of a railroad, and issued bonds for a part of the subscription, agreeing to issue them for the rest of it, when the road should be built to a certain point. The road relied mainly upon these bonds to raise the necessary money. The validity of the bonds being denied by taxpayers, who had filed bills to enjoin the raising of a tax to pay the interest, their value in the market was largely impaired, and it was found they could not be sold without a sacrifice. Under these circumstances the company applied to the city to pay a certain sum which had been borrowed by the road upon the pledge of the bonds already issued, with sundry other moneys, and in consideration thereof the city obtained from the company a large number of bonds which had not been negotiated, and a cancellation of the subscription. In a suit brought by a judgment creditor to enforce the original subscription, it was held that the compromise was legal, and the payment of such subscription would not be enforced, although it subsequently turned out that the bonds were worth more than they could have been sold for. Said Mr. Justice Strong, speaking for the court: "Had the company sold to a stranger, and then the city become a purchaser from the stranger, it will not be contended that any creditor of the company could complain. And it can make no difference whether the purchase was made directly or indirectly from the first holder of the bonds, assuming that there was no fraud. The transaction . . . was, in substance, plainly nothing more than a purchase by the city of its own bonds, some of which had been issued and others of which it was under obligation to issue, at the call of the vendor. . . . Looking at it in the light of subsequent events, it was no doubt an advantageous purchase for the city; and, if the uncontradicted evidence is to be believed, it was deemed at the time an advantageous sale or arrangement for the company. . . . We may add, the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong creditors of the latter; that it was at the time considered advantageous to the company, and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market."

So in *Coit v. Gold Amalgamating Company* (119 U. S. 343), it was held that where the charter of a corporation authorizes the capital stock to be paid for in property, and the shareholders honestly and in good faith pay for their subscriptions in property instead of money, third parties have no ground of complaint, although a gross and obvious over-valuation of such property would be strong evidence of fraud in an action by a creditor to enforce personal liability. The court held that where full-paid stock was issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. In delivering the judgment of the court in that case at the circuit (14 Fed. Rep. 12), Mr. Justice Bradley observed: "That trust [in favor of creditors] does not arise absolutely in every case where capital stock has been issued, and where it has been settled for by arrangement with the company. It is not as if the stockholders had given their promissory notes for the amount, these notes being in the treasury of the company; but there are often equities to which the stockholders are entitled,—on which they are to stand." As one of them, he mentioned the case of stock dividends fairly made in consideration of profits earned and of accumulations of the property of the company, and observed: "It is not true that it is in the power of a creditor in every case, and in all cases, as a mere matter of right, to institute an inquiry as to the valuation of the amount of the consideration given for the stock, and disturb fair arrangements for its payment in other ways than by cash. If the stock has been fairly created and paid for, there is an end of trusts in favor of anybody; and this does not affect the general proposition that unpaid subscriptions of stock are a trust fund to be administered for the benefit of creditors after a corporation becomes insolvent."

A case nearer in point is that of *Clark v. Bever* (139 U. S. 96), decided at the present term of this court. In this case a railroad company, of which defendant's intestate was president and stockholder, had a settlement with a construction company, of which defendant's intestate was also a member, for work done in building the road. The railroad company, being unable to pay the claim of the construction company, delivered to it thirty-five hundred shares of its stock at 20 cents on the dollar, and the same were accepted in full satisfaction of the debt. The stock was not worth anything in the market, and was issued directly to the defendant's intestate. No other payment than the 20 per cent was ever made on account of this stock. A judgment creditor of the railroad company filed a bill to compel the payment by the defendant of his claim, upon the theory that he was liable for the actual par value of such stock, whatever may have been its market value at the time it was received. It was held he could not recover. "Of course, under this view," says Mr. Justice Harlan, in delivering the opinion of the court, "every one having claims against the railway company, — even laborers and

employees, — who could get nothing except stock in payment of their demands, became bound, by accepting stock at its market value in payment, to account to unsatisfied judgment creditors for its full face value, although, at the time it was sought to make them liable, the corporation had ceased to exist, or its stock had remained, as it was when taken, absolutely worthless. . . . To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value — there being no statute forbidding such a transaction, — without subjecting the creditor, surrendering his debt, to the liability attaching to stockholders, who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts, or to borrow money secured by mortgage upon the corporate property.”

So in *Fogg v. Blair* (139 U. S. 118), also decided at the present term, it was held to be competent for a railroad, exercising good faith, to use its bonds or stock in payment for the construction of its road, although it could not, as against creditors or stockholders, issue its stock as fully paid without getting some fair or reasonable equivalent for it. It was there said: “What was such an equivalent depends primarily upon the actual value of the stock at the time it was contracted to be issued, and upon the compensation which, under all the circumstances, the contractors were equitably entitled to receive for the particular work undertaken or done by them.” It appeared in that case that full and adequate compensation for the work done had been paid by the company in its mortgage bonds, and, as the bill contained no allegation whatever as to the real or market value of such stock, it was held that the contractors receiving this stock were not liable to creditors for its par value. It was added: “If, when disposed of by the railroad company, it was without value, no wrong was done to creditors by the contract made with Blair and Taylor. If the plaintiff expected to recover in this suit on the ground that the stock was of substantial value, it was incumbent upon him to distinctly allege facts that would enable the court — assuming such facts to be true — to say that the contract between the railroad company and the contractors was one which, in the interest of creditors, ought to be closely scrutinized.” It would seem to follow from this that if the stock had been of some value, that value, however much less than par, would have been the limit of the holder’s liability.

In *Morrow v. Nashville Iron and Steel Co.* (87 Tennessee, 262, 275, 276), the Supreme Court of Tennessee held, that a contract with a subscriber to stock of a corporation, that for every share subscribed he should receive bonds to an equal amount, secured by mortgage on the company’s plant, is void as against creditors, and also between the subscriber and the corporation. But the court drew a distinc-

tion between such a case and sales of or subscription to the stock of an organized and going corporation. It said: "The necessities of the business of an organized company might demand an increase of capital stock, and if such stock is lawfully issued, it may very well be offered upon special terms. In such case, if the market price was less than par, it is clear that a purchaser or subscriber for such stock at its market value would, in the absence of fraud, be liable only for his contract price. So a case might arise where the stock of a going concern was much depreciated, and where its bonds were likewise below par, and there was lawful authority to issue additional stock and bonds. Now, in such case, the real market value of an equal amount of stock and bonds might not exceed, or even equal, the par value of either. In such cases, the question of fraud aside, a purchaser would only be held for his contract price." This case from Tennessee puts as an illustration the exact case with which we are now dealing.

The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which, and the purposes for which, such increase was made. If it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained. *Stein v. Howard* (65 California, 616). As the company in this case found it impossible to negotiate its bonds at par without the stock, and as the stock was issued for the purpose of enhancing the value of the bonds, and was taken by the subscribers to the bonds at a price fairly representing the value of both stock and bonds, we think the transaction should be sustained, and that the defendants cannot be called upon to respond for the par value of such stock, as if they had subscribed to the original stock of the company. Our conclusion upon this branch of the case disposes of it as to those who were held liable by virtue of their subscription to the bonds.

6. We have no doubt the learned circuit judge held correctly that it was only subsequent creditors who were entitled to enforce their claims against these stockholders, since it is only they who could, by any legal presumption, have trusted the company upon the faith of the increased stock. *First National Bank of Deadwood v. Gustin Minerva Consolidated Mining Company* (44 N. W. Rep. 198); 2 Morawetz on Corporations, §§ 832-833; *Coit v. N. C. Gold Amalgamating Co.* (14 Fed. Rep. 12). We also agree with him, that creditors who became such after the increase was voted in May, 1886, are entitled to look to those who subsequently received the stock, notwithstanding they did not receive it until after the debts had been

contracted. The circuit judge found in this connection that the "complainants had no knowledge or notice of the subscription paper of December 30, 1886, under which \$45,000 of the new stock was distributed to those who subscribed for bonds, nor of the distribution among the old stockholders of \$30,000 of said increased stock, nor does it affirmatively appear that they or either of them dealt with and trusted the company upon the faith of that increased stock; but the fact that the capital stock had been increased to \$200,000 was made public and was generally known." The real question in this connection is — When may it be presumed creditors trusted the corporation upon the faith of the increased stock? Obviously, when such increase was ordered. That is a fact to which publicity would naturally be given; the creditors could not be expected to know when and by whom such stock would be taken. It is true they assume the risk of the stock not being taken at all, but the moment shares are taken, they are supposed to represent so much money put into the treasury as they are worth, which becomes available for the payment not only of future, but of existing creditors. It is manifest that any attempt to gauge the liability of stockholders by the exact time they took their stock with reference to the dates when the several claims of the creditors accrued, and by the further fact whether the creditors actually knew of and relied upon such stock, would, in a case like this, where the creditors and stockholders are both numerous, lead to inextricable confusion. Even the flexibility of a court of equity would be inadequate to adjust the rights of the parties.

7. With regard to the special defence set up by Neeley, that he never consented to nor received certificates for increased stock, we agree with the circuit judge that it is not sustained. He did not live in Nashville, but had given a proxy to one Sandford to represent him at stockholders' meetings; he knew of the arrangement to issue an amount of the stock equal to the bonds, and to distribute \$30,000 of the increased stock, ordered by the resolution of May, 1886; and on April 5, 1887, he gave a power of attorney to Sandford, authorizing the latter, for him, and in his name and stead, "to receipt to the Clifton Coal Company, for stock in my name, and transfer, bargain, and sell the same as if I were there present." Under this power of attorney, Sandford surrendered Neeley's certificate for 300 shares, and receipted for 375 shares, the certificates for which were delivered to him as agent of Neeley, and which Sandford subsequently voted at stockholders' meetings, under the general proxy from Neeley to represent his stock. Knowing of the contemplated action in issuing the new stock, and having authorized Sandford to represent him in all matters connected therewith, we think it too late for him to repudiate Sandford's act in receiving the additional 75 shares, which were distributed to him as the owner of 300 original shares. Indeed the circuit judge finds it to be established by the proof that all of

the old stockholders knew of and acquiesced in the disposition of the new stock as made; and that such increased stock was represented and voted at subsequent meetings of stockholders, and was recognized and held out to the public as part of the capital stock of the company. Under the case of *Sawyer v. Hoag* (17 Wall. 610), Neeley was clearly not entitled to set off against the claim of the creditors his own claim against the corporation. Cook on Stock and Stockholders, secs. 193 and 194.

There are several minor points made in the briefs of counsel with regard to the claims of certain creditors, which we do not find it necessary to discuss at length. We think there was no error in the rulings of the court in these particulars.

It results that the decree of the court below must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE LAMAR, dissenting:

I dissent from the conclusion of the court in respect of the stock received by the subscribers to the bonds. That stock was not paid for in money or money's worth, or issued in payment of debts due from the company, or purchased at sale upon the market. It was a mere bonus, thrown in with the bonds as furnishing the inducement to the bond subscription, of larger control over the corporation, and of possible gain without expenditure. Becoming secured creditors through the bonds, the subscribers increased their power through the stock. In my view, there was no actual payment for the stock, and to treat it as paid up, is to sanction an arrangement to relieve those who would reap the benefit derived from the possession of the stock, in the event of the success, from liability for the consequences, in the event of the failure of the enterprise.

When the capital stock of a corporation has become impaired, or the business in which it has engaged has proven so unremunerative as to call for a change, creditors at large may well demand that experiments at rehabilitation should not be conducted at their risk.

My brother Lamar concurs with me in this dissent.

ELYTON LAND COMPANY v. ELEVATOR COMPANY.

(9 *Southern Rep.* 129. *Supreme Court of Alabama.* 1891.)

APPEAL from Chancery Court, Jefferson County.

WALKER, J.:—

The bill was filed by the Elyton Land Company as a judgment creditor of the Birmingham Warehouse & Elevator Company, a corporation, and its purpose is to secure the payment of the judg-

ment by the enforcement of the alleged unsatisfied liability of the individual defendants as original subscribers to the stock of the defendant corporation. It is averred that said individual defendants pretend that they have discharged and satisfied their liability as such subscribers; but it is alleged that the transaction whereby it was attempted to discharge that liability is merely colorable, and is void as against the creditors of said corporation; and that said subscribers are liable to pay in money the amount of their said subscriptions, or so much thereof as is necessary to satisfy said judgment. The following is the substance of the case stated by the bill: —

On the 9th day of March, 1887, the Elyton Land Company executed and delivered to defendant, J. A. Van Hoose, as trustee for the Birmingham Warehouse & Elevator Company, a corporation then in process of organization, its bond of title for two blocks of land near the city of Birmingham, to be paid for at the price of \$53,000. Said Van Hoose paid to the Elyton Land Company \$5,000 on the execution and delivery of the bond for title, by the terms of which it was provided that he was to execute a transfer and conveyance of his rights and interests thereunder to the Birmingham Warehouse & Elevator Company, upon its organization, and that that company should make its nine notes for the balance of the purchase-money to the Elyton Land Company, said notes to be each for \$5,333.33, bearing interest from August 20, 1886, payable, respectively, at 1, 2, 3, 4, 5, 6, 7, 8, and 9 years from that date. On the 19th day of February, 1887, said Van Hoose, and the other individual defendants, Johnston, Sage, and McLester, filed their petition in the office of the probate judge of Jefferson County for the organization as a corporation of the Birmingham Warehouse & Elevator Company, the capital stock of which was to be fixed at \$250,000, to be divided into 2,500 shares of \$100 each. On the same day a commission was issued to said Van Hoose, Johnston, Sage, and McLester, constituting them a board of corporators, and authorizing them to open books of subscription to the capital stock of the proposed corporation. On the 11th day of March, 1887, said board of corporators, over their signatures, reported and certified to said probate judge that on the 9th day of March, 1887, they had opened books of subscription to the stock of said proposed corporation, and that they had each subscribed for 500 shares, "subscribed through James A. Van Hoose, trustee for the subscribers, and payable in real property near the city of Birmingham, . . . of the money value stated in said subscription of two hundred and fifty thousand one hundred and thirty-three dollars and thirty-three cents, subject to the unpaid purchase-money due to the Elyton Land Company, amounting to fifty thousand one hundred and thirty-three dollars and thirty-three cents, the payment of which is to be assumed by said company, said lands being fully described in the bond for titles of the Elyton Land Company to said James A. Van Hoose, trustee, dated March 9, 1887, which said trustee is to

convey to said company in payment of said two thousand shares of stock," and Van Hoose, Johnston, and McLester each subscribed for one share, payable in money. Said corporators further reported that on the organization of said company said Van Hoose, Johnston, Sage, and McLester were present, and each represented in person 501 shares in stock; that each of said persons was elected a director of said corporation, and that the board of directors elected Van Hoose as president and McLester as treasurer and secretary of the corporation. It was further reported and certified by the corporators that on the 10th day of March, 1887, after the organization of said company, all the capital stock thereof payable in money was paid to the treasurer, and all the property subscribed was delivered to him. The subscriptions were made as reported, and certified by the corporators. It was not true at the time of the filing of the bill, or when the subscriptions were made and reported, that said land was of the money value of \$200,000. The price named in said bond for title — \$53,000 — was at the time of said subscriptions the full money value of said land when sold on long credit. Said Van Hoose, Johnston, Sage, and McLester well knew that said land was not worth, nor was it of the money value of \$200,000, or anything near that sum. After said subscriptions were made, and after said Birmingham Warehouse & Elevator Company was organized, said Van Hoose indorsed to it said bond for title, and said company executed its nine promissory notes, as by the terms of the bond for title it was provided it should do; and said Van Hoose, Johnston, Sage, and McLester now claim that the assignment of said bond was a discharge and satisfaction of said subscription of \$200,000, which has not been otherwise paid. It is this transaction which the bill alleges is merely colorable, and is void as against the creditors of said corporation. Only \$5,000 has been paid on account of said purchase-money. The Elyton Land Company has recovered judgment against said Birmingham Warehouse & Elevator Company on two of said notes. That judgment remains unsatisfied, and said corporation has no property out of which it could be satisfied by execution.

Each of the individual defendants demurred to the bill upon the following among other grounds: (1) That the bill, on its face, shows that the complainant has no right to the relief therein prayed, because it shows that this defendant owes nothing to the Birmingham Warehouse & Elevator Company, either in unpaid subscriptions for stock or otherwise; (2) because said bill alleges no facts which render this defendant liable personally in any way for the alleged debt mentioned therein as due from said Birmingham Warehouse & Elevator Company to the complainant; and (3) because said bill shows that this defendant subscribed for stock in said Birmingham Warehouse & Elevator Company, payable in property, at a valuation mentioned in said subscription, which property has been delivered and received in full payment for said stock; and said bill fails to

show that said property was overvalued unreasonably, intentionally, and fraudulently, or that the defendant has made a profit from the stock so subscribed and taken by him. A decree was rendered sustaining the demurrers as to the grounds here mentioned. The appeal is from that decree.

On the averments of the bill it is to be taken as true that the property which was received by the corporation as full payment of the stock subscription was worth only \$5,000, the amount which had been paid on the bond for title. It follows that the decree of the chancery court involves the assertion of the validity, as against the creditors of the corporation, of the payment of a stock subscription of \$200,000 by the transfer to the corporation of property worth only \$5,000. In reviewing this determination, regard is to be had to certain constitutional and statutory provisions, which are to be construed and applied in the light of settled principles governing the relations of stockholders to the corporation of which they are members, and to the creditors thereof. By the constitution of 1875 it was provided that "no corporation shall issue stock or bonds, except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void;" and that "dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her." Sections 6, 8, art. 14, of the constitution. Prior to the adoption of the present constitution, each stockholder in any corporation was liable to the amount of stock held or owned by him, the law imposing a liability not only to the extent that the stock was unpaid, but for an additional sum equal to the amount of such stock. Section 3, art. 13, of the constitution of 1868; section 1760, Rev. Code 1867; *McDonnell v. Insurance Co.* (85 Ala. 401, 5 South. Rep. 120). Before the creation of this additional liability, the stock and other property of a private corporation was regarded and treated in a court of equity as a trust fund for the payment of the debts of the corporation, and in the event of the insolvency of the corporation, unpaid stock subscriptions could be condemned for the satisfaction of the creditors; and said additional liability was a mere increase of the security for the payment of the corporate debt. *Smith v. Huckabee* (53 Ala. 191). While corporate creditors were secured by this special liability existing in their favor, there was no direct constitutional or general statutory prohibition against the abuse of corporate powers by the issue of stock not in good faith representing the value of money, service, or property actually contributed to the corporate enterprise; and the general incorporation law then in force contained no requirements as to the mode of subscribing for stock, or as to how the subscription liability should be satisfied. Chapters 3, 4, tit. 2, pt. 2, Code 1867. The dangers to which corporate creditors were exposed by the absence of such regulations were obviated by the

provisions for said additional liability. When those provisions were repealed by the constitution of 1875, there was an obvious necessity of providing that the trust fund, the remaining security for corporate creditors, should exist as a thing of substance, and that the liability for unpaid stock should not be merely illusory. This necessity was not overlooked. The former legislative policy of securing corporate creditors by making the stockholders liable to them in amounts over and above what they could be called upon to pay on their stock subscriptions gave place to a new policy, the aim of which was to afford proper security to persons dealing with corporations, by prohibiting the issue of stock except for value received by the corporation, and by providing definite regulations for the payment of stock subscriptions in money, or in labor, or property at its money value. This new policy is evidenced generally by section 6, art. 14, of the constitution, quoted above, and particularly, as to manufacturing, mining, immigration, and industrial business corporations, by section 1805 of the Code of 1876, which provides that "all subscriptions to the capital stock of any company organized or proposed to be organized under the provisions of this article shall be made payable in money, or in labor, or in property at its money value, to be named in the list of subscription; and in case of a failure to perform the labor, or deliver the property, according to the terms of the subscription, the money value thereof as named in the list of subscription shall be paid by the subscribers." These enactments are not for the benefit of corporate creditors alone. The policy evidenced thereby bears upon the relations of corporations to the public, and upon the relations of stockholders to each other, to the corporation, and to its creditors.

This court has not heretofore had occasion to pass upon the question as to the effect of these provisions upon the rights of corporate creditors. The effective operation of the constitutional provision in other connections has been recognized in several cases. In *Fitzpatrick v. Publishing Co.* (83 Ala. 604; 2 South. Rep. 727), it was held, at the instance of an objecting stockholder, that under the constitutional and statutory provisions a corporation with a paid-up capital of \$10,000 has no authority to double its capital stock and distribute the new stock among its stockholders as a stock dividend, on the mere statement that its capital stock "has been invested in property which has more than doubled in value, and is now worth twenty thousand dollars over and above all liabilities;" and an injunction was issued to restrain and enjoin the corporation from carrying into effect a resolution which had been adopted by the stockholders for the issue and distribution of such new stock. In the course of the opinion it was said: "Let us not by timid interpretation impair the strength of this bulwark, erected by our constitution makers against the frauds which have become the reproach of the age we live in." In *Williams v. Evans* (87 Ala. 725; 6 South. Rep. 702), it was held

that relief could not be granted on an executory contract to pay for the transfer of a subscriber's right under a stock subscription whereby it was provided that the corporation to be formed should issue "five dollars of stock for one dollar of subscription." The stock had not been issued when the contract in suit was made. The court said: "A contract which contemplates the violation of a statute or a constitution as a mode of executing such contract is illegal and void. . . . One of the purposes of this clause of the constitution was to protect the public, as well as stockholders, against spurious and worthless stock by the process of watering; in other words, from fraudulently issuing and putting on the market fictitious corporate stock, which is based on nothing valuable as a consideration for its issue. It is greatly to the interest of the public that the policy of this provision should be enforced." In *Parson v. Joseph*, decided during the present term, and reported in 8 South. Rep. 788, the bill, to which a demurrer was overruled, was filed by a stockholder to secure the cancellation of certain certificates of stock issued to another stockholder, on the ground that the stock so issued was fictitious, and that its issue was in violation of the constitution and the statute law of the State. It was alleged that certain stock was paid for in full by conveying to the company 39 acres of land at an agreed price and valuation of \$137 per acre, when the land was not worth more than \$25 per acre; that afterwards the capital stock of the company was doubled, and without further consideration than the 39 acres of land the amount of stock issued therefor was doubled. The contention was in regard to this latter issue of stock. It was alleged that the excessive valuation of the land was made knowingly, wilfully, and with the fraudulent intent of having the fictitious stock in question issued in violation of law. On these averments it was held that the stock in question was issued in violation of section 1662 of the Code of 1886, and of section 6, art. 14, of the constitution. It is to be observed that the respective requirements of section 1805 of the Code of 1876 and section 1662 of the Code of 1886, as to how stock subscriptions shall be payable, differ in this: that the former requires the subscriptions to be made payable in money, or in labor or property at its money value, to be named in the list of subscription; while the latter provides that all subscriptions must be payable in money; but the commissioners may receive subscriptions payable in money, the subscriber having the privilege of discharging the same by the rendition of stipulated necessary services, or the performance of stipulated necessary labor for the corporation, at the reasonable value of such services or labor, or in property at the reasonable value thereof. It does not seem, however, that the variations in the terms of these two statutes are such that the fact that the stock subscription was made under the one or the other of them would make any substantial difference in the right of a stockholder to object to the issue of other stock representing property received by the corpora-

tion at an excessive and fraudulent over-valuation. In the case last cited it was suggested that stockholders who knowingly and intentionally have subscribed and paid for stock with property upon a fictitious valuation are liable to creditors as stockholders who have not paid up in full for their stock; but the question of such liability was not presented in that case. In *Tutwiler v. Land Co.* (89 Ala. 391; 7 South. Rep. 398), several questions that might arise from the issue of stock for property taken at a palpably excessive valuation were stated, but not decided. It is plain from this review of the decisions that the constitutional and statutory provisions in question are treated as effectual to prevent the courts from lending their aid for the enforcement of any contract or obligation the execution of which involves a disregard of those regulations, and that, so far as they are appropriate for the protection of stockholders from improper discriminations in accepting payments for stock, those regulations are accorded such effect and operation as to fully accomplish this purpose of their enactment. It cannot be doubted that the protection* of the interests of corporate creditors is as much within the aim and policy of those regulations as were the objects in behalf of which they have been successfully invoked in this court.

In considering the claim of corporate creditors to hold the stockholders of the corporation individually liable on the ground that an attempt by them to satisfy their stock subscriptions by the transfer to the corporation of property at a gross over-valuation was not such payment as the law requires, the fact is not to be lost sight of that the solution of the question is dependent in some measure at least upon constitutional and statutory provisions which the court has already construed as amply effectual to secure the accomplishment of other objects, also within the purview of the enactments; and it may be added that a like beneficial operation should be accorded to these provisions when invoked in furtherance of either of their manifest purposes. It is impossible to reconcile the decisions of the various courts upon the question of the liability to the creditors of the corporation of stockholders on stock issued for property taken at an over-valuation. We will briefly consider the cases principally relied on in support of the proposition that such liability cannot be maintained. In *Coit v. Amalgamating Co.* (119 U. S. 343; 7 Sup. Ct. Rep. 231), the liability was claimed on the ground that the stock was paid for in property at a valuation illegally and fraudulently made at an amount far above its actual value. The court found that this claim was not sustained by the evidence. It was said in the opinion: "The corporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item — the value of the charter privileges — which is at all liable to any legal objection. But, if that were deducted, the remaining amount would be so near the aggregate capital that no implication could be raised against the entire good

faith of the parties in the transaction." It is plain that this case is not an authority against the existence of the liability contended for by appellant. In *Brant v. Ehlen* (59 Md. 1), there was no assertion of the absence of such liability. It was expressly stated in the opinion that the questions presented were dealt with upon the assumption that the sale and purchase of the land which was paid for in stock were made in good faith. Another case, decided subsequently, and reported in the same volume, — *Crawford v. Rohrer* (Id. 599), — shows clearly the rule prevailing in that State on the subject under consideration. In that case it was decided that "any arrangement among stockholders, or those in charge of the affairs of the corporation, by which the stock is but nominally paid for, whether in money or property, the corporation not in fact getting the benefit of the price in good faith, will be regarded as a sham, and not as a valid payment, as against the creditors of the corporation, however it may be regarded as between the corporation and the subscriber." In *Carr v. Le Fevre* (27 Pa. St. 413), a stockholder was sought to be charged on stock which had been paid for in land. It was said in the opinion: "There is nothing in the special verdict tending to show that there was any fraud in this transaction;" and that "the parties took the precaution to have the lands valued and appraised. We are bound to presume that this was fairly done." The element of gross over-valuation was lacking in that case. In this particular it was like the Alabama case of *Davis v. Chemical Co.*, decided during the present term, and reported in 8 South. Rep. 496. In *Van Cott v. Van Brunt* (82 N. Y. 535), it appeared that stock and bonds of a railroad company were issued to a contractor for the building of the road, and that the work done under the contract was of less value than the par of the stock and bonds agreed to be paid therefor. By this arrangement the stock was disposed of in good faith, and without fraud, though for less than its face value. It was held that the liability of the stockholder had been discharged. On page 542 of the opinion it is made to appear that the transaction was without the influence of statutes in that State somewhat similar to provisions prevailing here, as will be shown by references to be made to other New York decisions. This case has several times been the subject of unfavorable comment. Tayl. Priv. Corp. (2d ed.) § 545, note 5; 2 Mor. Priv. Corp. § 826; Cook, Stocks, § 47, note 5; *Jackson v. Traer* (64 Iowa, 483; 20 N. W. Rep. 764). *Phelan v. Hazard* (5 Dill. 45) was a suit by a creditor to charge a transferee of stock, who had purchased the same for value and in good faith, as full-paid stock. It was said that a liability could not be established against the defendant by showing that the property conveyed to the corporation in payment for the stock was not worth the amount of the stock, or that it was not worth anything over and above the mortgages upon it at the time of the transfer. The court held that the agreement whereby property was received in payment for the stock was conclu-

sive upon the company and its creditors, until by direct attack it has been impeached and rescinded for fraud; and it was said that "the courts, even where the rights of creditors are involved, will treat that as payment which the parties have agreed should be payment." This case was followed as authority in *Coffin v. Ransdell* (110 Ind. 417; 11 N. E. Rep. 20). The three cases last cited represent the weight of American authority opposed to the recognition of the liability asserted in the case at bar. It is to be marked that in neither of those cases were any statutory provisions mentioned as having any bearing upon the conclusions reached. It is also to be noted in the latter two of the three cases English decisions were principally relied on as authority. The opinions in both those cases quote with approval from *In re Baglan Hall Colliery Co.* (L. R. 5 Ch. App. 346), where it was said, in reference to the right of a creditor to question the payment for stock by a transfer of property at an over-valuation, that "the test to be applied is this: Could the company by any proceeding have set aside the transaction?" The English rule seems to be that the creditor can have no other or greater rights in this regard than the corporation itself could assert. In this country, on the contrary, the best authorities maintain that arrangements to issue stock as full paid, though only partly paid for in fact, may be valid and binding between the company and its stockholders, and yet may be set aside at the instance of creditors, and full payment on the stock enforced for the satisfaction of the debts of the corporation. *Scovill v. Thayer* (105 U. S. 143); *Curry v. Woodward* (53 Ala. 371). This latter rule results from the doctrine, well established in America, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. *Wood v. Dummer* (3 Mason, 308); *Railroad v. Branch* (59 Ala. 139); *Smith v. Huckabee* (53 Ala. 191); *Paschall v. Whitsett* (11 Ala. 472); *Allen v. Railroad Co.* (Id. 437). This doctrine, first distinctly enunciated in *Wood v. Dummer* (*supra*), does not prevail in England as in this country. *Tayl. Priv. Corp.* § 658, note 1; *Cook, Stocks*, § 42. The absence of the recognition in English cases of this trust feature of a subscription to stock renders them unsafe guides in American courts when dealing with questions relating to the liability of stockholders in reference to the debts of the corporation.

Several cases are cited in support of the contention that the provision of section 6, art. 14, of the constitution does not have such effect on the transaction in this case as to leave the stockholders who participated therein still liable for the debts of the corporation. In *Railroad Co. v. Dow* (120 U. S. 237; 7 Sup. Ct. Rep. 482), it was held that a similar provision of the constitution of Arkansas did not authorize a corporation itself to repudiate its liability on \$2,600,000 in bonds and \$1,300,000 in stock, both of which had been issued in payment for property worth only \$1,300,000. This case involves no question of the right of creditors to charge stockholders. As has

already been shown, an arrangement which would preclude the corporation from demanding further payment upon stock issued by it would not prevent creditors from proceeding against the stockholders if the stock has not really been paid for. Nothing is said in that case to indicate that the transaction would have been sustained to the same extent as against the creditors of the corporation. The case is not an authority against the existence of the liability here asserted. The same thing may be said of the case of *Railroad Co. v. Thompson* (103 Ill. 187), which is cited in the opinion in the case just mentioned. In *Stein v. Howard* (65 Cal. 616; 4 Pac. Rep. 662), it was held that an increase of capital stock, under a resolution authorizing the additional shares to be sold at 87½ cents on the dollar, was not such "a fictitious increase of the stock" as was prohibited by a constitutional provision similar to ours. Neither in this case nor in the two cases cited just before it is there anything in the report to indicate what, if any, statutory regulations prevailed in those States in reference to the mode in which subscriptions to stock in corporations should be made payable.

We will now turn to the principal cases which assert the invalidity as against creditors of attempts to satisfy the liability on stock subscriptions by the transfer of property at a gross over-valuation. In *Jackson v. Traer* (64 Iowa, 469, 20 N. W. Rep. 764), the facts were that a railway company had been indebted to a construction company in the sum of \$70,000, which it was unable to pay; and in satisfaction of the debt it issued to the construction company certificates of stock of the face value of \$350,000, which shares were distributed among the members of the construction company. It was held that such members were to be treated as stockholders who had paid 20 per cent on their stock, the stock held by them being five times greater in amount than the debt for which it was issued, and that they were liable to a creditor of the corporation to the extent of the unpaid 80 per cent of the par value of the stock. To the same effect is *Osgood v. King* (42 Iowa, 478). In neither of these cases does it appear that the statutes of Iowa require subscriptions to stock to be made payable in any particular mode. The existence of the liability was not made to depend upon a statutory requirement in this regard. By the New York statute governing the organization of corporations for manufacturing purposes it is provided "that the trustees of such companies may in good faith purchase property necessary to their business, and issue stock to the amount of the value thereof in payment therefor, and the holders of such stock are exempt from liability for the debts of the corporation." In *Douglass v. Ireland* (73 N. Y. 100), it appeared that the capital stock of a corporation organized under that act, to the amount of \$300,000, was issued in consideration of the assignment to the company of executory contracts for the purchase of property found by the jury to be of the value of \$68,000. The defendant acquired his stock

with a full knowledge of the facts, having, as a trustee of the corporation, participated in the transaction. He was held liable as a stockholder who had not fully paid up. The court said. "A deliberate and advised over-valuation of property thus purchased and paid for is a fraud upon the law, and a violation of the condition upon which the exemption of stockholders from liability under the provisions of the statute is made to depend. It is in direct violation of the policy as well as the terms of the law, which demands payment, either in money or property at its value, of all the capital stock of the company, as a condition of immunity to the stockholders from liability for debts of the corporation. The payment of an amount for property in excess of its value deprives creditors, and the public of the security contemplated by the statute, and thus a fraud is perpetrated as well upon the law as upon creditors. The fraud is consummated by the issue of stock as full paid under the Act of 1853, which has not been fully paid for in value by the property by which it is issued, and it does not depend upon any fraudulent intent other than that which is evidenced by the act of knowingly issuing stock for property to an amount in excess of its value. All that is necessary to establish the legal fraud, and take the stock issued out of the immunity assured to stock honestly issued in pursuance of the Act of 1853, is to prove two facts: (1) That the stock issued exceeded in amount the value of the property in exchange for which it was issued; and (2) that the trustees deliberately, and with knowledge of the real value of the property, over-valued it, and paid in stock for it an amount which they knew was in excess of its actual value." The rule laid down in this case is firmly established in New York. *Boydton v. Andrews* (63 N. Y. 93); *Schenck v. Andrews* (57 N. Y. 133); *Boydton v. Hatch* (47 N. Y. 225); *Iron Co. v. Drexel* (90 N. Y. 87). A New Jersey statute authorized payment for capital stock to be made "either in money or in land; the land to be appraised by the board of directors, and taken at such value on such terms as may be agreed on." The capital stock of a corporation was fixed at \$100,000, all of which was subscribed for by five persons, who became the directors of the company. Certain lands were purchased for \$50,000, and the deed thereto was made directly to the corporation, which gave its obligations for the whole of the purchase-money. The directors then appraised the lands at \$100,000, and credited \$50,000 of that valuation as a payment of 50 per cent on their stock subscriptions. The lands were not worth more than the original purchase price. On this state of facts it was held, in *Wetherbee v. Baker* (35 N. J. Eq. 501), that, as against creditors of the corporation, such allowance of credit on the subscriptions was invalid, and that the stockholders were liable for the whole amount of their subscriptions. In reference to the valuation of the land by the directors, as authorized by the statute above quoted, the court say: "The directors, in making the appraisement and valuation and

dealing with their stock subscriptions, act in a fiduciary capacity, and are bound to discharge the duties of the trust with fidelity. This appraisalment, it is manifest, was illusory, and made only in the interests of the directors, who were to profit by it;" and that "in all such cases transactions under such powers have been upheld only where the contract for the rendition of services or the purchase of property payable in stock has been made in good faith, and the property taken in payment of stock subscriptions has been put in at a fair *bona fide* valuation; and the courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors only where payment has been made in money, or in what may fairly be considered as money's worth." In *Bailey v. Coke Co.* (69 Pa. St. 334), the facts were that Bailey, with two other persons, on September 29 purchased certain land for \$125,000, and on October 1 following the corporation agreed to take the land at an advance of \$50,000, subject to the whole purchase-money, so that the stock subscription of \$50,000 made by Bailey and the two others should be paid for in full by the agreed advance on the land. The statute provided that "no share shall be issued for less than its par value." It was held that by such a transaction Bailey did not pay for his stock, and that he was still liable thereon. Rights of creditors were not involved in this case. The transaction was regarded as a fraud on the rights of other stockholders, and as involving a non-compliance with statutory safeguards intended for the protection of the public. The case is not unlike the Alabama case of *Parson v. Joseph* (*supra*).

The review of the authorities will not be further extended. Discussions of them may be found in Cook, Stocks §§ 33-47; 1 Mor. Priv. Corp. §§ 425-429; 2 Mor. Priv. Corp. § 825 *et seq.*; 2 Wat. Corp. § 188; Tayl. Priv. Corp. §§ 545, 701 *et seq.* Our examination satisfies us that the weight of American authority does not support the statement made by Mr. Cook in section 47 of his work on Stocks and Stockholders, to the effect that the attempts which have been made, in cases where stock was issued for property taken at an over-valuation, to hold the party receiving such stock liable for its full par value, less the actual value of the property received from him, have been unsuccessful; and that if there has been an over-valuation, which is shown to have been fraudulent, then the contract is to be treated like other fraudulent contracts, and is to be adopted *in toto* or rescinded *in toto*, and set aside. We have found no authority at all asserting the exemption of the stockholder from such liability where it appeared that the stock subscription was governed by a statutory regulation at all similar to section 1805 of the Code of 1876, or section 1662 of the Code of 1886. On the other hand, the New York, New Jersey, Maryland, and Pennsylvania decisions which have been cited show that the courts in those States, in giving effect to statutory requirements, certainly no more stringent than ours as to the mode

in which stock subscriptions shall be made payable, do not allow attempted payments in property worth greatly less than the amount of the stock issued therefor to foreclose the just demand of corporate creditors to require that the stock subscriptions be made good in money, or in money's worth, as contemplated by the statutes. Those courts recognize in such provisions safeguards intended for the protection of persons dealing with corporations, as well as for the corporations themselves and the persons associated together therein. Our general laws afford the amplest and freest facilities for persons desiring to engage in almost any kind of lawful venture to secure by corporate association the advantages of defined and limited responsibility, and at the same time the efficient execution of their purposes, by means of an artificial being, changes in the membership of which cause no break in the continuity of its action, nor affect its capacity to act, within the scope of its powers, as a natural person. It is plain that such associations, endowed with such powers and privileges, would be a source of danger to persons dealing with them, unless the law required that in their formation suitable provisions be made for a substantial responsibility for such engagements as they may enter into. When legal provisions are found which are appropriately framed to secure the existence of such responsibility, it is not permissible so to construe them as to allow a mere formal and illusory compliance therewith to defeat the objects intended to be accomplished. No argument is needed to show that a requirement that the stock of a corporation shall be paid in money, or in labor, or property at its money value, inures to the benefit of persons who may become creditors of the corporation, in that it requires the capital stock to be the representative of substantial values, and insures the existence of a fund which must be within reach for the satisfaction of debts if the affairs of the corporation are managed as contemplated by the law. It is equally clear that if a stock subscription which is required to be made payable in money, or in labor, or property at its money value, and is in fact made payable in property at a designated money valuation, may be satisfied by the transfer of property the value of which is insignificant, or merely nominal as compared with the valuation stated, then, so far as this provision of the law looks to the protection of creditors, it might as well have allowed the subscription to be made payable in "chips and whetstones." Except section 6, art. 14 of the constitution, and section 1805 of the Code of 1876, there were not, at the time of the formation of the appellee, in reference to the mode of satisfying stock subscriptions, adequate provisions for the protection of creditors of such corporations. Those enactments are appropriate for this purpose. The requirement of section 1805 of the Code of 1876, that "in case of failure to perform the labor, or deliver the property according to the terms of the subscription, the money value thereof, as named in the lists of subscription, shall be paid by the subscribers," cannot

be regarded as providing for a penalty to compel the performance of the labor, or the delivery of the property. The evident meaning is that, in the event of such failure, the corporation shall receive the equivalent, and no more nor less than the equivalent, in money, of the labor, or of the property, as the case may be. This clause of the statute is convincing that the statement of the money value of the property in which the subscription is made payable is a material feature of the contract, and that the property delivered must be of a value to correspond with that named in the subscription. As affecting the rights of creditors, the statute is simply a definite requirement as to what shall constitute that trust fund to which persons dealing with the corporation have a right to look. The defendants in this case, in making and accepting payments on the stock subscriptions, were acting in a fiduciary capacity in reference to that fund. The performance of the contract of subscription, to be binding on creditors, should have been such as is required in the case of a contract between a trustee and one having knowledge of his trust obligation. In form the stock subscription was such as the statute called for. Under section 2023 of the Code of 1876, and section 8, art. 14, of the constitution, the stockholders are liable only for the unpaid stock owned by them. But the creditors are entitled to demand that the payment on the stock shall be an actual and *bona fide* discharge of the liability imposed by the contract of subscription. The defendants in making and accepting payment in property were bound to exercise their judgment and discretion fairly and honestly directed to secure a substantial compliance with the terms of the contract. In the exercise of that judgment and discretion they are entitled to the benefit of whatever margin there may be for honest differences of opinion in the valuation of the property; but a deliberate and intentional over-valuation of the property is not permissible. The transfer of the property known to be worth only \$5,000 to pay a stock subscription of \$200,000 does not bear the semblance of a compliance with the contract of subscription as to one of the essential terms thereof. The taking of property at a valuation forty times greater than its actual worth, which was known to the parties, shows upon its face the absence of a *bona fide* exercise of judgment and discretion in making the valuation, and an intentional non-compliance with the requirement that the property shall be taken at its money value. The absence of fraudulent motive on the part of a trustee does not give validity to a mere simulated execution of the trust; and an averment of fraud in reference thereto is unnecessary. The parties beneficially interested in the trust are entitled to a substantial compliance with its terms. They are not bound by an act of mere formal compliance, which really involves their practical exclusion from the benefits intended to be secured to them. The capital stock of a corporation constitutes the basis of its credit, and persons dealing with the corporation have a

right to assume that the stock has been actually paid in, or that it may be reached. The transaction whereby payment was attempted to be made, as shown by the averments of the bill in this case, is not binding on creditors, because it did not constitute such a payment as was contemplated by the terms of the contract of subscription, and was in effect a palpable evasion of the requirements of the statute. It is, however, contended in the argument for appellee that the appellant, through its officers, knew of the history of the organization of the appellee corporation, and of the mode in which the subscriptions to the stock were to be paid; that in fact it was an active promoter of the whole transaction in advance. It may be that such an unauthorized extinguishment of the subscription liability may not be impeached by one who was actively instrumental in securing the organization of a corporation with a view of making a sale of property to it, and did in fact accept benefit in dealing with the corporation with full knowledge of the arrangement by which the stock was proposed to be paid for. Disability to question a wrongful transaction usually attaches to a party who consented thereto or participated therein. *First Nat. Bank v. Gustin, etc. Mining Co.* (Minn. 44 N. W. Rep. 198); *Bank v. Alden* (129 U. S. 372); 9 Sup. Ct. Rep. 332; *Parson v. Joseph (supra)*; 2 Mor. Priv. Corp. § 829. But the averments of the bill in this case do not show that the appellant participated in, or knew of the mode in which the stock subscription was undertaken to be paid. In the absence of averments upon this subject, it is not to be taken for granted that the appellant, in making the agreement to convey the land to the corporation when formed, contemplated that the stock in the corporation should not be paid for as the law directed, or that, in accepting the notes of the corporation, it had such knowledge, and took such part in the furtherance of the acts connected with the transfer of the bond for title for the stock, that it is to be presumed to have dealt with the corporation on the basis of treating its capital stock as fully paid up. We find nothing in the averments of the bill to preclude appellant from asserting the right of a creditor of a corporation to hold stockholders liable for subscriptions to stock not really paid for. The statements of fact in the bill support the conclusion therein averred that the transaction by which payment for the stock was attempted to be made was merely colorable, — in other words, that it was not really a payment, — but had only the outward appearance without the substance of payment. Such being the case, the individual defendants are still liable on their stock subscriptions to the extent that the attempted payment falls short of a *bona fide* compliance with the terms of the contract, and the allegations as to excessive over-valuation of the property in question were sufficient under the rules above stated. The chancery court erred in sustaining the demurrers.

Reversed and remanded.

HOSPES v. CAR COMPANY.

(50 N. W. Rep. 1117. *Supreme Court of Minnesota*. 1892.)

APPEAL from district court, Washington County,

Sequestration proceedings by E. L. Hospes & Co. against the Northwestern Manufacturing and Car Company. The Minnesota Thresher Manufacturing Company intervened and filed a complaint against George R. Finch and others, stockholders in the Northwestern Manufacturing and Car Company. From an order overruling demurrer to the intervener's supplemental complaint, George R. Finch, the St. Paul Trust Company, executor, and others, appeal. Reversed.

MITCHELL, J.:—

This appeal is from an order overruling a demurrer to the so-called "supplemental complaint" of the Minnesota Thresher Manufacturing Company. The Northwestern Manufacturing and Car Company was a manufacturing corporation organized in May, 1882. Upon the complaint of a judgment creditor (Hospes & Co.), after return of execution unsatisfied, judgment was rendered in May, 1884, sequestering all its property, things in action, and effects, and appointing a receiver of the same. This receivership still continues, the affairs of the corporation being not yet fully administered; but it appears that it is hopelessly insolvent, and that all the assets that have come into the hands of the receiver will not be sufficient to pay any considerable part of the debts. The Minnesota Thresher Manufacturing Company, a corporation organized in November, 1884, as creditor, became a party to the sequestration proceeding, and proved its claims against the insolvent corporation. In October, 1889, in behalf of itself and all other creditors who have exhibited their claims, it filed this complaint against certain stockholders (these appellants) of the car company in pursuance of an order of court allowing it to do so, and requiring those thus impleaded to appear and answer the complaint. The object is to recover from these stockholders the amount of certain stock held by them, but alleged never to have been paid for. What was said in *Meagher Case* (50 N. W. Rep. 1114), just decided, is equally applicable here as to the right to enforce such a liability in the sequestration proceeding upon the petition or complaint of creditors who have become parties to it. There is nothing in this practice inconsistent with what was decided in *Thresher Co. v. Langdon* (44 Minn. 37; 46 N. W. Rep. 310). The complaint is not the commencement of an independent action by creditors in their own behalf, antagonistic to the rights of the receiver, but is filed in the sequestration proceeding itself, and in aid of it.

The principal question in the case is whether the complaint states facts showing that the thresher company, as creditor, is entitled to

the relief prayed for; or, in other words, states a cause of action. Briefly stated, the allegations of the complaint are that on May 10, 1882, Seymour, Sabin, & Co. owned property of the value of several million dollars, and a business then supposed to be profitable. That, in order to continue and enlarge this business, the parties interested in Seymour, Sabin, & Co., with others, organized the car company, to which was sold the greater part of the assets of Seymour, Sabin, & Co., at a valuation of \$2,267,000, in payment of which there were issued to Seymour, Sabin, & Co. shares of the preferred stock of the car company of the par value of \$2,267,000, it being then and there agreed by both parties that this stock was in full payment of the property thus purchased. It is further alleged that the stockholders of Seymour, Sabin, & Co., and the other persons who had agreed to become stockholders in the car company, were then desirous of issuing to themselves, and obtaining for their own benefit, a large amount of common stock of the car company, "without paying therefor, and without incurring any liability thereon or to pay therefor;" and for that purpose, and "in order to evade and set at naught the laws of this State," they caused Seymour, Sabin, & Co. to subscribe for and agree to take common stock of the car company of the par value of \$1,500,000. That Seymour, Sabin, & Co. thereupon subscribed for that amount of the common stock, but never paid therefor any consideration whatever, either in money or property. That thereafter these persons caused this stock to be issued to D. M. Sabin, as trustee, to be by him distributed among them. That it was so distributed without receipt by him or the car company from any one of any consideration whatever, but was given by the car company and received by these parties entirely "gratuitously." The car company was, at this time, free from debt, but afterwards became indebted to various persons for about \$3,000,000. The thrasher company, incorporated after the insolvency and receivership of the car company, for the purpose of securing possession of its assets, property, and business, and therewith engaging in and continuing the same kind of manufacturing, prior to October 27, 1887, purchased and became the owner of unsecured claims against the car company, "*bona fide*, and for a valuable consideration" to the aggregate amount of \$1,703,000. As creditor, standing on the purchase of these debts, which were contracted after the issue of this "bonus" stock, the thrasher company files this complaint to recover the par value of the stock as never having been paid for. The complaint does not allege what the consideration of these debts was, nor to whom originally owing, nor what the intervener paid for them; nor whether any of the original creditors trusted the car company on the faith of the bonus stock having been paid for. Neither does it allege that either the thrasher company or its assignors were ignorant of the bonus issue of stock, nor that they or any of them were deceived or damaged in fact by such issue, nor that the bonus stock was of any value. Neither is

there any traversable allegation of any actual fraud or intent to deceive or injure creditors. A desire to get something without paying for it, and actually getting it, is not fraudulent or unlawful if the donor consents, and no one else is injured by it; and the general allegation that it was done "in order to evade and set at naught the laws of the State" of itself amounts to nothing, but a mere conclusion of law. As a creditors' bill, in the ordinary sense, the complaint is manifestly insufficient. The thrasher company, however, plants itself upon the so-called "trust-fund" doctrine, that the capital stock of a corporation is a trust fund for the payment of its debts; its contention being that such a bonus issue of stock creates, in case of the subsequent insolvency of the corporation, a liability on part of the stockholder in favor of creditors to pay for it, notwithstanding his contract with the corporation to the contrary.

This "trust-fund" doctrine, commonly called the "American doctrine," has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a system of legal rules. The doctrine was invented by Justice Story in *Wood v. Dummer* (3 Mason, 308), which called for no such invention, the fact in that case being that a bank divided up two-thirds of its capital among its stockholders without providing funds sufficient to pay its outstanding billholders. Upon old and familiar principles this was a fraud on creditors. Evidently all that the eminent jurist meant by the doctrine was that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders,—a proposition that is sound upon the plainest principles of common honesty. In *Fogg v. Blair* (133 U. S. 541; 10 Sup. Ct. Rep. 338), it is said that this is all the doctrine means. The expression used in *Wood v. Dummer* has, however, been taken up as a new discovery, which furnished a solution of every question on the subject. The phrase that "the capital of a corporation constitutes a trust fund for the benefit of creditors" is misleading. Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests,—one equitable and one legal; one person, as trustee, holding the legal title, while another, as the *cestui que trust*, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further. This is

well illustrated and clearly announced in the case of *Graham v. Railway Co.* (102 U. S. 148). That was a creditors' suit to reach a piece of real estate on the ground that it had been conveyed by the corporation fraudulently for a wholly inadequate consideration. The trust-fund doctrine was invoked by a subsequent creditor, and it was claimed that, as the trust had been violated, the deed should be set aside. If the premise was correct that the corporation held it in trust for creditors, the conclusion was inevitable; but the court denied the premise, saying that a corporation is in law as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same; and that there is no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors any more than a like disposal by an individual; that the same principles of law apply to each. That the phrase that "the capital of a corporation is a trust fund for the payment of its creditors" is misleading, if not inaccurate, is illustrated by the character of the actions that are frequently mistakenly instituted on the strength of it. For example, in the case of *Railroad Co. v. Ham* (114 U. S. 587; 5 Sup. Ct. Rep. 1081), two roads had been consolidated, the new company acquiring the property of the old ones. A creditor of one of the old companies, on the strength of the "trust-fund" doctrine, claimed a lien on its property in the hands of the new corporation. If this property was impressed with a trust in favor of creditors in the hands of the old company, it would logically follow that it would continue so in the hands of the new one. But the court denied the relief, and in giving its construction of the "trust-fund" doctrine, said: "The property of a corporation is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among stockholders. It is also true, in the case of a corporation, as in the case of a natural person, that any conveyance of the property of the debtor without authority of law and in fraud of existing creditors is void." This is probably what is meant when it is said in some cases, as in *Clark v. Bever* (139 U. S. 110; 11 Sup. Ct. Rep. 468), that the capital of a corporation is a trust fund *sub modo*. If so, no one will dispute it. But it means very little, for the same thing could be truthfully said of the property of an individual or a partnership. And obviously it would make no difference whether the disposition of the corporate property is to a stranger or to a stockholder, except that, of course, the latter could not be an innocent purchaser.

There is also much confusion in regard to what the "trust-fund" doctrine applies. Some cases seem to hold that unpaid subscribed capital is a trust fund, while other assets are not, — that is, so long

as the subscription is unpaid, it is held in trust by the corporation, but, when once paid in, it ceases to be a trust fund; while other cases hold that, paid or unpaid, it is all a trust fund. The first seems to be the rule laid down in *Sawyer v. Hoag* (17 Wall. 610), in which the "trust-fund" doctrine was first squarely announced by that court with all the vigor and force characteristic of the great jurist who wrote the opinion. In that case a stockholder in an insurance company had given his note, as the court found the fact to be, for 85 per cent of his subscription to the stock of the company. After the company had become bankrupt, and the stockholder knew the fact, he bought up a claim against the company for one-third its face, and in a suit by the assignee in bankruptcy on his note set up this claim as an offset. That this would have been a fraud on the bankrupt act, and at least a moral fraud on policy-holders, is quite apparent without invoking the "trust-fund" doctrine; and, if the note for unpaid stock was a trust fund, there could have been no offset, whether the company was solvent or insolvent. In the opinion it is said that, "if the subscription had been paid by the note or otherwise, the note ceased thereby to be a trust fund to which creditors can look, and became ordinary assets, with which directors may deal as they choose." But in *Upton v. Tribilcock* (91 U. S. 45), it is stated: "The capital paid in and promised to be paid in is a fund which the trustees cannot squander or give away." While in *Sanger v. Upton* (Id. 56), it is said: "When debts are incurred a contract arises with the creditors that it (the capital) shall not be withdrawn or applied otherwise than upon their demands until such demands are satisfied." And in the same connection it is distinctly stated that there is no difference between assets paid in and subscriptions; that "unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it; that creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due the company; that, as regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation." This language is quoted and approved in *County of Morgan v. Allen* (103 U. S. 508). It would seem clear that this is the correct statement of the law. The capital (not the mere share certificates) means all the assets, however invested. If a subscriber gives his note for his stock, that note is no more and no less a trust fund than the money would have been if he had paid cash down. Capital cannot change from a trust to not a trust by a mere change of form. It is either all a trust or all not a trust, and the "trust-fund" rule, whatever that be, must apply to all alike, and in the same way. If the assets of a corporation are given back to stockholders, the result is the same as if the shares had been issued wholly or partly as a bonus. The latter is merely a short cut to the same result. So with dividends paid out of

the capital, voluntary conveyances, stock paid in overvalued property; all are forms of one and the same thing, all reaching the same result (a disposition of corporate assets), which may or may not be a fraud on creditors, depending on circumstances. This much being once settled, the solution of the question when a subsequent creditor can insist on payment of stock issued as paid up, but not in fact paid for, or not paid for at par, becomes, as we shall presently see, comparatively simple.

Another proposition which we think must be sound is that creditors cannot recover on the ground of contract when the corporation could not. Their right to recover in such cases must rest on the ground that the acts of the stockholders with reference to the corporate capital constitute a fraud on their rights. We have here a case where the contract between the corporation and the takers of the shares was specific that the shares should not be paid for. Therefore, unlike many of the cases cited, there is no ground for implying a promise to pay for them. The parties have explicitly agreed that there shall be no such implication, by agreeing that the stock shall not be paid for. In such a case the creditors undoubtedly may have rights superior to the corporation, but these rights cannot rest on the implication that the shareholder agreed to do something directly contrary to his real agreement, but must be based on tort or fraud, actual or presumed. In England, since the Act of 1867, there is an implied contract created by statute that "every share in any company shall be deemed and be taken to have been issued and to be held subject to the payment of the whole amount thereof in cash." This statutory contract makes every contrary contract void. Such a statute would be entirely just to all, for every one would be advised of its provisions, and could conduct himself accordingly. And in view of the fact that "watered" and "bonus" stock is one of the greatest abuses connected with the management of modern corporations, such a law might, on grounds of public policy, be very desirable. But this is a matter for the Legislature, and not for the courts. We have no such statute; and, even if the law of 1873, under which the car company was organized, impliedly forbids the issue of stock not paid for, the result might be that such issue would be void as *ultra vires*, and might be cancelled; but such a prohibition would not of itself be sufficient to create an implied contract, contrary to the actual one, that the holder should pay for his stock.

It is well settled that an equity in favor of a creditor does not arise absolutely and in every case to have the holder of "bonus" stock pay for it contrary to his actual contract with the corporation. Thus no such equity exists in favor of one whose debt was contracted prior to the issue, since he could not have trusted the company upon the faith of such stock. *First Nat. Bank v. Gustin M. C. Min. Co.* (42 Minn. 327; 44 N. W. Rep. 198); *Coit v. Amalgamating Co.* (119 U. S. 347; 7 Sup. Ct. Rep. 231); *Handley v. Stutz* (139 U. S. 435; 11

Sup. Ct. Rep. 530). It does not exist in favor of a subsequent creditor who has dealt with the corporation with full knowledge of the arrangement by which the "bonus" stock was issued, for a man cannot be defrauded by that which he knows when he acts. *First Nat. Bank v. Gustin M. C. Min. Co.* (*supra*). It has also been held not to exist where stock has been issued and turned out at its full market value to pay corporate debts. *Clark v. Bever* (*supra*). The same has been held to be the case where an active corporation, whose original capital has been impaired, for the purpose of recuperating itself issues a new stock, and sells it on the market for the best price obtainable, but for less than par, *Handley v. Stutz* (*supra*); although it is difficult to perceive, in the absence of a statute authorizing such a thing (of which every one dealing with the corporations is bound to take notice), any difference between the original stock of a new corporation and additional stock issued by a "going concern." It is difficult, if not impossible, to explain or reconcile these cases upon the "trust-fund" doctrine, or, in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, "Make that representation good by paying for your stock." It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of "bonus" stock. This furnishes a rational and uniform rule, to which familiar principles are easily applied, and which frees the subject from many of the difficulties and apparent inconsistencies into which the "trust-fund" doctrine has involved it; and we think that, even when the trust-fund doctrine has been invoked the decision in almost every well-considered case is readily referable to such a rule.

It is urged, however, that, if fraud be the basis of the stockholders' liability in such cases, the creditor should affirmatively allege that he

believed that the "bonus" stock had been paid for, and represented so much actual capital, and that he gave credit to the incorporation on the faith of it; and it is also argued that, while there may be a presumption to that effect in the case of a subsequent creditor, this is a mere presumption of fact, and that in pleadings no presumptions of fact are indulged in. This position is very plausible, and at first sight would seem to have much force; but we think it is unsound. Certainly any such rule of pleading or proof would work very inequitably in practice. Inasmuch as the capital of a corporation is the basis of its credit, its financial standing and reputation in the community has its source in, and is founded upon, the amount of its professed and supposed capital, and every one who deals with it does so upon the faith of that standing and reputation, although, as a matter of fact, he may have no personal knowledge of the amount of its professed capital, and in a majority of cases knows nothing about the shares of stock held by any particular stockholder, or, if so, what was paid for them. Hence, in a suit by such creditor against the holders of "bonus" stock, he could not truthfully allege, and could not affirmatively prove, that he believed that the defendants' stock had been paid for, and that he gave the corporation credit on the faith of it, although, as a matter of fact, he actually gave the credit on the faith of the financial standing of the corporation, which was based upon its apparent and professed amount of capital. The misrepresentation as to the amount of capital would operate as a fraud on such a creditor as fully and effectually as if he had personal knowledge of the existence of the defendants' stock, and believed it to have been paid for when he gave the credit. For this reason, among others, we think that all that it is necessary to allege or prove in that regard is that the plaintiff is a subsequent creditor; and that, if the fact was that he dealt with the corporation with knowledge of the arrangement by which the "bonus" stock was issued, this is a matter of defence. *Gogebic Inv. Co. v. Iron Chief Min. Co.* (78 Wis. 427, 47 N. W. Rep. 726). Counsel cites *Fogg v. Blair* (*supra*) to the proposition that the complaint should have stated that this stock had some value; but that case is not in point, for the plaintiff there was a prior creditor; and, as his debt could not have been contracted on the faith of stock not then issued, he could only maintain his action, if at all, by alleging that the corporation parted with something of value.

In one respect, however, we think the complaint is clearly insufficient. The thrasher company is here asking the interposition of the court to aid in enforcing an equity in favor of creditors against the stockholders by declaring them liable to pay for this stock contrary to their actual contract with the corporation. While the proceeding is not, strictly speaking, an equitable action, yet the relief asked is equitable in its nature. Under such circumstances, it was incumbent upon the thrasher company to show its own equities, and

that it was in a position to demand such relief. It was not the original creditor of the car company, but the assignees of the original creditors. By that purchase it, of course, succeeded to whatever strictly legal rights its assignors had; but it is not rights of that kind which it is here seeking to enforce. Under such circumstances, we think it was incumbent upon it to state what it paid for the claims, or at least to show that it paid a substantial, and not a mere nominal, consideration. The only allegation is that it paid "a valuable consideration." This might have been only one dollar. It appears that it bought the claims after the car company had become insolvent, and its affairs were in the hands of a receiver; also that the indebtedness of that company amounted to about \$3,000,000, and that there were not corporate assets enough to pay any considerable part of it. The mere chance of collecting something out of the stockholders does not ordinarily much enhance the selling price of claims against an insolvent corporation. If any person or company had gone to work and bought up for a mere song this large indebtedness of the car company for the purpose of speculating on the liability of the stockholders, no court would grant them the relief here prayed for. It would say to them, "We will not create and enforce an equity for the benefit of any such speculation." Counsel for respondent suggests that the thrasher company is but an organization of the original creditors, who formed it, and pooled their claims, so as to save something out of the wreck of the car company; but nothing of the kind is alleged. On this ground the demurrer should have been sustained.

In view of further proceedings it may be proper to say that in our opinion there is nothing in the position that the right of recovery against the stockholders was barred by the Statute of Limitation. The argument in support of the proposition all rests upon the false premise that the cause of action accrued in May, 1882, when the "bonus" stock was issued. The corporation never had any cause of action against the defendants. As between them and the company, the agreement for the issue of the stock was valid. The creditors are not here seeking to enforce a right of action acquired through or from the corporation, but one that accrued directly to themselves, or for their benefit, and that did not accrue at least until the corporation became insolvent, in May, 1884.

Counsel for the St. Paul Trust Company stated that, if the court should reverse the order appealed from on any of the grounds urged by the other appellants, it would not be necessary for us to consider any of the assignments of error peculiar to his appeal; but, as we reverse upon a ground that may be remedied by amendment, we deem it proper to say that, in our opinion, the claim against the Kittson estate is a "contingent" claim, within the meaning of Gen. St. 1878, c. 53.

Order reversed.

HARTFORD RAILROAD COMPANY v. CROSWELL.

(5 *Hill* (N. Y.), 383. 1843.)

ASSUMPSIT, tried at the New York circuit in March, 1841, before Gridley, C. Judge. The action was brought to recover certain instalments upon the defendant's subscription to the capital stock of the plaintiffs' company. On the trial the case was this. In May, 1833, the Legislature of Connecticut passed an act authorizing the plaintiffs to construct a railroad from the town of Hartford to the city of New Haven. The capital stock was divided into shares of \$100 each, and the defendant subscribed for and was allowed ten shares. The subscription was in these words: "Whereas the general assembly of the state of Connecticut, at their session in May, 1833, passed a resolution incorporating the Hartford and New Haven Railroad Company, with power to construct a railroad or way from the town of Hartford to the city of New Haven: We do hereby subscribe to the stock of said company the number of shares annexed to our names respectively, on the terms, conditions, and limitations mentioned in said resolution. New York, July 31, 1835." In May, 1839, the Legislature of Connecticut amended the act of incorporation by authorizing the company to "procure, charter, or purchase and hold" such number of steamboats, to be used in connection with their road, as they might deem expedient, to an amount not exceeding \$200,000, and, for that purpose, to increase their capital stock to the same amount. On the 2d of July following the board of directors resolved to accept the amendment, and to adopt it as a part of the charter. They also resolved that the stockholders who were paying up their instalments should be allowed a preference in the distribution of the new stock to be created in pursuance of the amendment. In September, 1839, at a general meeting of the stockholders, the resolution to accept the amendment was ratified. Due notice of this meeting was given; but the defendant was not present, nor did it appear that he had at any time signified his assent to an acceptance of the amendment. Intermediate the date of the defendant's subscription and the amendment of the charter, the instalments sought to be recovered were regularly called for by public notice to that effect, and a personal demand thereof was shown to have been made of the defendant, who refused to pay. The road was completed and put in operation before the commencement of the suit. Upon these facts a verdict was rendered for the plaintiffs by consent, subject to the opinion of the court upon a case.

By the Court, NELSON, C. J.:—

The main objection taken to a recovery in this case is that the plaintiffs are seeking to enforce the performance of a different con-

tract from that into which the defendant entered when he subscribed for the stock ; in other words, that the defendant never assented to the contract upon which the action is founded.

The original charter conferred upon the company all the usual and necessary powers for locating and constructing a railroad from the town of Hartford to the city of New Haven. The ten shares subscribed for by the defendant were expressly taken upon "the terms, conditions, and limitations" mentioned in the charter. And such would doubtless have been the legal effect of the subscription had no reference to the charter been made in it. The contract thus entered into was as specific and definite as the charter of the company could make it ; and the meaning and intent of the parties cannot therefore be mistaken. It was a contract to take stock in an association incorporated for a particular object, having such limited and well-defined powers as were necessary to the accomplishment of that object. The defendant assented to the object by his subscription, and thereby agreed that his interest should be subject to the direction and control of the powers thus expressly conferred, but nothing more.

Since entering into this contract, the plaintiffs have procured an amendment of their charter, by which they have superadded to their original undertaking a new and very different enterprise — and, for aught that can be known, a very hazardous one — with the necessary additional powers to carry it into effect. Instead of confining their operations to the construction and management of their railroad between Hartford and New Haven, they have undertaken to establish and maintain a line of water communication by means of steamboats, at an expense not to exceed \$200,000 ; to all which, it is insisted, the contract of the defendant has become subject, without his approbation or assent.

It is most obvious, if incorporated companies can succeed in establishing this sort of absolute control over the original contract entered into with them by the several corporators, there is no limit to which it may not be carried short of that which defines the boundary of legislative authority. The proposition is too monstrous to be entertained for a moment. Corporations possess no such power. Indeed, they can exercise no powers over the corporators, beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent. This is so in the case of private associations, where the articles entered into and subscribed by the members are regarded as the fundamental law or constitution of the society, which can only be changed by the unanimous voice of the stockholders. *Livingston v. Lynch* (4 John. Ch. Rep. 573) ; Coll. On Part. 641. So here, the original charter is the fundamental law of the association, — the constitution which prescribes limits to the directors, officers, and agents of the company not only, but to the action of the corporate body itself, — and no radical change or altera-

tion can be made or allowed, by which new and additional objects are to be accomplished or responsibilities incurred by the company, so as to bind the individuals composing it, without their assent.

The question has been the subject of consideration in Massachusetts and Pennsylvania, and in each the courts have not hesitated to maintain the inviolability of the contract as originally entered into, denying to the company the power of altering it essentially, and of binding the subscribers who have not given their assent. In the case of *The Middlesex Turnpike Corporation v. Locke*, (8 Mass. Rep. 268), the suit was brought upon a subscription contract for stock, by which the defendant agreed to take one share and to pay all assessments made upon it. The ground of defence which prevailed was, that the location of the turnpike road had been changed by an act of the Legislature, after the defendant's subscription, the act having been passed at the instance of the corporation; and that the defendant had never assented to the alteration. The court said: "The plaintiffs rely on an express contract, and were bound to prove it as they allege it. Here the proof is of an engagement to pay assessments for making a turnpike in a certain specified direction. The defendant may truly say, *non hæc in fœdera veni*. He was not bound by the application of the directors to the Legislature for the alteration of the course of the road, nor by the consent of the corporation thereto." The same principle was recognized and admitted in the case of *The Indiana & Ebensburg Turnpike Co. v. Phillips* (2 Penn. Rep. 184).

I do not deny that alterations may be made in the charter by the procurement of the company, without changing the contract so essentially as to absolve the subscriber. Such would be the case, perhaps, in respect to mere formal amendments, or those which are clearly enough beneficial, or at least not prejudicial to his interests. A modification of the grant may frequently be advisable, if not necessary, in order to facilitate the execution of the very object for which the company was originally established; and I admit there are intrinsic difficulties in the way of laying down any general rules by which to distinguish between the two kinds of cases. Each must depend upon its own circumstances, and be disposed of with due regard to the inviolability belonging to all private contracts.

Some of the cases which have occurred exemplify the difficulties attending the question. In *Irvin v. The Turnpike Co.* (2 Penn. Rep. 466), it was held that a benefit which results to individual property by the location of the road, did not, in contemplation of law, enter into the consideration of the contract of subscription. Hence, it was there decided that the subscriber was bound, notwithstanding a change in the location of the road made by an act of the Legislature against his remonstrance; and this though the change was obviously to his prejudice in point of fact. The decision, it will be perceived, is contrary to the case before referred to in Massachusetts. The court, moreover, were not unanimous, Rogers and

Kennedy, JJ., having dissented. In *Gray v. The Monongahela Navigation Co.* (2 Watts & Serg. 156), the same learned court held, that an alteration in the charter, by which additional privileges were granted to the corporation, was not such a violation of the contract of subscription as would relieve the subscriber, although the additional privileges might extend the liabilities of the company, and thus incidentally affect him.

I refer to the last two cases as affording a very full and able examination of the subject, without intending, at this time, to assent to their conclusions, or to all the reasonings of the learned chief justice who delivered the opinions. In each of them, however, the general principle before asserted in *The Indiana & Ebensburg Turnpike Co. v. Phillips* is recognized, viz., that the alteration by the Legislature may be so extensive and radical as to work a dissolution of the contract; but an effort is made so to modify and regulate the application of the principle as to admit of improvements in the charter, useful to the public and beneficial to the company, without this consequence.

In the case before us, the change in the powers and purposes of the plaintiffs' company has been so extensive as to preclude us from sanctioning a recovery upon the defendant's subscription, unless we are prepared entirely to abandon the principle above stated, and to declare that the interests of subscribers shall be subject to the will and pleasure of a majority of the stockholders.

Judgment for the defendant.

KENOSHA RAILROAD COMPANY v. MARSH.

(17 Wis. 13. 1863.)

APPEAL from the Circuit Court for Kenosha County.

The Circuit Court, on motion of the defendant, nonsuited the plaintiff.

By the Court, PAINE, J.: —

This action was brought upon a subscription to the capital stock of a railroad company chartered to build a road from the city of Kenosha to Beloit. Ch. 60, Pr. Laws of 1853. Afterwards, by Ch. 22, Pr. Laws of 1857, the Legislature changed the enterprise from that of building a road to Beloit, to one of building a road to the state line between this State and Illinois, at or near Genoa, in Walworth County. This change was obtained by the company, which acted under it, and, under still another law, consolidated with an Illinois company which was authorized to build a road from Rockford in that State to the same point on the state line. This action was brought by the consolidated company.

After the evidence of both parties had been introduced, the de-

fendant moved for a nonsuit, for the reason, among others, that this was such a radical change in the enterprise as released him from his subscription. The motion was granted upon another ground, but we think it was properly granted upon this.

Considered independently of the effect of the power reserved in our constitution to the Legislature, to amend or repeal the charters of all incorporations, all authorities concur in stating the general rule to be, that a radical, fundamental change in the character of the enterprise releases the stock subscriber who does not assent. In applying this rule many cases are found where the particular change made was held not to be of this character. But we think the plain implication from the reasoning in all of them is, that a change like the one here in question would be so held. Thus in *Banet v. R. R. Co.* (13 Ill. 504), the change made only straightened the original route, leaving it between the same termini. The court held that this was not a radical change, but that it left the enterprise substantially unchanged. But they say expressly that if the change had been to authorize a road from Alton to Vandalia, or Shelbyville, it would have been a different enterprise. But it will be seen by a reference to the map that a change to a road from Alton to Shelbyville would have been very similar to the one made here. The road as changed here runs in a line entirely southwest of the original route, and to a point only about half as far as Beloit. Within the reasoning of all the cases we think this is a change from one enterprise to another, and not one which leaves the original enterprise substantially remaining.

The supreme court of Indiana has recently held that the mere consolidation with another company under an act of the Legislature releases non-assenting subscribers. *McCray v. R. R. Co.* (9 Ind. 353); *Booe v. R. R. Co.* (Id. 93). I should not wish to adopt that conclusion without further examination. For although it may be within the principle of *R. R. Company v. Croswell* (5 Hill, 383), and other cases of a similar character, still there seems to me to be a fair distinction between such changes as only add something to the original enterprise, — which becomes tributary to it, and makes its operation more perfect and successful, and changes which abandon the original undertaking for a new one. There is certainly some ground for saying that changes of the former character may be deemed to be fairly within the scope of the original object, as it may reasonably be assumed that every association which undertakes the accomplishment of a particular enterprise, intends to make such changes as experience may show to be necessary for its most successful prosecution. And if this may be assumed, then, although such changes were of course not originally provided for, yet they may fairly be regarded as so far incidental to the original purpose as to be within the scope of the authority which each member has conferred upon the corporation, to bind him by its action whenever the necessary legislative assent is obtained. And if this can be regarded as a correct rule, I

should not be prepared to say that a consolidation with another company whose road ran from either terminus in the same general direction, or the connection of a line of steamboats with the road, when one of the termini was on navigable water, if authorized by the Legislature and assented to by the corporation as a body, ought to release a stockholder who did not assent. These things are totally different in their nature from a change which abandons the original enterprise entirely. These cases go, therefore, much further than it is necessary to go here. The following cases also sustain the conclusion that such a change as was made here releases subscribers not assenting. *Plank Road Company v. Arndt* (31 Penn. St. 317); *Hester v. Memphis & Charleston R. R. Co.* (32 Miss. 378). The following cases, as stated in the Digest, sustain the same rule, though the volumes have not yet arrived in our library: *Champion v. Memphis R. R. Co.* (35 Miss. 692); (vol. 20, U. S. An. Dig. p. 219, sec. 222); *Witter v. Miss., etc. R. R. Co.* (20 Ark. 463); (vol. 20, U. S. An. Dig. p. 219, sec. 235). See, also, *Fry's Ex'rs v. R. R. Co.* (2 Met. (Ky.) 314).

The question then remains, whether the power reserved in the constitution to amend, alter, or repeal charters should prevent that effect. Some of the cases seem to place great stress upon the existence of this power, and to intimate that under it the non-assenting stock subscriber may be bound by a change, the effect of which would otherwise be to release him. I am wholly unable to see that it should have any such effect. The occasion of reserving such a power either in the constitution or in charters themselves is well understood. It grew out of the decisions of the supreme court of the United States that charters were contracts within the meaning of the constitutional provision that the States should pass no laws impairing the obligation of contracts. This was supposed to deprive the States of that power of control over corporations which was deemed essential to the safety and protection of the public. Hence the practice, which has extensively prevailed since those decisions, of reserving the power of amending or repealing charters. But this power was never reserved upon any idea that the Legislature could alter a contract between a corporation and its stock subscribers, nor for the purpose of enabling it to make such alteration. It was solely to avoid the effect of the decision that the charter itself was a contract between the State and the corporation, so as to enable the State to impose such salutary restraint upon these bodies as experience might prove to be necessary. But I suppose it would hardly be claimed that the State, even where this power of amendment is reserved, could, by amending the charter of a railroad company so as to provide for a new and entirely different road, impose any obligation on the corporation to build it. It might possibly repeal the old charter, but whether the company would undertake the enterprise provided for in the amendment, would still depend entirely upon its own consent; as it is well settled that a grant of corporate franchises cannot be imposed upon any persons

against their consent, any more than any other grant. Undoubtedly, the Legislature might, under this power, impose new duties and new restraints upon corporations in the prosecution of the enterprises already undertaken. And provisions of this nature would be binding whether assented to or not. But when it comes to a question of embarking in a new enterprise, the Legislature cannot impose this as a duty upon any corporation. All it can do is to grant it the power, and then it is for the corporation to accept it or not, as it pleases. So that, in all cases where charters are changed, the right to bind stock subscribers who do not assent seems to me to derive no additional support from the fact that the power of amending the charter had been reserved, but to depend essentially upon the question whether the change is of such a character that it may be deemed so far in furtherance of the original undertaking, and incidental to it, as to be fairly within the power of the corporation to bind its individual members by its corporate assent, or whether it is such a departure from the original purpose that no member should be deemed to have authorized the corporation to assent to it for him. If I am correct in supposing that an amendment authorizing an entirely different road would not be binding on the corporation without its own assent, it must follow that the question whether any particular subscriber is bound must depend upon the question whether he has himself assented, or whether the rest could bind him by their assent, and not on the question whether the Legislature had power to pass the amendment.

The result of my views upon this point is, that an amendment of this kind, merely authorizing the substitution of a new enterprise for the old, has precisely the same effect that it would have had if there had been no power reserved to amend the charter. The Legislature does not profess to make it obligatory. They grant it as a power to be accepted if the company chooses to accept it; otherwise not. This is just what they might have done if the power of amendment had not been reserved. And it seems to me that the question whether an individual subscriber was bound or not by the corporate assent, should be determined by the same principles in either case. The power of amendment was never reserved with reference to any question between the corporation and its stock subscribers, but solely with reference to questions between the corporation and the State, when the latter desired to make compulsory amendments against the wish of the former.

The effect of this reserved power is discussed in the matter of *Oliver Lee & Co.'s Bank* (21 N. Y. 20, 21), by Judge Denio. The amendment there made did not attempt to change the corporate enterprise, but belonged to the class I have referred to, of amendments designed for the better protection of the public. It was a case where new liabilities were imposed on the stockholders, arising from the continued exercise of the corporate powers originally conferred.

There being, therefore, no question in the case of a radical change of the original enterprise, I cannot think the judge intended that his remarks should be applicable to such a case. I cannot think that he intended to say that any person who subscribes for the stock of a corporation chartered for a special enterprise, where the power to alter or amend the charter is reserved by the Legislature, has thereby agreed that the Legislature, and the majority of his associates may, without his consent, transfer his investment to a totally different project. Indeed, that this could not be done is fairly implied from a subsequent opinion of Judge Denio, in *The Plank Road Company v. Griffin* (24 N. Y. 156). There the company was originally chartered to build a plank road. Afterwards a law was passed extending the time in which they were allowed to finish it by laying down plank, and allowing them, in the mean time, to erect toll-gates and exercise the rights of turnpike companies. The judge says: "It is certainly possible that this act was obtained simply as a cover for abandoning the plan of a plank road, and to enable the directors to establish a turnpike. This, however, is not the presumption of the law. On the face of the enactment it simply conferred on the corporation an indulgence which it would not otherwise possess, of postponing the completion of the road for a considerable time, and of so managing it that it should be a source of profit in the mean time. I think this was within the scope of the reservation contained in the general act which declares that the Legislature may at any time alter, amend, or repeal it, and may amend and repeal any corporation which may be formed under it."

This plainly implies that if the act had abandoned the original project, the subscriber would not have been bound. For the judge had no occasion to make the argument he did to show that the change was within the scope of the power of amendment, if that power was unlimited.

Pierce, in his work on railroads, p. 98, gives it as the result of the authorities, that even when the power of amending is reserved, it is not unlimited, but "that such a radical change in the company as diverts it from its original purpose" is not binding on a dissenting shareholder. But if the power is not unlimited, where is the limit? By what principles is it to be established? I know of none except those I have already contended for, which base the right upon the implied authority conferred by each one who becomes a member of a corporation, on the majority, to bind him by such changes as may fairly be regarded as incidental to the original project.

The judgment must be affirmed.

ASHTON v. BURBANK.

(2 *Dillon*, 435. 1873.)

THIS is an action on a promissory note, dated August 19, 1867, for \$3,000, made by the defendants to the Provident Life Insurance and Investment Company. The defendants were subscribers of that company, and the note in suit was given for an assessment upon their stock. The original charter of said company authorized it to transact a "life and accident insurance" business. After the defendants' subscription to the stock, the charter was amended, and the name of the company changed to the Eagle Insurance Company; and it was also authorized, by the amended charter, to transact the business of "fire, marine, and inland insurance." The amended charter was accepted, but in point of fact the company took no risks during the short period it afterwards did business, except such as were authorized by its original charter. Subsequently the company, being then in possession of the note in suit, forfeited, under authority given in its charter, the stock of the defendants therein. The note in suit, when long past due, was transferred by the company to the plaintiff.

Based upon these facts, two special defences are made to the note, the facts relating to which appear in the special verdict, and the question on the special verdict is whether either of these defences is sufficient in law to defeat a recovery on the note. The special verdict is in these words:—

"The note was executed by the defendants, and is now the property of the plaintiff by assignment and purchase from the payee after due, and the plaintiff is entitled to recover thereon the full amount thereof, less the credit indorsed on the same, of \$157.50, October 10, 1868, unless the following facts, which we state in the form of a special verdict, constitute a defence:—

"First Special Defence. —We find the following facts: The Provident Life Insurance and Investment Company, the payee of the note in suit, was chartered by the Legislature of the State of Illinois, February 13, 1865 (Laws of 1865, p. 761, made a part of this verdict), 'to carry on the business of life and accident insurance' at Chicago, with power to establish a branch at Peoria, Illinois. The defendants, living in Minnesota, subscribed to the stock of said company, each in the sum of \$5,000, and paid in cash, at the time of the subscription, ten per cent thereon. Some months afterward the company made an assessment of fifteen per cent on said stock, and it was for, or in payment of this assessment, that the note in suit was given. That is, the consideration of said note in suit is the aforesaid assessment of fifteen per cent upon the defendants' said subscription to the said stock of said company. Two days after the note in suit was given

the defendants received from the said company certificates of stock, which recite that twenty-five dollars on each share had been paid. Each certificate is as follows:—

“Capital, \$1,000,000.

Shares, \$100 each.

“Provident Life Insurance and Investment Company, Chicago, Illinois.

“No. 417.

50 Shares.

“Be it known, that J. C. Burbank, Esq., is entitled to fifty shares of the capital stock of the Provident Life Insurance and Investment Company, on which has been paid twenty-five dollars on each share, and holds the same subject to the conditions and stipulations contained in the act of incorporation of said company; which shares are transferable on the books of the company, at its office in Chicago, by the said Burbank or his attorney, on the surrender of this certificate and payment of all instalments then due, and when such transfer shall be sanctioned and approved by the transfer agent.

“Witness the signature of the President and Secretary, and the [Seal.] seal of the company, attached.

“Chicago, August 21, 1867.

“I. Y. MUNN, President.

“C. HOLLAND, Secretary.

“This certificate to be surrendered on payment of the next instalment, when a new one will be given.”

“This amount was made up as follows, viz.: the ten per cent paid at the time of the subscription, and the said fifteen per cent for which the note in suit was executed as aforesaid. On the 10th of October, 1868, the defendants paid the payee \$157.50 as interest, being the amount indorsed thereon.

“Subsequently, to wit, on the 3d day of March, 1869, the Legislative Assembly of Illinois passed an act as follows:—

“An act to amend an act to incorporate the Provident Life Insurance and Investment Company,” approved February 13, 1865.

“Sec. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, That so much of section 1 of said act, to which this is amendatory, as relates to the name and style of the corporation, and sections 5 and 15 of the said act, to which this is amendatory, be, and the same are hereby, repealed.

“Sec. 2. The name and style of the company shall be and is Eagle Insurance Company, and the said company may transact fire, marine, and inland insurance; and may hold an annual meeting of the shareholders on the first Tuesday of July for the election of thirteen directors, to serve until their successors be chosen.

“Approved March 3, 1869.”

“The defendants neither procured nor assented to said last mentioned act, nor did they know of it until after its passage, and thereupon they protested against it, and refused to pay the note in suit on this ground. Subsequently the said Eagle Insurance Company ceased to do business, and this note, among other assets, was sold to the plaintiff in the year 1871 in payment of a debt due from the Eagle Insurance Company to him. After the said amendment of the char-

ter of March 3, 1869, the Eagle Insurance Company did not, in fact, transact any fire, marine, or inland insurance business, or do any other business than such as was authorized by the original charter.

"Second Special Defence. — We find all the foregoing facts, and also the following, to wit: Under the second section of the charter of the Provident Life Insurance and Investment Company calls were made upon the defendants in September, 1869, for the payment of an additional assessment of twenty per cent upon their stock, payable October 25, 1869, which they neglected and refused to pay, and that the board of directors of the Eagle Insurance Company, on the 2d day of December, 1869, declared all the stock on which said assessment had not been paid, including defendants' said stock, forfeited; and soon after new stock subscriptions were received from new subscribers, and the old directors went out, and new directors, elected by the new stockholders, came in; and the Eagle Insurance Company ceased to do active business or issue new policies after January, 1870."

The provision in the charter of the company in relation to the forfeiture of stock is, that if any shareholder or subscriber shall neglect to pay a call for a specified number of days, "it shall be lawful for the directors to declare the shares forfeited to the company, and all previous payments made thereon."

DILLON, CIRCUIT JUDGE: —

We hold the following propositions: —

1. The plaintiff, taking the note in suit directly from the company long after it was due, and after the change in the charter, and after the action of the company forfeiting the defendants' stock therein, stands precisely in the place of the company, and cannot recover on the note unless the company could have recovered, had the action been brought by it:

2. The note being given for an unpaid stock assessment represents, for all the purposes of this action, that assessment, and the note not having been paid, it follows that the defendants have not paid the stock assessment for which the note was given. Under its charter the company had the power, if any assessment upon stock subscribed was not paid, to forfeit the stock and all previous payments thereon; or, at its election, the company would have the right to sue for such assessment. But the two courses are inconsistent, and it must elect whether to sue for and recover the stock subscription, or to forfeit the stock. It cannot do both. Having elected, in this case, to forfeit the defendants' stock, it cannot afterwards recover for a prior unpaid assessment; and this doctrine, which was conceded in argument, is not, in our judgment, varied, as the plaintiff's counsel contends, by the circumstance that the company at the time of the forfeiture of the stock held the defendants' note for such prior unpaid assessment. *Small v. Herkimer Manuf. Comp.* (2 Comst. 330).

3. The change in the charter by which a life and accident company was authorized to transact fire, marine, and inland insurance, is an organic change of such a radical character as to discharge previous subscribers to the stock of the company from any obligation to pay their subscription, unless the change is expressly or impliedly assented to by them. Here there was no such assent, and no acquiescence in the structural change made in the charter of the company. The company could not, against such a subscriber, maintain a suit to collect his subscription, and take the money and use it as capital for the transaction of business under the charter as altered. We think, in such a case, the subscriber is not bound to enjoin action under the amended charter, but may, if he elects, defend against an action to recover on his subscription to the stock.

If the company accepted the amended charter, as it did by adopting the new name, it is not essential to such a defence to show that at the time of the trial the corporation had actually exercised the enlarged powers conferred upon it. The defendants are not bound, on their subscription, to pay to the company money which, if paid, may be used as capital to carry on the business authorized by the amended charter.

Judgment for the defendants.

NELSON, J., concurs.

CHAPTER XVIII.

EFFECT OF TRANSFER OF STOCK UPON THE STOCK-
HOLDERS' LIABILITY.HUDDERSFIELD CANAL COMPANY *v.* BUCKLEY.

(7 Term, 38. 1796.)

THIS was an action on the case in tort. The declaration stated that the defendant had subscribed to advance the several sums of £500, £100, and £200 towards making and maintaining the Huddersfield canal, mentioned in the statute 34 Geo. 3, c. 53, and in respect of such subscription had become one of the proprietors of the Huddersfield Canal Company, and an owner of and entitled to eight shares in the undertaking; that afterwards, to wit, on the 11th of July, 1794, the committee of the company, duly chosen, etc., by virtue of the powers of the act made a call of £10 per cent on the proprietors in respect of the shares which they respectively held to carry the act into execution, and directed that such call should be paid to J. Brook, one of the treasurers to the company, at the times, and in the proportions therein mentioned, and (amongst others) £3 per cent on such call on the 25th of November then next; and £5 per cent on such call on the 28th of February next; and that the committee gave regular notice of such call, etc., as directed by the act. The second count stated that on the 5th of March, 1795, the committee made a further call of £10 per cent, and directed that £5 per cent thereof should be paid on the 9th June, and £5 per cent on the 28th of July then next. The third count was for £8 per cent, directed by a third order of the committee made on the 29th of July, 1795, to be paid on the 28th of October then next. And the fourth count was £10 per cent, directed by another order of the committee on the 23d of November, 1795, £5 per cent of which was to be paid on the 4th of February then next, and the remaining £5 per cent on the 18th of March then next. The declaration then stated that though the proportions of the said calls in respect to £300 (being three of said eight shares) had been duly paid to the plaintiffs, the defendant had not paid the several proportions of £500, residue of the said several sums of £500, £100, and £200 so subscribed by the defendant, as he was directed, etc., amounting to £180, but neglected so to do, etc.

The defendant paid £40 into court on the first count, and pleaded the general issue, not guilty.

At the trial at the last Assizes at York, before ROOKE, J., a verdict was given for the plaintiffs, damages £146 14s. 1½d.; £140 being the amount of the calls stated in the three last counts; £2 14s. 4½d. being interest of the £40 paid into court by the defendant on the first count; £3 12s. 8½d. being interest of the several calls stated in the three last counts from the several times when those calls became due to the day of the plaintiffs suing out their writ; subject to the opinion of this Court on the following case.

On the 30th of May, 1793, the defendant and many other persons subscribed an instrument duly stamped, not under seal, by which they agreed to subscribe the respective sums set opposite to their names toward the expenses of soliciting the act in question and of making and maintaining the canal, etc., and agreed to pay such sums to the treasurer when called upon for that purpose, etc. The defendant subscribed for five shares and two shares, and afterwards subscribed for another share. By the statute 34 Geo. 3, c. 53, the subscribers were incorporated by the name of the Huddersfield Canal Company, and were empowered to make the calls stated in the declaration, which were regularly made as stated in the declaration. The first proportion of the first call, being £2 per cent, was paid by the defendant on all the eight shares so subscribed for by him; and the remainder of that call, being £8 per cent on his remaining five shares, amounting to £40, was paid into court by the defendant; and the calls on the three other shares were paid by R. Gray, the purchaser of them. On the 6th of August, 1794, the defendant sold five of his eight shares to J. Kelsall at a profit of £17 per cent on each share, and transferred his interest therein to Kelsall by a proper transfer, registered by the company's clerk. On the 4th of December, 1794, the following entries were made in the plaintiffs' books by their agents: "J. Buckley, first subscription, £500; second ditto, £100; subscription as a landowner, £100; subscription as a mill-owner, £100. — 1794, July 9th. By transfer to R. Gray, £300; August 6th, ditto to J. Kelsall, £500." By a corresponding entry also in the books, under the name of J. Kelsall, the transfer of £500 to him from Buckley was stated.

The questions for the opinion of the Court were, 1st, Whether the plaintiffs can recover in this action the amount of the subscriptions demanded by the declaration; 2dly, Whether the defendant be liable to pay interest on the call paid into court from the time it was ordered by the committee to be paid to the treasurer, and on the calls mentioned in the three last counts from the respective days when those calls were required to be paid until payment thereof.

The parts of the act of Parliament relative to this case are Sects. 1, 62, 63, 64, 65, 70, 71, 72, 73, 74, 79, and 119. By Sect. 1, after reciting the public utility of the measure, and that the persons

therein named were desirous at their own costs and charges to make and maintain the intended canal, certain persons by name, among whom are the defendant and T. Kelsall, and their respective successors, executors, administrators, and assigns, are incorporated. By Sect. 62, power is given to raise £184,000, to be divided into shares, which by Sect. 63 are to be shares of £100 each, and shall be vested in the persons subscribing and their executors, administrators, and assigns, in proportion to the sums they severally subscribe; and persons having such shares are directed to pay a proportionable sum towards carrying on the undertaking as thereafter directed. By Sect. 64, the names and descriptions of persons entitled to shares, with the number of their shares and amount of their subscriptions, and the numbers by which each share is distinguished, are to be entered in a book belonging to the Company, and tickets to be delivered to each subscriber, specifying the share, etc.; and such tickets are to be evidence of the title of the subscribers. The form of the ticket is this: "A. B. is a subscriber, etc., of the share, etc., No. 1, and the said A. B., his executors, administrators, or assigns, is and are entitled, etc." By Sect. 65, persons who have subscribed, and their executors, administrators, and assigns, shall be deemed proprietors, etc., and shall have votes at the meetings, etc., for such shares. Sects. 71 and 72 mention shares or subscriptions. By Sect. 73 a book is to be kept containing the names of the persons who shall from time to time become proprietors or entitled to shares, etc. By Sect. 74, power is given to a committee (who are to be elected according to the directions in Sect. 70) to make calls for money on the proprietors; it directs the owners of shares to pay, etc.; and adds, "If any person shall neglect to pay his proportionable share of the money to be called for by the first call, etc., it shall be lawful for the company to sue for and recover the same in any of his Majesty's courts of record by action of debt or on the case;" and if any person shall neglect to pay his proportionable share of the money to be called for after the first call, he shall forfeit £5 for every share; and if he shall neglect to pay, etc., for the space of three months after the time appointed, etc., he shall forfeit his share for the benefit of the other proprietors, etc. By Sect. 79, the proprietors may sell shares; and duplicates of the assignments of shares are to be delivered to the committee and an entry thereof made in the Company's books; and after such assignment, the purchasers are to have shares in the profits, and to be entitled to vote as proprietors. By Sect. 80, no share is to be sold after the call of any money until such money is paid. By Sect. 119, subscribers are required to pay the sums by them respectively subscribed, or such proportions thereof as shall from time to time be called for by the committee, etc.; "and in case any person shall neglect to pay the same at the time required, it shall be lawful for the Company to sue for and recover the same in any court of law or equity."

Topping, for the plaintiffs, anticipated the three objections which would be made on behalf of the defendant; 1st. That the action could not be maintained in its present form; 2dly. That no interest is payable on the calls made by the committee after non-payment of those calls; 3dly. That the assignment to a purchaser discharges the original subscriber from all future responsibility; and then contended that they were without foundation. Answer to the first; whenever an act of Parliament requires a person to do a thing, or to pay a certain sum of money for the benefit of another, and the other neglects to do it, the former may sue him in an action on the case. But it is not necessary to resort to that general argument in this case; for the 74th Section enables the Company to sue any proprietor for sums of money ordered by the committee to be paid by action of debt or on the case. This form of action, therefore, is warranted by the express words of the act of Parliament, which are not "by action on the case in assumpsit," but generally "action on the case." And even if the meaning of these words were doubtful, the defendant by paying money into court on the first count has admitted a right of action in the plaintiffs. *Coxe v. Parry* (1 Term Rep. 464). Secondly, the plaintiffs are also entitled to interest on the calls. The money ordered on a call is a certain liquidated demand; the instant that money was payable the plaintiffs had a right to it, and were entitled to recover damages for the non-payment of it. Besides, it is now too late for the defendant to make this objection, the jury having given interest by way of damages. Thirdly, the assignment by an original subscriber to a purchaser does not discharge the former from his responsibility under the act. The original subscribers are the persons on whose credit the scheme was begun, and on which the Legislature gave their sanction to the measure. They are the persons named by the Legislature, not merely to begin the undertaking, but also to carry it into execution; the act reciting that those persons were desirous at their own cost and charges to make and maintain the canal, etc. And if it were competent to them to throw the burden on others, the assignments might be made to beggars, and thus the Legislature would be deceived, the owners of land through which the canal passes would be injured, and the public deprived of the benefit which the Legislature intended they should derive from the undertaking. This is like the case of a lease, in which though the lessor consents to the lessee's assigning to a third person, he does not give up his remedy against the original lessee. The power given by the act to the subscribers to assign was merely introduced for the benefit of the subscribers, but there is no part of the act that discharges them from their original responsibility on their assigning; on the contrary, by Sect. 119, which was inserted in the act after the power of assigning was given, they are required to pay their subscriptions; and that clause is nugatory, unless it has the effect of continuing the responsibility in the original subscribers.

Yates, *contra*. First, the action is not maintainable in this form. It is brought for a mere breach of contract, in not paying a sum of money; and whether it be a private agreement between the parties, or ratified by act of Parliament, the non-payment of a sum according to the agreement not under seal can only be the subject of an action of assumpsit. The non-payment of the sum in question cannot be considered as a breach of duty so as to convert it into a tort. The courts have at all times been anxious to preserve the boundaries of action; and when a plaintiff's cause of action arises on a contract to pay a sum of money, he ought to sue in assumpsit, otherwise the defendant is deprived of the privilege, to which he is entitled, of a set-off. With regard to the words "action on the case," they must be understood according to the subject-matter to which they are applied; and being applied here to the case of a breach of contract they must be understood to mean "action on the case in assumpsit." Secondly, at all events the defendant is not liable to pay interest on these calls. Thirdly, considering the whole scope and meaning of this act of Parliament, an original subscriber by the transfer of his shares and the acceptance of the assignee by the Company ceases to have any connection whatever with the Company, and is thereby discharged from every future demand that the Company may make on him in respect of those shares. By the act certain persons and their executors, administrators, and assigns are incorporated; express power is given to the original subscribers to assign their shares; the shares are declared to be vested in the subscribers and their assigns; and throughout the whole act the assignees of subscribers are mentioned as standing in the situation of the original subscribers. By Sect. 65, persons who have subscribed and their assigns are deemed proprietors, and are entitled to vote at all meetings; that is, the original subscribers have a right of voting until they assign, and then that power is transferred to their assignees. Then it would be highly unjust that the original subscribers should continue liable to the demands of the Company after they had parted with their right of voting and that property in respect of which only they ever became liable, and after the entire management of the Company has passed into other hands. With regard to the supposed analogy between this case and that of lessor and lessee, though the lessee is not discharged from his covenants by assignment and by the lessor's accepting the assignee, yet after such an assignment the lessee is not liable for rent in an action of debt. *Vid.* 1 Brownl. 20; *Walker's Case* (3 Co. 24); *Marsh v. Brace* (Cro. Jac. 334); *Thursby v. Plant* (1 Saund. 40); and *Wadham v. Marlowe* (E. 25 G. 3 B. R., cited 1 Term Rep. 91), that being founded on the enjoyment of the land; and there being no covenant in this case, that analogy is in favor of this defendant.

LORD KENYON, C. J.:—

Though I am of opinion with the plaintiffs upon the two first

points, I am clearly of opinion with the defendant on the last. I think that the action is maintainable in this form, the act having said in express terms that the Company may sue by an action on the case, and the plaintiffs having stated in their declaration everything that the act of Parliament requires. Nor is there any doubt but that the jury may give interest, not *eo nomine* as interest, but as damages for the detention of the debt, for non-performance of the contract. But the last point is equally clear against the plaintiffs. And not entertaining any doubt upon it, as it is a matter of infinite moment to the great mass of property embarked in this kind of speculation, I think we ought not to order a second argument lest an idea should go abroad that we have any doubts. On looking through the act of Parliament, it is clear that the Legislature meant that the parties should only be liable to the payment of their shares so long as they individually continue members of this Company, that is, so long as they have property which constitutes them such. The persons who have the right of voting are to vote in respect of their shares. The act also says that persons who have subscribed and their assigns shall be deemed proprietors; but it would be ridiculous to determine that a person, after he has sold his shares in respect of possessing which only he became a proprietor, should still continue to be a proprietor. After assignment the assignees hold the shares on the same conditions, and are subject to the same rules and orders, as the original subscribers, and are to all intents and purposes substituted in the places of the original subscribers. One reason, however, now urged why the original subscribers should always continue responsible is, because perhaps the shares may be assigned to insolvent persons: but the Legislature, when they gave their sanction to this undertaking, did not suppose that it was a mere South Sea scheme, they thought it a beneficial undertaking for the public, and conceived they had introduced a sufficient check by enacting that, if the subscribers did not pay their money from time to time as they should be required by the committee, they should forfeit their respective shares; and that no subscriber should part with his share while he was in arrear to the Company. No mischief, therefore, is likely to ensue either to the Company or the public from this construction of the act. I think that every clause in the act of Parliament leads to this conclusion, that the persons liable to the calls are those only who continue to be, at the time when the calls are made, members of this corporation. Here the defendant had assigned his shares, and that assignment had been entered in the Company's books, before the calls stated in the three last counts of the declaration were made, and therefore he is not liable to pay them; but he is liable for the calls stated in the first count, and not having paid them at the time, and the jury having given interest on them by way of damages, the plaintiffs are entitled to that last sum on the first count, the money paid into court on that count only covering the principal sum.

ASHHURST, J. : —

There is no doubt respecting the principal question. The original subscribers have power to assign their shares to whomsoever they please; then it would be strange to say that after disposing of their shares they should still continue liable to all the burdens which are thrown on the owners of this property. The point, however, does not rest on general reasoning; for the only restriction imposed by the act on the power of alienation is that the owners shall not assign until all the money due at the time of assigning is paid; but in all other cases the subscribers may assign their shares and discharge themselves from their liability to future calls by the assignment.

GROSE, J. : —

As to the form of the action: the words in the act are general, "action on the case."

LAWRENCE, J. : —

The only difficulty respecting the form of the action is that suggested by the defendant's counsel, that the defendant is by this mode of declaring deprived of a set-off; but that difficulty is not sufficient to restrain the generality of the words used in the act of Parliament.

PER CURIAM. Postea to the plaintiffs, in order that they may enter up their judgment on the first count for £2 14s. 4½*d.* for the interest on the £40 paid into court.

MIDDLETOWN BANK *v.* MAGILL.

(5 Conn. 28. 1823.)

THIS was an action of assumpsit, to recover certain sums of money loaned, by the plaintiffs, to the defendants. There was one special count; to which were added the usual money counts. The suit was commenced on the 12th of August, 1820.

Arthur W. Magill, John Russ, Lemuel Whitman, Ithamar Atkins, and Samuel Williams, named in the writ as defendants, pleaded, severally, non-assumpsit; and on this issue, closed to the court, the cause was tried in Middlesex County, December term, 1820. The court found the facts, and reserved the case for the consideration and advice of all the judges.

The case was as follows. On the 24th of May, 1816, Arthur W. Magill was duly appointed agent of the Middletown Manufacturing Company, for the then ensuing year, and acted in that capacity during the period of his appointment. The company having a running account at the Middletown Bank, he, as agent, on the 16th of July, 1816, for the purpose of maintaining the credit of the company at such bank, and obtaining discounts, as its exigencies might,

from time to time, require, addressed a letter to the cashier, containing a list of the stockholders of the company, which included all the present defendants, promising to give notice of all transfers made during the indebtedness of the company to the bank, and giving an extract from the by-laws of the company regulating the mode of transfer; which letter was received by the cashier on the day of its date. The following notes, on the days of their respective dates, were executed by Magill, as agent of the company, and indorsed by Alexander Wolcott, and were soon after discounted at the bank, for the benefit of the company, viz. one note dated July 9, 1816, for 2,500 dollars; one dated September 6, 1816, for 6,000 dollars; and one dated September 20, 1816, for 700 dollars. On the 29th of October, 1816, the cashier sent to Russ, one of the defendants, a letter, which was delivered to him on the day of its date, notifying him of the existence of these notes, and that the bank looked to him, as one of the company, for payment. The notes have never been paid, and have been owned and held by the plaintiffs ever since they were discounted.

HOSMER, C. J. :—

Arthur W. Magill and others, having entered into an association for the manufacture of cloths, procured from the Legislature a charter of incorporation. Apprehensive that a grant in the usual manner, whereby the corporate funds are alone liable to creditors, would be injurious to the community, the Legislature annexed to the charter this proviso, "that the persons and property of the members of said corporation shall, at all times, be liable for all debts due by said corporation." The notes in suit were made when all the defendants were members of the Middletown Manufacturing Company; but by the transfer of their stock, two of them ceased to be such before the insolvency of the corporation, or the commencement of the plaintiff's action. Whether the two defendants alluded to are liable on the notes, without which liability the present suit cannot be sustained, is the general question to be determined.

That certain members of the corporation are responsible for the company debts, is not susceptible of dispute; but the difficulty consists in ascertaining who those members are. The plaintiffs contend, that the members of the company are originally and absolutely liable for all debts contracted by the corporation when they were members, in the same manner as they would have been, had the persons associated proceeded on their purposed employment, without an act of incorporation. On the other hand, the claims of the defendants are numerous. They insist that their liability is not joint, but several; in chancery only, and not at law; arising on the insolvency of the corporation, or at the commencement of suit, and not at the origin of the debt; and finally, that the corporation alone is debtor, and the remedy against the members only accessory and commensurate with the corporate funds.

The original and absolute liability of the members for the debts of the corporation, contracted when they were members, was expressly decided, by this court, in the case of *Southmayd and Hubbard v. Russ & al.* (3 Conn. Rep. 52). The court, according to the imperative requisition of the statute law, did not merely announce a result, but publicly assigned their reasons on the very point of controversy. Their opinion was in no sense *obiter*. As creditors of the Middletown Manufacturing Company, the plaintiffs had obtained a judgment for a debt against the corporation, and were endeavoring to enforce it against the members by an action of *scire facias*. It necessarily follows, that the only subject of inquiry was, what is the remedy against the members of the Middletown Manufacturing Company, for a debt contracted by the corporation? To this inquiry the court made answer, that the judicial writ of *scire facias* could not be sustained, because the members were under the obligation of the original contract, on which alone an action against them could be supported. The case is entirely analogous to that of an action of assumpsit upon a bond, determined against the plaintiff on the specific ground that the action should have been debt: in which event, it is presumed, that no lawyer would consider the decision as *obiter*, and for this invincible reason, because it is upon the direct pertinent point of inquiry. On the same principle, the determination in *Southmayd and Hubbard v. Russ & al.*, that the action against the members of the Middletown Manufacturing Company should have been brought on the original contract, directly and pertinently evinced that the remedy by *scire facias* was not sustainable. "The Legislature," say the court, "intended to invest the company with corporate powers, and so to limit them that the responsibility of the members for the company debts should not be impaired. In other words, the incorporation was not to have any effect on the subject of individual indebtedness. For the company debts the members were "at all times" to be liable. The original and absolute indebtedness of the members demonstrates the manner of their responsibility. They are answerable precisely as if there had been no incorporation. The debt is no sooner incurred than the liability commences."

Here I should pause: but a difference of opinion in the court impels me to discuss the case on principle.

Before I enter upon a construction of the proviso to the act of incorporation on which the whole controversy depends, I will advance certain established rules, by which the exposition must be guided. "Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar as their general and popular use. As to the subject matter, words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end." 1 Black. Com. 59, 60. "The best construction of a statute is, to construe it as near to the

rule and reason of the common laws as may be, and when the provision is general, to subject it to the order and control of the common law." *Stowell v. Lord Zouch* (1 Plowd. 365); 2 Inst. 148, 301; *Thursby v. Plant* (1 Saund. 240); *Miles v. Williams* (10 Mod. 245); *Rex v. Bishop of London* (1 Show. 455).

In the argument of this case, it was asserted, very mistakenly, that the proviso in question was in derogation of rights already granted, and ought to be construed strictly. On this point, both the fact and the law were misconceived.

Before the proviso was introduced, no right had been conferred; but the body of the act and the proviso both came into existence *uno flatu*. The Legislature declined granting the company those rights and privileges which the body of the act contemplated; and to qualify it in such manner as to meet their views of justice and general convenience, the proviso was superadded, speaking this intelligible language; take your charter subject to this condition, or you shall not have it at all. Thus much as to the fact.

The law on the subject in question has long been established, and unquestionably is at rest. "If a proviso in a statute be directly contrary to the purview of a statute, the proviso is good and not the purview, because it speaks the later intention of the legislators." *The Attorney-General v. Governor of Chelsea Water Works* (Fitzg. 195); 6 Bac. Abr. 382, Gwill. ed.

The equity and common-sense of this principle are manifestly incontrovertible. For the benefit of creditors, the proviso was annexed to the charter, and was a paramount and fundamental object with the Legislature. To construe it strictly, by an inversion of principle, would contravene the legislative object, frustrate their anxious solicitude in behalf of creditors, and virtually nullify the proviso to the act of incorporation. For between a charter without a proviso, and one with a proviso restrained to the narrowest possible limits by construction, and controlled by the body of the act which it was made to govern, what is the essential difference? From the premises it results, as a correct principle of exposition, and necessary to further the intention of the Legislature, that for the security and benefit of the creditors the proviso must be liberally construed in their favor.

On the application of the preceding principles, in this case, I am of opinion that the members are subject to the same liabilities they would have been, had they associated for the purpose of manufacture, without a charter. In that event, the common law would have made all the members of the copartnership who were such at the time of a debt contracted, responsible for the payment of it; and the same responsibility rests upon them, under the act of incorporation. By the acceptance of the charter, the agent of the corporation became their agent, and the debts of the corporation, contracted by him, their debts.

It has not been claimed, on either side, that all the members of the corporation, from the commencement of it to its dissolution, would be liable for the debts contracted. They are divisible into three classes, comprising those who ceased to be members before the indebtedness; or who were such at the origination of a debt; or who became members at a subsequent period.

In respect of the first class, it has not been, and, I think, cannot, be urged, that they are subjected to any responsibility for the debts originating subsequent to their membership. That the second class are debtors, and the only debtors, I shall endeavor to show.

It has been insisted, for the defendants, that the liability of the members is not joint, but several. I have heard no argument, nor am I capable of conceiving any, by which such a proposition can be supported. It is opposed to the words of the proviso, which clearly substitute certain members jointly to the legal obligation for the payment of debts, in place of the corporation. It equally contravenes the common law, which considers the liability for a single debt, contracted by several persons, as joint, and capable of enforcement against all the individuals. It is contrary to the liberal construction of the proviso in favor of creditors that established principle demands, and casts on them the hazard of loss, by the insolvency of one or more of the debtors, which the contract has devolved on the company. And finally, it is opposed to all analogy, and to the nature of the credit, which is given to the debtors generally, and not to them singularly, or in proportion to their respective shares of the joint stock.

That the remedy against the members is in chancery, and not at law, is a mere *gratis dictum*, and dependent solely for its force on the preceding proposition. If the members were severally obliged, it then might be made a question whether, in avoidance of multiplicity of suits, chancery would not afford the requisite redress. But as the responsibility is joint, the extraordinary powers of this court can no more be resorted to, than to enforce the collection of a joint bond or promissory note.

It has been said, that the liability of the members is suspended on the insolvency of the corporation. For this construction I am not able to discern any principle. The proviso subjects certain members of the corporation for its debts "at all times." It contemplates an absolute and unintermitted responsibility, from the origin to the extinguishment of the corporation debts. The liability of the members, in the event only of the company's insolvency, is not absolute, but contingent; not unintermitted, but arising on a fact subsequent to the creation of the debt. So far from existing "at all times," it has no existence at any time, unless an uncertain event should happen. To sanction the construction insisted on by the defendants, the court must first repeal a part of the proviso, and then substitute a conditional for an absolute engagement. The con-

struction alluded to is at war with the words, as well as with the reason and spirit of the charter. The intention of the Legislature was not merely to secure the creditors from the hazard of the corporation's insolvency, but to continue the members a copartnership, or at least joint contractors at common law, as if no incorporation had taken place. At present, I shall take this proposition for granted, as it will be, more particularly, the subject of a future part of my argument.

That my observations on the material question in the case may be more condensed and uninterrupted, I will, before I enter on them, reply to some arguments advanced by the defendants. It was said, that a mercantile company cannot possess such attributes as the charter of incorporation has given; but the assertion was not supported. It is admitted, that the corporation has certain rights not self-created, which, for the internal management of their concerns, the Legislature has conferred upon them. But, as we correctly insisted on for the plaintiffs, the charter has not deprived the members of any power essential to a copartnership. It is not my intention to enter minutely on a subject most satisfactorily discussed in the argument to which I have alluded. I will merely advance certain incontrovertible principles, the right application of which must put the controversy on this point at rest. A partnership exists when two or more persons associate together in some lawful business, with a view to joint profit. It is a voluntary contract between more persons than one, for joining together their money, goods, or labor, upon an agreement that the gain or loss shall be divided proportionably. *Hoare & al. v. Dawes & al.* (Doug. 271); *Grace v. Smith* (2 Bla. Rep. 998); *Watson* on Part. 1. This is its radical and elementary principle; and beyond this simple, fundamental truth, the partners may prescribe to themselves any terms not prohibited by law. These terms are matter of expediency; and may exist or not, without affecting the essence of the partnership, comprised, as it is, in a joint agreement to perform business for the acquisition of a joint profit. Save in this indispensable stipulation, the creditors have no interest; for this it is which alone subjects the partners to a joint responsibility. In the case of *Marcey v. Clark* (17 Mass. Rep. 330), it was said by the Court: "The Legislature have thought fit, and we think wisely, to subject the property of all members of these corporations to a liability for the debts of the company. By this, in fact, they only continue the principle of partnership in operation; and considering the multitude of corporations which the increasing spirit of manufacture gives rise to, regard to the interest of the community seems to require, that the individuals, whose property, thus put in common mass, enables them to obtain credit universally, should not shelter themselves from a responsibility, to which they would be liable as members of a private association. Since this statute was enacted, (and equally applicable is the remark to the Middletown Manufac-

turing Company) "all who deal with such companies look for their security to the individual members, rather than to the joint stock." The opinion thus expressed considers the members virtually as partners, notwithstanding the incorporation; and declares, what results almost with the force of a necessary inference, that they are so considered by the community, and credited in this character. It is unnecessary further to pursue this subject. Let it be supposed that the members of the corporation, strictly speaking, are not partners. By the acceptance of the charter they jointly assume the payment of the corporation debts; and having held themselves out to the world under this responsibility, they are liable to creditors as joint contractors. This is the only material consideration; for as to their internal movements and obligations, they are personal to themselves, and in them the community has no concern.

An analogy between the liability of towns, and other strict corporations, and that resting on the members of the Middletown Manufacturing Company, has been supposed to exist; and was claimed, in the argument of this case. It is an unquestionable legal truth, that in relation to corporations in general, the members, as individuals, are never responsible for debt; and in respect of towns, and some other local corporations, in this State, the same observations are equally just. The liability is exclusively attached to the corporate funds, and not to the members of the corporation. As such incorporations are never insolvent, but, by taxation, may always replenish their exhausted treasuries, there exists an established usage authorizing the collection of debts, by distraining the property of individuals, who upon the corporation have a claim for their reimbursement. But generally speaking, against corporations, there is no remedy, except by a recurrence, in some legal mode, to their funds; and with respect to the Middletown Manufacturing Company, it is incontrovertibly clear, that were it not for the proviso in question, the members could never be subjected to any responsibility. It is the proviso, that striking peculiarity, which imparts rights to creditors, and renders the members liable to obligations not existing in the case of an ordinary corporation. By necessary inference, it results, that the obligations resting on the members of a corporation, under the usual grants, are essentially dissimilar from those existing on the members of the Middletown Manufacturing Company; and that between them there is no analogy. An inference from one of these corporations to the other, is entirely unwarrantable; and can have no other tendency than to mislead. This observation is the more necessary to be attended to, lest from the frequency, and almost universality of the usual incorporations and the familiarity of the rules applied to them, the mind, either intentionally or unconsciously, should make application of these rules to the subject under discussion.

By the proviso in question, "the persons and property of the members of the corporation are, at all times, liable for all debts

due by said corporation." What class of members is embraced by these expressions? Is it that class which exists at the contracting of a debt; or those who are members of the company at the commencement of suit? The intention of the Legislature, to which the company acceded, on the voluntary acceptance of the charter, when once ascertained, must definitely settle these questions. To determine this inquiry, I will recur to the words of the proviso, and attempt a construction of them with reference to their subject-matter; and then will attend to the consequences of the two expositions that appear most correct, so far as they have a legitimate bearing on the matter in controversy.

The words are to be construed in reference to the subject-matter.

A. W. Magill and others had entered into an association, or mercantile company, for the purpose of acquiring profit by the manufacture of cloths; and to the Legislature they applied in order to obtain a charter of incorporation. It was extremely apparent that this company, commencing business new and untried, would require a large capital; and that it could not fail to want and procure extensive credit. With this subject-matter in view, it was thought hazardous to the community to grant a charter in the usual manner; as this would render the corporation alone liable for debts. The community required better security to protect them from the hazard attending the great credits that undoubtedly would be given. With these facts in contemplation, a charter was granted, with the extraordinary proviso, the first, which in this State, had ever been subjoined to an act of incorporation, that the members of the corporation should be liable at all times for the debts contracted. In view of these considerations, the words of the act in question must receive their construction. The expressions "the persons and property of the members of said corporation," detached from the subject-matter of the grant, and construed *per se*, would impress the mind with the idea that the actual members were intended. But when to this is superadded, "the debts due by said corporation,"—debts which would successively exist, contracted by a fluctuating body, whose members are frequently changed,—it cannot readily be believed, that the liability was intended to be cast on the existing members at the commencement of suit. It would contradict all analogy of interpretation. Those who contract a debt become the debtors: and the debts contracted by the corporation, for which the members were made liable, must be considered, in the exercise of common-sense, guided by plain practicable principles, as debts contracted by the members. The contract of the corporation, and of the members, made by their mutual agent, necessarily are coetaneous,—springing into existence in respect of both, by the same act, and at the same time; and inferring the same obligation. There is no incongruity in the construction which supposes, that by the term "members" the Legislature intended, not those who were such, at the bringing

of suit, but those who were members at the contracting of debt. It is not required that the expression "the members of the corporation" should be construed literally, and restrictedly, but that it be expounded largely, if the subject-matter referred to render it fit and reasonable; for the same words, when applied to different subjects, have different meanings. It is far from unusual, that a word, on the suggested principle, should be deflected entirely from its common intendment; and the term "provisions" in the law of Edward 3, enacted to repress the usurpations of the papal see, which word, by construction, was made to restrain the nomination to benefices by the pope (a very peculiar meaning of the term), is both a proof and illustration of the remark. 1 Black. Comm. 60. When we proceed a step further, and consider that the proviso in question was made for the benefit of creditors, in a manner new and contrary to all precedent, necessarily demonstrating this to be a favorite and indispensable object of the grant, and the cause without which it would not have been made, the correct construction of it becomes more decisively apparent. To attain this object, the security and benefit of creditors, the proviso, as already has been shown, must be liberally construed in their favor. This liberality of construction cannot be deemed excessive, when we limit it by another established rule of exposition; and that is, that "the best construction of a statute is, to construe it as near to the rule and reasons of the common law as may be; and when the provision is general (as in this case it is), to subject it to the order and control of the common law." *Vide* cases cited *ante*. The construction most beneficial for the creditors harmonizes with the common law, and casts the obligation and liability for debts contracted on the members of the corporation, at the time the contract was made. While this exposition is just, in relation to the debtors, it is most favorable for the creditors. They always may know the persons in whom they confide, and judge whether they are worthy of credit; and, as was said, by Parker, C. J. (17 Mass. Rep. 334), in relation to a law which rendered the members of manufacturing corporations liable for the corporate debts, "all who deal with such companies look for their security to the individual members, rather than to the joint stock." The real condition of the incorporated company they may be unable to ascertain, as appearances sometimes are most flattering, when the circumstances of a corporation are perilous and rapidly declining. The construction which I have given the proviso appears to be natural and obvious; and I am persuaded that every person, on reading the charter in question, for the purpose of ascertaining the expediency of crediting the corporation, has entertained the same opinion. That this was its practical exposition, by the parties to the promissory notes in suit, is decisively apparent from the letter of A. W. Magill, the agent of the corporation, to the President and Directors of the Middletown Bank, immediately preceding the loans. This is

the obvious inference resulting from his furnishing the names of the members, and engaging to give information, if any material transfers of stock should be made. The words of the proviso, so far as I have pursued them, construed with reference to the subject-matter, and expounded as near to the rule and reason of the common law as its expressions will admit, support the general proposition assumed, that the members of the corporation, existing at the time of a debt contracted, are bound to pay it. If they are thus put under obligation of the contract, they cannot exonerate themselves, by selling their stock, or in any other manner, except by performance of the agreement. That it was the intention of the Legislature to secure the interest of the creditors by the proviso, has not been controverted. I am equally clear, it was their precise object that the rights of the creditors against the members of the corporation should not be impaired by the charter, but that they should be subject to the debts contracted, as at common law. In this construction there is nothing inconsistent with the words of the proviso, supported, as it unquestionably is, by the considerations already advanced; but it contains an expression that greatly supports the exposition. The proviso affirms, that the members shall "at all times" be liable for the corporation debts. As all the members, throughout the existence of the corporation, were not intended to be responsible for every debt, it was proper for the Legislature to designate what class of members should be liable. This they did, by a specific attribute, denoting that they are the members, capable "at all times" of being debtors, from the origin to the extinguishment of the debt. To what persons does this description apply? Certainly not to those who ceased to be members before a debt was contracted. It is equally manifest, that those are not embraced, who become members after a debt had originated; for in no intelligible sense can it be affirmed, that for such debt they "at all times" were liable. There was a time, when they were not responsible, — the period which elapsed after the debt accrued, and before they became members. The words "at all times" are synonymous with the phrase without permission; and when the correlative is debt, the plain meaning is that the debt and debtors coexist so long as both endure. The construction I have adopted is recommended by its perfect equity. With entire justice, the members of the company are subject to the same liabilities which attend unincorporated associations. Their charter privileges, so far as respects their internal concerns, render them no less the debtors of their creditors, nor relax any of the just obligations they are under to those who have entrusted them with their property. In this way, by leaving the individuals obliged to the payment of their debts, the Legislature, with a laudable spirit of wisdom and foresight, intended to protect the community against a corporation, which, by putting much property into one common mass, with a view to extensive business, could

not fail to acquire great credit. It would then become the interest of all who should contemplate contracting with the corporation, to look to the individual members, rather than to the joint stock; and thus the members would bear, as they ought, the hazards of an untried business, and become the victims of their own disasters, in preference to their being fatal to their unfortunate creditors.

The construction given is necessary to meet the mischiefs contemplated by the Legislature, and to impart that security to creditors which reason and justice demand. No other exhibition of the charter will do this effectually. If the members are alone liable who are such at the commencement of suit, the creditors have not the advantage of knowing who are their debtors, at the time of giving credit, nor until, by the refusal of payment, an action against them is actually instituted.

The construction I have given has the merit of being obvious, and not far-fetched; and founded, as it is, on the rules and reasons of the common law, it furnishes to every man a familiar and certain rule of action. The inquiries whether the members are jointly or severally held responsible, in chancery or at law; and the other numerous questions in the case, if there is any foundation for them, demonstrate, what I am very unwilling to admit, that there is no certain or well-known rule of action, sufficient to guide those for whose benefit the proviso was intended, to any safe mode of conduct.

That the liability to debt is cast on those who should happen to be members at the commencement of suit, is a construction for which I cannot perceive any sufficient ground. It is not warranted by the words of the proviso construed with reference to the subject-matter. It reverses the rule of the common law, and gives a strict interpretation against creditors in that very particular in which the construction should be liberal in their favor. It imparts to the creditors, against the members of the corporation, a conditional liability only to their demands, provided suit is brought, instead of that absolute and unintermitted responsibility which the proviso contemplates. The construction is most favorable to the members, instead of being most favorable to the creditors. It is opposed to the equitable right of creditors to look for payment to those who were alone visible to them, and whom they alone could credit; and refers them to future members, whom they could by no possibility know or trust; and in this manner, it involves them in the hazard of a recurrence to those who, not unfrequently, are found to be the stockholders of an insolvent corporation. That even this is some security must be granted; but that it is that plenary benefit which the Legislature most justly intended, I cannot admit.

In support of the defendants' construction, certain determinations of the Supreme Court of Massachusetts have been cited; but, in my judgment, with an entire misconception of the ground of those decisions. To render them of any avail, they must have decided that

when a law renders "the members of an incorporation" liable for the corporate debts, the words alluded to, without regard to the other provisions of the act, necessarily include those only who were members at the enforcement of the demand. No such principle was contended for by counsel, nor recognized by the court. They merely give a construction to certain legislative acts, from a view of the entire law, which neither contains the words, nor comprises the object, of the proviso in question. Hence, it appears, that they furnish neither principle nor analogy applicable to the case under discussion. The sole basis of these decisions is, that the words "members of a corporation," coupled with certain other expressions, and construed with reference to their peculiar subject-matter, obliges those members of a corporation to respond, who are such at the enforcement of the claim, or within a certain antecedent period.

The case first cited, was *Bond v. Appleton* (8 Mass. Rep. 472). By an act of the State of New Hampshire, establishing Hillsborough Bank, it was enacted, that if the corporation should neglect or refuse to pay any of their bills, when presented for payment, "the original stockholders, their successors or assigns, and the members of the said corporation," should be jointly and severally holden for the payment of them; and that the members compelled to pay should be authorized to recover of the remaining members of said corporation, their proportion of the sum paid. In expounding the statute, it was said by the court, that the words of the law were very extensive, but that it was the reasonable construction of them, that such of the original stockholders, their successors and assigns, as should be members when the payment of the bills should be refused, were bound to make satisfaction, particularly because the remedy furnished them for reimbursement was against the remaining members of the corporation. By the subject-matter of the entire law, and the very intelligible provision just referred to, the words, "the original stockholders," were considered as limited to such of the original stockholders as should be members of the corporation at the time when the payment of the bills should be refused. The soundness of the decision I am not disposed to question. It is an established principle of exposition, that "in the construction of one part of a statute, every other part ought to be taken into consideration;" and it is equally well settled, "that the general words in one clause of a statute may be restrained by the particular words in a subsequent clause of the statute." 6 Bac. Abr. 380, 381, Gwill. ed.; *Rex v. Archbishop of Armagh & al.* (8 Mod. 8). It is difficult to conceive why the case of *Bond v. Appleton*, founded on expressions manifestly and essentially different from the one before the court, should be considered as analogous, or comprising a principle of decision favorable to the defendants. On the other hand, it clearly appears, although the members of the corporation were made liable, that this expression was not confined to actual members at the time of enforcing a

demand, but was inclusive of those who were members at an antecedent period, and had ceased to be such,—they were members when the debt originated. The obligation to pay having attached, they could not escape from it by the disposal of their stock.

The case next cited was *Child v. Coffin & al.* (17 Mass. Rep. 64). By a statute, passed in 1808, it was enacted, that whenever any execution should issue against any manufacturing corporation thereafter created, and such corporation should not, within fourteen days after demand made upon the president, etc., of such corporation, by the officer holding the execution, show him sufficient estate to satisfy and pay the sums due on such execution, the officer should serve and levy the same upon the bodies or estate of any member or members of such corporation. In construing the statute, it was said by the court, that by its necessary intendment it must be understood to include those who were members at the commencement of the action (against the corporation), and those only. This determination was not conformable to the precise words of the law; but was founded on the reason and spirit of its entire provisions. "The statute" (said Parker, C. J.), "makes every member of a manufacturing corporation against which judgment has been rendered virtually a judgment debtor; and by force of the statute the execution is against every such member, although not named in the precept." In this case, the words, "any member or members of such corporation," were enlarged, in conformity with the intendment of the entire law. In what consists the analogy between the case of *Child v. Coffin & al.* and the case before us? The statutes are differently expressed, and the subject-matter of them is essentially diverse. This, to every person who compares them, is so palpably apparent, that the question of original liability of the members, in the case before the Supreme Court of Massachusetts, could not have been made without the most manifest absurdity. The case comprises these undoubted principles: that "a thing which is within the letter of a statute is not within the statute, unless it be within the intention of the makers;" *Reniger v. Fogossa* (1 Plowd. 18); and that "the letter of a statute is sometimes restrained by equitable construction; in others it is enlarged; and in others the construction is contrary to the letter." *Eyston v. Studd* (2 Plowd. 465); 6 Bac. Abr. 386, 387, Gwill. ed. The determination, in applying these principles to a law altogether different from the proviso in question, and on a survey of all its provisions, enlarged the literal effect of a particular expression. In what manner does the decision bear on the case under discussion? I readily admit that I am unable to discover.

In the case of *Marcy v. Clark* (17 Mass. Rep. 330), the construction of the before mentioned statute was again the subject of discussion. The question said by the court to arise in that case was, whether Joseph Marcy was a member of the company at the time the goods were levied on by an execution against them. The inquiry

was made, at what time the individual should be a member, to make him incur the liability of the statute; and it was determined, "that the execution might be levied upon him who was a member at the time of the levy. Indeed (said Parker, C. J.), no other construction could be given to the statute; for none but a member was liable; and one who had sold his share in the corporate property certainly did not continue a member. Under the statute we have been considering, those who are liable must be members when the execution is levied."

Before I make the observations which occur to me on this case, I must be permitted to remark, with the greatest deference to the learned court who made the decision, that I cannot reconcile it with the principle stated and recognized by the court; nor with the determination in *Child v. Coffin*. In the case just mentioned, it was said, that the law embraced "such as were members at the time of the commencement of the action (against the company), and those only; and for this reason, that the court must give to the statute such a construction as shall not go beyond its necessary intendment." And in *Marcy v. Clark*, the court observed, that "the statute makes every member of a manufacturing corporation against which judgment has been rendered, virtually a judgment debtor; and by force of the statute, the execution is against every such member, although not named in the precept. Now, if the members at the commencement of the action, and those only, were embraced by it (p. 65); and virtually become judgment debtors, (p. 333); and if, as was said (p. 335), "all who are members of the corporation are virtually defendants in the action, and have an opportunity to be heard, in the form they have chosen, by joining the company;" I cannot subscribe to the construction that permits a judgment debtor to exonerate himself, by selling out his stock, and a person not a judgment debtor, by purchasing it, to become liable on the execution.

But be this as it may, the determination in *Marcy v. Clark* has no relevancy to the case under discussion. The statute authorizes the officer holding an execution against the manufacturing company, if there had been a refusal of payment, to levy it on the bodies and estates "of any member or members of such corporation." Admit, then, that in the opinion of the court it could only be levied on the actual members; what was the reason? It was because the words of the statute were considered imperative; and that there was nothing in the provisions or subject-matter of the law that authorized a control of the literal construction. It is undeniable that the express meaning of a law is its true meaning, if there is nothing upon which a construction can be founded showing a different intention. But the question arises, is there such a similarity between the statute before mentioned and the proviso in question, as to constitute an analogy, whereby the determination of one is, virtually, a decision of the other? Can it be believed that the supreme court in

Massachusetts would recognize this principle; and if there had been a prior determination of the proviso in question, that they would admit it decided the construction of their statute law? Are the words of the proviso and the statute the same? Certainly not. Is the subject-matter precisely similar? No one will pretend it. Were the object and intention of the two Legislatures identical? It is far from being true. Nay, are the principles of construction applicable to those two subjects, the same? It cannot be affirmed. I conclude, then, that the constituents of correct exposition, in the two cases, are manifestly and essentially diverse; and that, from the construction of one, there results no aid towards the construction of the other.

It has been supposed to have been the intention of the Legislature, by the act of incorporation, to render the corporation only the real debtor; that the corporate funds should be considered as the essential resource; and that the members, at the commencement of suit, should alone be liable to the extent of the corporate property. On this construction the members are in the nature of collateral sureties to the corporation. It results, as an inevitable consequence, that if the corporation property is exhausted, the responsibility of the members has terminated. Neither the words of the charter, nor the reason and spirit of that instrument, furnish the slightest foundation for this construction; but to both of them it is directly opposed. The proviso affirms, "that the persons and property of the members of said corporation shall, at all times, be liable for all debts due by said corporation." By the most clear and undeniable intendment of this clause of the charter, certain members of the corporation are subjected to an absolute and uninterrupted liability for the corporate debts, till they shall be paid; and not, that the corporation shall pay its debts, if it be able. But by the construction advanced, no members are absolutely responsible for the debts of the corporation; their responsibility being suspended on two contingencies. They are liable after the commencement of the suit, if there has not been an exhaustion of the property of the corporation. But until suit there is no liability: and even after suit, they are equally irresponsible, if no corporate funds exist. They are under the obligation only of paying the corporate debts, so far as the corporation is able to make the payment; but if their ability is at an end, the liability of the members has likewise terminated. This novel species of suretyship is reducible to this principle; that if the corporation shall not act fraudulently, but shall discharge the demand against it, until the ability to discharge is gone the members are exonerated. How nugatory and destitute of any beneficial operation in favor of creditors, is the construction! Unless the corporation should refuse faithfully to perform its engagements, so far as it has the power of doing, the responsibility of the members would be useless, because it is gone; and to

give it an importance, we must presume a fraud in the corporation. Thus, by one compendious stroke the proviso in the charter is construed, not merely with strictness, but the creditors are deprived of all security, except in the corporate funds; and the members, if there are no funds, or however trivial they may be, if they are honestly applied in payment of debt, are rescued from all obligation. And thus the words of the proviso, and the rules of the common law in the construction of the charter; the favorable exposition of the proviso in behalf of creditors; the equitable rights of creditors and obligations of debtors; and finally, the intention of the Legislature in making a just provision for their benefit, are made of no avail. To a construction which, in my judgment, rests on no foundation; which reduces a provision resulting from the anxious solicitude of the Legislature for the protection of the community, to a nugatory act, unworthy of their care, and instead of a shield to creditors, converting it into a sword to pierce them, by alluring and then disappointing their confidence, I cannot subscribe.

It has been strongly urged from the effects and consequences of the plaintiffs' exposition, that it is too unreasonable to be adopted. Undoubtedly, this is a legitimate source of construction; but it must not be pushed to the length of demanding, that all possible inconvenience must be avoided, and the Middletown Manufacturing Company have imparted to them all the privileges of their condition, without being subjected to any disadvantage. *Qui sentit commodum, sentire debet et onus*. The security of the community must be regarded, as much as that of the company. It is peculiarly hard, that one partner should be subject to ruin by the imprudent and fraudulent conduct of another; but this is sometimes the result. Fortunately for us, we are not left to that unlimited discretion on this subject which not unfrequently has led the most powerful minds into great error. There are rules founded in common-sense, and established by law, which, when rightfully applied, will lead to a correct result. The direct and obvious consequences of a law are voluntarily assumed, and constitute no reason for varying its construction; and of as little avail are consequences infrequent, remote, or productive of little inconvenience. It is only in doubtful cases, when the other rules of legal construction fail, and the consequences are unreasonable or absurd, that this kind of argument is resorted to. 1 Black. Com. 61; *The Queen v. Simpson* (10 Mod. 344):

Under the guidance of the preceding rules only, let the consequences of either construction be contrasted. Those on which reliance had been placed by the defendants may be classed under the following heads. 1. If, under the plaintiffs' construction a stockholder sell his stock, and is compelled to pay a corporation debt, he can obtain no reimbursement. 2. If a suit is brought, and judgment is had, against the members, the vendor must contribute to the payment; and if the suit is against the corporation, the property of the

vendor will be taken and he will be remediless. 3. The introduction of a new member into the company, and the secession of an old one, will constitute a new class of members, which will render necessary as many suits as there are changes in the members of the corporation.

The first consequence objected is without foundation. The vendor, in the case supposed, will have remedy against the corporation, as well as against those members whose debt has been paid.

With regard to the second, as both vendor and vendee must be presumed to know the obligations arising under the charter, the objected consequence will always be voluntary and anticipated; and, therefore, is of no weight. *Volenti non fit injuria.*

And in respect to the last objection, I repeat, the consequence is voluntary and foreseen, and will seldom arise, if common prudence is exercised in the making, and common punctuality in the payment, of the corporation contracts. If there are some inconveniences arising, they are the price paid for the charter, and the last objection seems more proper from the mouth of the creditors than from the debtors. They will be the principal sufferers, if inconvenience there is, from the subdivision of their demand.

The importance which it has been attempted to give to the supposed effects and consequences enumerated, to me appear to be factitious. They are the consequences which result from the common law when applied to every unincorporated manufacturing company; and will equally result in the case of a copartnership for any commercial purpose, if in their articles they adopt the same provisions which the Middletown Manufacturing Company here thought proper to do. This consideration decisively shows, that the argument of the defendants from the effects and consequences has no real weight.

In the State of Massachusetts, it has been found necessary to make an act relative to manufacturing corporations, attended, so far as I have been able to learn, with the same results which the defendants have so strongly deprecated, and yet the supreme court of that State have considered the law as founded in wisdom. In the case of *Marcy v. Clark* (17 Mass. Rep. 335), after a discussion of a preceding statute, it was said, by Parker, C. J., when delivering the opinion of the court, "It was reasonably thought, that it was the credit of those who were the members when the debt was incurred that the creditor trusted. It was, therefore, provided, by the statute of 1817, c. 163, that the bodies and estates of those who were members at the time any debt accrued, as well as of those who were members when the execution issued, should be liable. So, that even a *bona fide* transfer of shares will not relieve the member from any debt which accrued while he was a member of the corporation." Thus, by the respectable Legislature and learned

judiciary of a sister State, justice and public convenience had been supposed to demand a treble security for creditors, in the case of manufacturing corporations; that is, against the corporation; the members of it, at the origin of a debt; and the members existing at the enforcement of a claim.

Indeed, the defendants' claim seems to comprehend a principle until now unheard of. It demands a construction free from all possible disadvantage; inasmuch that the principles of the common law, founded, as they are, in private justice and public convenience, are too oppressive to be borne.

With the supposed inconveniences of the plaintiff's construction, let the consequences resulting from that of the defendants be contrasted. A proviso, which, when construed with reference to its subject-matter, is not of doubtful construction, is to be controlled by effects and consequences; and many of them, if not imaginary, at least infrequent, remote or of little inconvenience. The force of law and of voluntary contract, for such was the acceptance of the charter, must be eluded; the equitable demand of the creditors, frustrated; their security, if not wholly annulled, at least greatly impaired, by the denial of a remedy adequate to their just claims, and the substitution of another, which, it is fairly to be presumed, will be of little avail; and the proviso, if not annulled, rather alluring the community to an unreasonable confidence in a manufacturing corporation, than furnishing any important benefit.

In conclusion, I have no hesitation in expressing it as my clear opinion, that on the facts disclosed in this case the plaintiffs are entitled to judgment.

BRAINARD, J., was of the same opinion.

CHAPMAN, J.:—

This case depends on the construction which may be given to the words of the proviso contained in the act of incorporation, which are as follows:—"Provided also, and be it further enacted, that the persons and property of the members of said corporation shall, at all times, be liable for all debts due by said corporation."

The objects which the Legislature had in view in forming the incorporation in question, were evidently two-fold:—1. To give such powers to the corporation as would enable the members to manage their concerns, and carry on their business, with more facility, and more effectually, than could be done by an association of individuals unaided by incorporated powers; and 2. to give a security to such as should become creditors, which they would not have against a mere corporation, liable in its incorporate capacity only.

Keeping these two objects steadily in view, we shall be better able to ascertain what members are intended to be rendered liable at all times, for all debts due by said corporation, than by a resort to what is esteemed a liberal or strict construction of the words made

use of. If one construction would go to defeat, or render worse than useless, all the powers evidently intended to be conferred upon them for their benefit; and also, to put their creditors in a worse situation than they would be by a different one; that one which would be the most beneficial to both ought to be adopted, provided such construction stands equally well with the words of the proviso.

On the part of the plaintiffs, it is contended, that those members who were such at the time of the accruing of any debt against the company, whether payable on demand, or at a future time, are jointly liable, without reference to the solvency or insolvency of the corporation; and that this liability is not discharged, or at all affected, by ceasing to be members.

On the part of the defendants, it is contended, that those only are liable, who were members, when a legal demand was made, or in other words, when a suit was brought against the company.

The proviso, it is admitted, is in general terms, specifying no particular members, nor any particular debts, making no distinction between debts contracted before, at the time, or after they might become members.

The counsel for the plaintiffs have, however, admitted, that those members only were liable who were such at the time of the accruing of the debt; thus narrowing down the inquiry to their liability only; making an admission which could by no possibility injure them, since their suit was against them only. There are no words in the proviso rendering necessary such an admission; nor any words, even by implication, which designate such members as liable, rather than any other.

The words are general: — "The persons and property of the members shall, at all times, be liable, &c."

To have claimed that the members liable were those who were neither such at the time of contracting the debt, nor at the time the suit was brought, seems to have been, in the opinion of the counsel, to have taken a stand that neither law nor equity would support. On examination, however, I believe it will be found that those members who may happen to be such at the time any debt is contracted, are under no superior equitable obligations to the debts of the company. Indeed, if such a criterion should be resorted to, in order to ascertain what members the Legislature intended to throw the burden of paying the debts on to, I should be clearly of opinion, that they were the members who were actually such at the time payment of them was demanded.

In the first place, it is admitted, that the corporate property is liable to be taken and applied to the payment of the debts; and, in my opinion, until this fund fails, or is put beyond the reach of process, the members are liable neither in their persons nor private property. But even if, as is claimed, the creditors have their elec-

tion, either to proceed, in the first instance, against the corporation or the members of it, the argument is not materially weakened; since it is not claimed, that should the property of the corporation be taken, and applied to the payment of a debt which accrued before either of the persons were members, who were such at the time the action was brought, a right of action would thereby be given to such corporation to recover against those who were members, at the time the debt accrued. It would seem extraordinary that the Legislature should, by this proviso, have rendered those members, and those only, liable, who were such at the time the debt was contracted, and yet have provided no remedy to enable the corporation to reimburse themselves, when their corporate property is taken for the payment of such debts.

But further: suppose we should examine a little more particularly this supposed equity; since it is claimed that the proviso is to receive its construction from it. At the proper season, materials are purchased, on credit, sufficient to enable the corporation to carry on their concerns for a longer or shorter period; suppose a year. A., a member, immediately after transfers his interest to B., who is a member at the time a suit is brought to recover the price of such materials. If these are worked up, B. is entitled to his share of the profit of them; and if not, he, as a corporator, has an interest in them. A. has no more interest in it, than any other stranger. Should a profit be made B. shares in it. Should the manufactures derived from these materials be sold on credit, B. has an interest in it; or should they be sold for cash, as a corporator, he is entitled to his proportion. And yet A., it is claimed, is bound to pay the debt, though B. is much the most responsible man; for it will be perceived, that the argument does not proceed upon the ground that either the company or its members are insolvent, or at all unable to pay such debt. Such a construction would, in a case not unlikely to happen, defeat the creditor of his debt. The members, who are such at the bringing of the action, may all be responsible, and even the corporation abundantly solvent; yet the corporation property may not be within the reach of the process of law, and those who were members, at the time the debt was contracted, be entire bankrupts.

To give a rational construction to the proviso, the act of incorporation must be taken into consideration in connection with it.

It is evident, that the Legislature intended to create a permanent body, whose property should, at all times, be liable for the debts contracted by it. For this purpose, such corporation was made liable to be sued, and lest at any time this body should fail to pay its debts, the Legislature rendered liable that tangible body, which, at all times, must be appended to it, viz. the members.

Now, I repeat; the question is, what members? It is evident that the act contemplates the members of a fluctuating body; one that may be daily and even hourly changing, though the corpora-

tion, as such, is to remain permanent; but, still, this tangible body, though perpetually shifting, must be equally permanent with the corporation, since there must be stockholders so long as there is stock; and, of course, there must always be individuals to be called upon, in the case of a failure of the company to pay their debts.

A facility is also, by the act, given, to effectuate this change of members, by dispensing with the usual solemnities required in other cases. A mere transfer on the books will convey an interest in choses in action, personal property, and even real estate. This simple mode of conveyance divests a member of his whole interest; causes him to cease to be a member; and deprives him of all right thereafter to act or be heard in the management of the affairs of the company. And yet, if the plaintiffs' counsel are right, he is to all intents and purposes, in relation to those creditors, who became such while he was a member, a member still, though not as to any right to participate in the profits, but merely to share in the loss.

He becomes bound hand and foot, and is left wholly at the mercy of the corporation and its creditors. In vain he calls upon the creditors to secure their debts while corporate property remains in abundance; and equally vain is it for him to appeal to the justice of the members of the corporation. It is possible that the Legislature may have intended to produce such a state of things; but it never ought to be believed until they have expressed such an intention in the most unequivocal terms.

In giving a construction to a charter, containing a proviso expressed in such general terms, and where the intention of the Legislature is to be sought for, rather from the general object they had in view, than from the language they have used, an argument *ab inconvenienti* is not without its weight, though not admissible where the intention is clear.

It certainly could not have been the intention of the Legislature, by this proviso, so to shackle and embarrass the corporation as to render their charter worse than useless; and equally certain is it that they intended some advantages to the creditors, which they would not have had without the proviso.

I think a very slight examination will evince, that if the construction contended for by the plaintiffs' counsel should be adopted, the charter, which was intended to give the members some advantages over a private association, would be "their bane" without "an antidote." An establishment of this sort does its business, in part at least, on credit; and as by the charter the members, as well as the company, were made liable to be sued for the debts of the company, this was in the contemplation of the Legislature when the act was passed.

Was it the intention of the Legislature that a man should be "in jeopardy all his lifetime" if he should purchase a single share in the stock of this company? It is not unreasonable that he should

be liable while a member of the company; for then he has a control, in proportion to his interest, over their funds. He can point out to creditors corporate property, if any exists; or if he is compelled to pay the debts of the company, the law furnishes him a remedy either against the corporation, or his co-members. Not so with the member who has sold out. His power, as well as his relation with the corporation, has ceased; and nothing remains for him but to pay the debts contracted wholly for the benefit of others.

When a person becomes a member of a private association, he has a right to abandon it when he chooses; and what is of the highest importance, he has a right to apply the funds to the payment of its debts; and if he is compelled to pay them out of his own, he can call upon his copartners to contribute.

As the plaintiffs' counsel have throughout relied on the analogy supposed to exist between the corporation in question and a voluntary association, and as it is the basis of almost all their reasoning, they have a right to require, that their arguments derived from this source should be well considered, and if found incorrect, fairly refuted. It shall, therefore, be my business to show that no such analogy exists as will at all warrant the conclusions they have drawn.

1. The one is created by act of law; the other by act of the parties.

2. The rules, by which the one is governed; the amount of their capital; the mode of doing business; the kind and extent of it; the mode of transfer; in short, all their proceedings, are regulated by the charter, and by that every thing is put beyond the control of the members. The duration of its existence is without limitation. The members may, indeed, change; but the identical body remains, with the same powers, subject to the same rules, and incapable of the slightest alteration, without the aid of that power which gave it existence. The members may vote in the appointment of their agents; and here, as such, their agency ends.

I have already observed that a voluntary association depends on the act of the parties. So do all their proceedings in relation to the kind of business and mode of doing it. They may daily change and alter these, according to their free will and pleasure; and when they choose, may put an end to their existence as a company. Each of the copartners may dispose of the whole of the partnership property; may bind all, by a contract, in every thing relating to their business; and may put an end to the copartnership even against the will of the copartners. The death of one, or the going out of one, and the coming in of another, will have the same effect. Who ever can discern, in this view of the case, such an analogy as will warrant a decision founded on it, must see with other than legal eyes.

But it is said, if one partner sells out to a stranger who is admitted as a member of the firm, that notwithstanding such sale he is liable

to all the debts then due and owing from the copartnership. This is true; and this being admitted, it is confidently asked, why should not a corporator who has transferred his interest be in a like situation? I think that several decisive reasons may be given.

The copartnership, by the very act, is dissolved. But in the very case, the corporation remains entire; and the corporate property, thus transferred, is liable to be taken on any execution, in favor of the creditors of the corporation.

Is it so, with respect to the share of the copartner who sells out, to one who becomes afterwards a copartner? Certainly not. The copartner thus selling out remains liable, in his person and property; but the copartner who comes in is liable neither in his person nor property. The funds of the copartnership, so far as they belonged to the partner selling out (if done *bona fide*), become, at once, exonerated from all liability to be taken to satisfy the debts of the firm. The new partner retains, beyond all question, all the property he acquired by the purchase, and the vendor remains liable to all the debts of the copartnership. Really, could any thing be more unlike than the corporation in question and a voluntary association? In scarce a single point is there the least resemblance.

It may be amusing, and perhaps useful, to inquire into the consequences which would necessarily result from adopting the construction contended for by the plaintiffs' counsel; I mean, in respect to the creditors themselves.

An establishment of this kind must, by their agents, be continually engaged in purchasing the raw materials employing workmen to manufacture them into fabrics, which must be sold, to meet the expenditures of the corporation. In the mean time the stock is in market. It is daily, and even hourly, bought and sold. What purchaser of a single share could imagine that he should be liable to pay all the debts contracted by the corporation while he might remain a member?

But in respect to the creditors themselves; some persons may be employed by the month, some by the day; materials are to be delivered by parts; payment to be made at different periods. Now, in case of the insolvency of the corporation, to whom are these various creditors to look for payment? To those who were members at the time their debt accrued, say the plaintiffs. Who these are, may be partially ascertained from inspecting the books of the company; but to arrive at certainty on the subject, the time of day must be determined. Should the day-laborer include one in his suit who had transferred his interest before his day's work was completed, it would be fatal to him, or should he omit one, his suit must abate. Add to this, that instead of recovering his demand by a single suit, the suits must be as numerous as the transfers which have been made during the time of his employment. In short, there is no end to the difficulties and embarrassments which must attend any

attempt to chain so fluctuating a body, as the members must be, to one so fixed and permanent as a corporation.

One objection still remains to be encountered, viz. That if a member, by transferring his interest, exonerates himself from all personal liability, then the members may, at any time (in case the corporation becomes insolvent), defeat the claims of creditors, by transferring their interests to bankrupts.

Were this true, the argument derived from it would be indeed formidable. But no principle is better settled, than that a conveyance made with an intention to defeat a creditor is void. If then, the members dispose of their interest with such intentions, the creditors may treat them as members; and of course, they will remain liable, to the same extent that they would have been, had they made no such conveyance. *Vide Marcy v. Clark* (17 Mass. Rep. 330).

It was not to be expected that any cases would have been cited from the English books. None at all bearing upon the question can be found. No such being as the one under consideration ever existed there. This is a creature of our own manufacture, and must be governed by rules prescribed for it.

We have, however, in this State, certain corporations, which in my judgment bear some analogy to this; I mean towns, societies, etc. The creditors of a town may, on execution, take the property of any inhabitant (while such), whether the debt accrued during the time he might have been an inhabitant, or not. But the moment he ceases (by removal), to be an inhabitant, his liability ceases. In my view of the subject, the Legislature intended to form a corporation, in the present case, at least analogous to these. And what is the objection to this construction? The members may sell out to bankrupts; but if this is done fraudulently, as I have already observed, the stockholders are still liable. The great object which the Legislature had in view was, to have at all times a real body attached to the ideal one, which should be answerable for its debts. That this body should be a changeable one was contemplated by the act, as express provision is made for it; nor is it to be believed, that it was intended that no member could safely sell out, unless he should take a bond from the vendee to indemnify him from all the debts due and owing from the company. The creditor does not give credit to the stockholders, as such. They may be hourly changing. They in no sense of the word are debtors. Like the inhabitants of towns, they may be compelled to pay, while they remain members, not as debtors, but as guarantees. The corporation is the real debtor; and the members, while such, its surety.

A single case only, bearing directly on the point in question, has been cited, which, if considered as an authority, is decisive of this case. *Bond v. Appleton* (8 Mass. Rep. 472).

In that case, "the original stockholders, their successors and

assignees, were made jointly and severally liable, etc.;" but the court added, by construction, being such when a suit is brought; so entirely convinced were they, that the Legislature, though their words seem hardly open to construction, never could intend to create such a legal absurdity as such a corporation would be.

I am therefore of opinion that judgment be entered up for the defendants.

PETERS and BRISTOL, JJ., were of the same opinion.

Judgment to be rendered for the defendants.

CHESLEY v. PIERCE.

(32 N. H. 388. 1855.)

EASTMAN, J.:—

The act of incorporating the Contoocook Valley Railroad was passed June 24, 1848, and the grantees were made a corporation "with all the rights and privileges, liabilities and duties, by the laws of this State incident to railroad corporations."

By the Revised Statutes, chap. 146, § 1, it is provided that the stockholders of incorporated companies, thereafter incorporated, having for their object a dividend of profits, and the stockholders of corporations then existing whose charters were subject to amendment or repeal, "shall be personally holden to pay the debts and civil liabilities of such company hereafter contracted or incurred, in the same manner and to the same extent as though the stock were owned and the business transacted by the stockholders as unincorporated copartners;" subject, however, to exceptions and modifications thereafter provided for.

The exceptions and modifications spoken of require a previous demand to be made upon the company before suit against a stockholder, and the mode of proceeding is particularly set forth. There is no limitation, however, to the general liability of the stockholders to pay all the debts of the corporation, as set forth in the first section, if the proper steps are taken to charge them.

This first section of chap. 146, Revised Statutes, was in terms repealed by the Act of July 8, 1846, and also such other parts of the statutes then in force as might be inconsistent with that act. Chap. 321, Pamphlet Laws. And instead of this section the general provision was made, as follows: "All corporations, having for their object a dividend of profits among their stockholders, hereafter incorporated, or whose charters are subject by law to alteration, amendment, or repeal, shall be governed by the provisions and subject to the liabilities in this act contained; and the stockholders and officers thereof shall be personally liable for the debts and

civil liabilities of such corporations, in the following cases and not otherwise:

"1. They shall jointly and severally be liable for all debts and contracts of such corporations until the whole amount of the capital, fixed and limited by such corporation, shall have been paid in, and a certificate thereof shall have been made and recorded by the clerk of the town where such corporation has its place of business, or is situated."

Several other instances are also enumerated in which it is declared that they shall be liable; such as a reduction of the capital stock before the debts are paid; but they need not be stated, as they do not affect this case.

By the Revised Statutes, chap. 146, § 6, it is provided that every such company shall, within five days from the time of its being organized for the transaction of business, cause to be delivered to the town clerk of the town in which the company has its principal place of business, a list of the stockholders, and the shares owned by each; and the 7th section of the same chapter provides that from and after the time in which such list is required to be so left, no transfer of stock by any stockholder shall exonerate him from his personal responsibility "for the debts and liabilities of the company afterwards contracted or incurred, unless the same be in writing, and recorded in the office of the town clerk of the town in which such principal place of business is located."

These two sections of the Revised Statutes were repealed by the Act of July 10, 1846, (Pamphlet Laws, chap. 322); and instead thereof the provision, among others, was made, that the list of the stockholders should be filed with the town clerk in sixty days after the organization of the company and its preparation to transact business. It was also further provided, in the second section of the act, that any person whose name was on the list should be deemed to be a stockholder, until his name was stricken from the list; "provided, that any stockholder in any such corporation who shall sell and assign all his stock in the same, may immediately notify such town clerk in writing of the time when he sold and assigned such stock, and the names and places of residence of the persons to whom he sold; and in all such cases the stockholder so selling his stock shall be exonerated from all debts and liabilities of said corporation contracted after such sale and notice; and the persons purchasing such stock shall be liable for such debts and liabilities, contracted after such purchase and notice, in the same way and manner as the person selling such stock would have been if he had not sold."

Now, waiving the question whether assumpsit is the proper form of action to be brought on an instrument like the one in suit, and whether the company had the right to issue bonds or obligations in the manner in which this was issued (in regard to both of which questions we express no opinion); and admitting that the evidence

was competent to show the defendants to be stockholders at the time this action was commenced, still, a very important question arises, whether under the provisions of the statutes cited, the defendants can be charged?

This obligation was issued on the 3d day of May, 1849, and the plaintiff became the holder of it prior to 1850. The defendants, however, were neither of them stockholders before the 30th of April, 1850. Admitting that the defendant Pierce made a payment towards his shares as early as January, 1849, still the payments were not all made till April, 1850, and his certificate for stock was not issued till then. Sawyer made no payment till March 9, 1850, and his certificate was issued January 3, 1851.

We do not intend to say that a person may not be a stockholder in a corporation without having in his possession a certificate of his shares. If by his acts or words he makes what may amount to a proposition to become a stockholder, and pays for his stock, and the corporation accepts the money, such acts, independent of any provision in the charter upon the subject, might be sufficient for a jury to find a contract for membership between the individual and the corporation, by which he would become a stockholder without any formal vote of the corporation to that effect, and without any issuing of a certificate for shares. Or if he should subscribe for stock, and the corporation should by vote accept him as a member, this might be sufficient, without payment for the shares. *Chester Glass Co. v. Dewey* (16 Mass. 94). But here certificates were issued; to Pierce on the 30th of April, 1850, — on the day on which the last payment was made; and to Sawyer on the 3d day of January, 1851. It cannot be said that they were stockholders before those dates, for the evidence is that the payments for the stock were not all made till the day on which the certificates were issued; and there is nothing having a tendency to show them stockholders till that time. There was no action of the corporation accepting them as stockholders. They may have been subscribers for shares, but their shares were not paid for, and the corporation had not accepted the defendants as stockholders until the certificates were issued. And we do not understand that the plaintiff makes any particular question upon this point.

This distinct question, then, is presented: Can the defendants be charged for a debt incurred before they became stockholders, notwithstanding they may have been stockholders at the time the suit was brought? This question has been considered upon statutory provisions somewhat similar to ours in several of the States.

The general statute of Massachusetts upon manufacturing corporations contains a section substantially the same as the first section of our Act of July 8, 1846. And the Supreme Court of that State, in the case of *Curtis v. Harlow* (12 Met. 3), have decided that the provisions of the section extend to those who are members when the

liability of the company is sought to be enforced, and is not confined to those who were members when the debts were contracted.

This decision is placed upon the ground that such is the meaning of the language of the statute. Dewey, J., who delivered the opinion, says, that the language of the statute necessarily embraces all persons who are members at the time when the liability is to be enforced; that those who became stockholders after the date of the contract are as fully members of the company as the earlier associates; that the term "members" must be held to include all the actual stockholders, and that with their membership they take all the benefits and the responsibilities which attach to that relation. Whether those who are stockholders at the time the debt is contracted, but cease to be members before the commencement of the suit, are liable, is not decided by that case. In regard to that the court express no opinion, but say it may be that both are liable.

The language of the Massachusetts statute is somewhat stronger than ours; the phraseology is, "all the members" of every manufacturing company shall be liable, etc.; and from an examination of their statute we do not find any provision like that contained in the second section of our Act of July 10, 1846 (above cited), providing that a stockholder who shall sell his shares and notify the town clerk having the list shall be exonerated from all debts contracted after such sale and notice, and that the purchaser shall be liable for the debts contracted after such purchase.

In Connecticut the court have been divided upon the question; a majority, however, deciding the point in the same way as in *Curtis v. Harlow*, in Massachusetts. See *Southmayd v. Russ* (3 Conn. 54); *Middletown Bank v. Magill* (5 Conn. 28); *Deming v. Bull* (10 Id. 409).

In New York, where the provision of the act was, that "the stockholders of said corporation shall be jointly and severally personally liable for the payment of all debts or demands contracted by the said corporation," etc., the Supreme Court, in the case of *Moss v. Oakley* (2 Hill, 265), held that the suit could be brought only against such as were stockholders when the debt was contracted, and not those who become so afterwards.

In delivering the opinion of the court, Bronson, J., says that the statute is capable of either construction without doing any violence to the language, but he thinks that the construction given by the court will best answer the end which the Legislature had in view.

The phraseology of this statute is almost identical with ours; the words, "jointly and severally," however, being introduced into the New York statute, which are not embraced in ours.

This same statute was afterwards considered in the Court of Errors of New York, in the case of *McCullough v. Moss* (5 Hill, 567). Several opinions were delivered by honorable senators, but they were

not agreed in the construction to be put upon the statute. Some held that it applied to those only who were members when the suit was commenced, while others advanced the same views as those entertained by the Supreme Court in the case of *Moss v. Oakley*. There were other points in the case, and the decision did not turn upon this point alone.

In *Allen v. Sewall* (2 Wendell, 327), the words of the statute were that "the members of the company shall be liable individually," and Savage, C. J., said, "It was the intention of the Legislature to put the defendants [the stockholders] upon the same footing as to the liability as if they had not been incorporated. Individual liability in the act must be understood in contradistinction to corporate liability; and the defendants must, therefore, be held responsible to the same extent, and in the same manner, as if there was no act of incorporation."

These are the only cases that we have met with that bear upon the point, and it will be seen that, so far as they go, the question is not settled. We are, therefore, brought to give such construction to the statute, independent of authority, as we think the Legislature intended and the language of the act requires.

It will be observed that the first section of the Revised Statutes, which we have quoted, made the stockholders personally liable "in the same manner, and to the same extent, as though the stock were owned and the business transacted by the stockholders as unincorporated copartners." Such is the language of the statute; that is, their liabilities were to be precisely the same as though the business were carried on by a partnership instead of a corporation; subject, of course, to the other provisions of the act, that the creditors should demand payment of the corporation before suit against the individual stockholders. Standing, then, under that statute in the position of partners, stockholders would be liable for the payment of such debts and such only as should be contracted while members of the corporation. Such is the general rule in regard to partnerships. A person is not individually liable for the debts of a firm contracted before he becomes a member of it, nor for those contracted after he leaves it, unless there be some agreement to that effect when he unites with or leaves the partnership. We state this as the general principle, and do not of course allude to the particular powers of partners in settling the affairs of a partnership after dissolution.

We entertain no doubt that under the Revised Statutes stockholders could be made liable in their individual capacity only as copartners; that consequently they would be liable for those debts only which were contracted while members of the corporation; and that were we to decide this suit under that statute, judgment would have to be entered for the defendants.

The question then arises, did the Act of July 8, 1846, change the

law in this respect? Was it the intention of the Legislature at that time to make the personal liability of stockholders greater than that of copartners, and greater than it had been theretofore? We think not; and the whole scope of the act appears to us to show clearly that the intention was to limit instead of extending that liability. Hence the repeal of the action fixing the general liability, and the enactment of the provisions particularizing the defaults which should make the stockholders personally liable; one of which appears in this case, viz.: that the debt was contracted before all the stock was paid in.

It is true, that the Act of 1846 does not in terms specify the manner and extent of the liability, as is done by the Revised Statutes; but it is also true that there is nothing in the language of the act requiring a construction that shall impose a greater liability than that which attaches to partners. The language of the section is, that "the stockholders and officers shall be personally liable for the debts and civil liabilities of the corporation." Stockholders are spoken of in connection with the contracting of the debts; and such as were then stockholders, when the debts were contracted, would seem to be those intended, and not those who might become members afterwards. At all events there is nothing in the phraseology requiring a different construction.

And this construction is, we think, the one best calculated to do justice between the parties. He who purchases stock and comes into a corporation after it has been engaged in business, may often be deceived in relation to the number and magnitude of its debts, but while he is a stockholder he can know something about the extent of the obligations contracted by the company, and is not wholly without the means of exerting an influence over those who manage its concerns. And as to those who deal with the corporation, they bestow their labor or part with their money or property on the credit of the corporation, and those who are known to be stockholders and so far as the responsibility of the stockholders is to be considered, it might oftentimes be ruinous to a creditor to turn him over to persons with whom he did not deal, and who may have come into the corporation at a subsequent period; they may be much less able to respond to creditors than were those who owned the stock at the time the debt was contracted. *Moss v. Oakley* (2 Hill, 270).

The stockholders are made guarantors for the payment of the debts of the corporation; not guarantors in the technical sense of the term, but they are liable in the cases stated in the act, when the corporation shall fail to make the payments. And what principle can be more just or equitable than that which makes a stockholder liable for those debts, and those only, which are contracted while he is a member of the association, participating in its business and transactions, and sharing in its advantages and profits? And why should he be liable for debts contracted before he has become a

member, when he had no connection with the company, or for those incurred after he has parted with his stock and honestly left the association? We think that the justice of the matter requires that his liability should be co-extensive with his membership; that so long as he is a stockholder he should be liable for the debts then contracted, and not for those incurred either before he joined the company or after he left it; and that such was the intention of the Legislature that passed the act, and the proper construction to be put upon it.

And we are confirmed in the opinion that such was the intention of the Legislature, by recurring to the Act of July, 10, 1846, a portion of which we have quoted, which provides that upon a sale of stock and notice to the town clerk where the list is filed, the stockholder so selling his stock shall be exonerated from all debts and liabilities of the corporation contracted after such sale and notice; and that the purchaser shall be liable for such debts as may be contracted after such purchase.

This act would seem to indicate quite clearly the intention of the Legislature to place the stockholders in this respect on the ground of partners.

This list, which is filed with the town clerk, is for the benefit of those who deal with the company. They may resort to it to see who are the stockholders, that they may the better know whether to trust the corporation or not; and it is the names that they find there to which they give credit, and not those that may have been there a year before, or may be there a year after.

And by the express terms of the act, also, it is those whose names are then there who are liable for debts then contracted, and not for debts contracted thereafter; and those who subsequently become members are not liable for the debts previously contracted.

As the decision of this point in the case goes to the foundation of the plaintiff's right of recovery, we have found it unnecessary to examine the other questions.

According to the agreement of the parties, as expressed, in the order of transfer, there must be

Judgment for the defendants.

In re JOINT STOCK DISCOUNT COMPANY.

MANN'S CASE.

(*L. R. 3 Ch. App. 459 n. 1867.*)

In May, 1865, 200 shares in the above-named company were, by the directions of Parkinson, a stockbroker of Halifax, to whom they belonged, transferred to and registered in the name of Mann, to secure an advance to Parkinson.

Parkinson repaid the advance in August, 1865; and by his direction the shares were transferred by Mann to one Simms, a nominee of Parkinson, and a clerk of his London agent. The 8th clause of the company's articles of association provided that the instrument of transfer of any share in the company should be executed both by the transferor and the transferee, and the transferor should be deemed to remain the proprietor of such share until the name of the transferee was entered in the register book in respect thereof. The 9th clause contained a form of transfer, and the 10th clause provided that the company might decline to register any transfer of shares made by any member who was indebted to the company, or in cases where the directors considered the transferee to be an irresponsible person, or that the transfer was made for purposes not conducive to the interests of the company.

The deed of transfer was duly executed by Simms, the transferee, as well as by Mann, the transferor, and the transfer was accepted by the company, and duly registered in their books. Simms, however, was then an infant of the age of eighteen, but this fact was not known either by Mann or the company. Simms afterwards transferred 180 of these shares to other persons, and when the company was ordered to be wound up, in March, 1866, the remaining twenty shares were still standing in his name. The official liquidator placed Simms on the list of contributories in respect of these shares, but Simms having proved his infancy at the time of the transfer to him, the Master of the Rolls, on a summons taken out by the liquidator, and adjourned into Court, ordered that the register of shareholders should be amended by striking out the name of Simms, and placing that of Mann thereon, and that Mann's name should be placed on the list of contributories in respect of the twenty shares.

From this order Mann now appealed.

It appeared that Mann had no notice of any claim upon him until the 15th of February, 1867, and that Parkinson had become bankrupt and absconded.

Mr. Cotton, Q. C., and Mr. W. F. Robinson, for the appellant: It was the duty of the directors of this company to ascertain that the proposed transferee was a proper and competent person. They accepted Simms as transferee, and registered the transfer to him; they are, therefore, now estopped from raising an objection which they ought to have made before they passed the transfer. Mann knew nothing of the infancy of Simms; had he done so the transfer might have been held fraudulent, and Mann still a contributory. *Reid's Case* (24 Beav. 318). A minor may be a shareholder, and even vote, under the 79th section of the Act, 8 & 9 Vict. c. 16; and a conveyance to an infant is not void, but only voidable upon his coming of age. It has been, moreover, held that an infant can bind himself, and that his acceptance amounts to a statement that he is of

age. *Stikeman v. Dawson* (1 De G. & Sm. 90; 11 Jur. 214). As the articles of association require the confirmation and ratification by the company of every transfer, the company, in fact, become parties to a transfer. They have acted on this transfer, and liabilities have been incurred by them after Mann's name had ceased to be on the register.

Locock Webb (Jessel, Q. C., with him), for the official liquidator, was not called upon.

SIR JOHN ROLT, L. J.:—

In this case the infant Simms was rightly removed from the register of shareholders, not by his election on attaining his majority, but by an order of the Court, on the ground that the transfer to him, made during his minority, was a mere nullity. Then it would follow, at first sight, that the transfer by Mann being a nullity, Mann still remained a shareholder. It is, however, contended that there is a duty thrown upon the directors to inquire whether a proposed transferee is a proper and competent person to be a transferee. Not merely that they had a power to reject an improper person, but that it was their duty to do so, and that they neglected this duty. Moreover, that the company had carried on business, and incurred liabilities, after Mann had ceased to be on the register of shareholders, and that the company are consequently estopped from saying that this transfer was a nullity.

I think that this argument cannot be sustained, and the answer to the following question shows that this is so. Was there any greater or prior duty cast upon the company of inquiring whether Mann's transferee was a proper person, than upon Mann, the transferor himself, of so doing? Both Mann and the company took it as a matter of course that the transferee was a proper person. The nomination by Parkinson of Simms as the transferee amounted to a representation that Simms was a proper person; Mann accepts that representation, passes it on to the company, and they act on the assumption that Simms was a proper person. Surely, the first duty of ascertaining that his transferee was a proper person was cast upon Mann himself. Therefore, I think that Mann still remained a shareholder, and that this appeal must be dismissed with costs.

In re MEXICAN AND SOUTH AMERICAN COMPANY.
HYAM'S CASE.

(1 De Gex, F. & J. 75. 1859.)

THIS was an appeal by the Messrs. Hyam from an order of the Master of the Rolls retaining their names on the list of contributors of the Mexican and South American Company. The particulars as to the character and objects of the company, and the nature

of its shares, will be found in the report of Grisewood and Smith's Case (4 De G. & J. 544). The shares were transferable by delivery of the scrip certificates. The order for winding up the company was made on the 24th of November, 1857. The Messrs. Hyam had bought the scrip certificates of their shares in 1856, and continued the holders of them till November, 1857. In the early part of that month they placed them in the hands of a broker for sale, but shortly afterwards informed him that they had found a purchaser, and introduced to him a Mr. Hodson who purchased the shares at 2s. 6d. per share, and the certificates were handed over to him. This took place about the 10th of November, at a time when the company was known to be in a state of great embarrassment, though its shares were still quoted in the market, and had a market price of 2s. 6d. per share. Mr. Hodson, who was a clerk in the employ of the Messrs. Hyam, paid the purchase-money by delivering some Ottoman Bank shares standing in his own name to the same broker to be sold. The broker sold them, retained the purchase-money of the Mexican shares out of the proceeds, and paid the residue to Mr. Hodson. The Master of the Rolls having decided that Messrs. Hyam must be on the list of contributories, the present appeal was brought.

The Attorney-General (Sir R. Bethell), Mr. Selwyn, and Mr. Joseph Brown, for the appellants:—The appellants were entitled to dispose of their shares to whom they would, and though their motive confessedly was to escape from liability, the transfer relieves them from liability, provided it was a *bona fide* out-and-out transfer, which there is no ground for disputing that it was. The case is on all fours with *De Pass's Case* (4 De G. & J. 544 (Am. ed.) note 3), and *Jessop's Case* (2 De G. & J. 638), is strongly in our favor. There is no doubt that the company was in a bad state, but its shares were quoted in the market, and business in them was done on the Stock Exchange, after the date of this transfer.

It is true that Hodson was a man of straw, but that is of no importance. In a company whose shares are transferable by delivery of the certificates, there is no such mutual confidence or privity of contract as to make it unlawful to transfer to a pauper, any more than it is unlawful for an assignee of a lease to do so.

Counsel for the official manager applied for a further examination of witnesses, stating that there had lately come to the knowledge of the official manager facts materially bearing on the case. The appeal accordingly stood over till the 23d of November, when it was admitted by the appellants' counsel that the Ottoman Bank shares, though standing in the name of Mr. Hodson, were in reality the property of Messrs. Hyam.

Mr. Roundell Palmer, Mr. Bovill, and Mr. Roxburgh, for the official manager:—We do not dispute that a *bona fide* out-and-out sale and transfer of these shares would, though made for the sake of escaping liability, have been effectual for that purpose, but we

say that this transaction was a mere pretence without any element of *bona fides*, a mere device to enable Messrs. Hyam to escape from liability by appearing not to be shareholders.

Mr. Selwyn, in reply.—The case merely comes to this, that Messrs. Hyam, having a right to do anything they pleased with the shares in a direct way, have adopted an indirect one. That the Ottoman Bank shares belonged to Messrs. Hyam, and that these Mexican shares were therefore in fact purchased by Hodson with Messrs. Hyam's own money makes him a trustee for them; but he is not, therefore, any the less the holder of the shares, and the only person liable to contribute in respect of them. On the transfer being made, the connection between Messrs. Hyam and the company ceased; the trust is a matter with which the company has nothing to do.

THE LORD CHANCELLOR: —

The only question we have to determine is, whether these two gentlemen ought to remain on the list of contributories of this company. I am of opinion that His Honor the Master of the Rolls did right in refusing to remove them from that list. According to the decisions of this Court, to which I most respectfully bow, if it had been proved that they had parted with all interest in these shares, although it was for the express purpose of getting rid of their liability, and although they knew the shares were of no value, and although they knew that the transferee was a man of straw, they would have been absolved from liability and entitled to have their names removed from the list of contributories. See *Ex parte Parker* (L. R. 2 Ch. Ap. 685), *Weston's Case* (L. R. 6 Eq. 238; s. c. L. R. 4 Ch. Ap. 20). I confess that if those cases had come before me, I should have hesitated before I concurred in the decisions, because I think there might have been a considerable difference drawn between the case of an assignee of a lease assigning the lease to a man of straw, and a shareholder who has become a partner with others, and who has incurred a joint liability with them, assigning his shares at a time when the property has ceased to be of any value, and with the sole object of throwing the liability entirely on his co-partners. But I again say, I most respectfully bow to the decisions of this Court. According to those decisions, it is incumbent upon a shareholder to prove that he has actually parted with all interest in the shares. That onus rests upon him. His Honor the Master of the Rolls was not satisfied with the evidence produced before him to show that the appellants in this case had actually parted with their interest. I think that the evidence now before us clearly demonstrates that they have not parted with their interest; that it was a mere fable they were acting; that they intended all that passed to have no operation whatever as between themselves and the pretended transferee. See *Bradley v. Hale* (8 Allen, 59); *Cox v. Jackson* (6 Allen, 108). The questions that have been suggested about whether the liability to be placed on the list of contributories rests

upon a trustee or upon his *cestui que trust* do not arise here, for the relation of *cestui que trust* and trustee was never established between these parties. It was a mere fable they were acting, not intended to have any real operation; and it is quite clear to me that this was a contrivance on the part of these two gentlemen for the purpose of enabling them to get rid of their liability, if there should be liability cast upon them by reason of this being a losing concern, but, if by some unforeseen possibility an advantage should arise, to claim the benefit that might be claimed from their still being actually shareholders in the company. The whole examination proves that. Had they put their defence in this shape, that the transfer was a transfer to a man of straw, and that they knew it to be so, it would have had a much better chance of success than in the shape it has assumed, the fictitious shape of an ordinary commercial transaction, — a sale of what was valuable, and was understood to be valuable both by the transferors and the transferee. The false color given to the transaction is conclusive to my mind to show that it was a mere sham, and was not intended to have any actual operation; see *Bradley v. Hale* (8 Allen, 59); *Cox v. Jackson* (6 Allen, 108); therefore I consider that these two gentlemen are to be adjudged as still shareholders in this company, and that they were properly placed on the list of contributories. As to the extent of their liability as contributories, or their privileges as contributories, we are not at all called upon to give an opinion.

THE LORD JUSTICE KNIGHT BRUCE: —

The transaction in question is clearly one of fraud and simulation. Without seeing at present any reason from dissenting from either of the decisions of the Lords Justices to which allusion has been particularly made in the argument, I think the order of the Master of the Rolls right. I do not consider that it prejudices, or that our order will prejudice, any right that Mr. Selwyn's clients may have to apply in respect of the call for debts or otherwise.

THE LORD JUSTICE TURNER: —

The Messrs. Hyam were undoubtedly the owners of the shares up to the 10th of November. The question is, whether they have discharged themselves from that ownership. I do not mean to intimate now any doubt upon the question, whether they could have discharged themselves from that ownership, by making an out-and-out transfer of the shares. The opinion of my learned brother and myself has been already given on that point, and I do not, as at present advised, entertain any doubt upon the matter. But that they could make a mere nominal transfer of the shares, in trust for themselves, I beg leave altogether to dispute. The sole argument in the present case is, that Hodson was to be a trustee for the Hyams; but that is a trust which, upon the facts of this case, if created at all, was created for the fraudulent purpose of covering the real ownership, and is not a trust which this Court could in any

way recognize or act upon. It is said that they might have assigned to a beggar. I assume that they might; but I very much doubt, subject to any further argument which could be advanced upon this subject, whether they could create a beggar a trustee for themselves, as between them and the other partners in this concern. It is clear that the intent in the present case was to cover the real ownership by the creation of a fraudulent trust. I am of opinion that the decision of the Master of the Rolls is in all respects right; and this appeal must be dismissed, and, as I think, be dismissed with costs, including those of the creditors' representative.

NATIONAL BANK *v.* CASE.

(99 *U. S.* 628. 1878.)

APPEAL from the Circuit Court of the United States for the District of Louisiana.

This is a bill brought by Frank F. Case, receiver of the Crescent City National Bank of New Orleans, against the stockholders of that institution, to pay him seventy per cent of the par value of the stock owned by them severally at the time when their respective liabilities were fixed by its insolvency, without regard to any pretended transfers of such stock as they may have attempted to make after the insolvency occurred. As to some of the defendants the bill was dismissed; as to others, a decree was rendered conformably to the prayer of the bill, and a writ of execution awarded against them and their property to enforce the payment of the sums adjudged to be due by them respectively. Among the defendants against whom the decree was rendered was the Germania National Bank of New Orleans, Alcus, Scherck, & Autey, The Crescent Mutual Insurance Company, and Benjamin J. West. They thereupon appealed here.

MR. JUSTICE STRONG delivered the opinion of the court:—

The Crescent City National Bank of New Orleans was organized under the national banking law in 1871. On the 13th of February, 1873, its London correspondents failed, and the bank lost heavily by the failure,—nearly the entire amount of its capital. This loss was almost immediately known in the community where the institution was located, and necessarily affected its credit. On the 14th of March, 1873, payment of checks drawn upon it by its depositors was suspended, and on the 17th of the same month its circulating notes went to protest.

In reference to the alleged ownership by the Germania Bank (one of the appellants) of shares in the Crescent City Bank, the facts appear to be as follows: On the fourteenth day of December, 1872, it loaned to Phelps, McCullough, & Co. \$14,000 on a note of the

firm dated Dec. 7, 1872, payable in ninety days, and to secure the payment of the loan the borrowers pledged to the bank one hundred shares of the stock of the Crescent City Bank, with power, on non-payment of the note, to dispose of the stock for cash, at public or private sale, without recourse to legal proceedings, and to this end to make transfers on the books of the corporation whose stock it was. At the same time a power of attorney was given to Mr. Roehl, empowering him to transfer the stock to the Germania Bank, of which he was cashier. The note fell due on the 10th of March, 1873, and was not paid, and on that day a transfer of the one hundred shares to the Germania Bank was made on the transfer books of the Crescent City Bank. The Germania then caused seventy-six of the shares to be transferred to William A. Waldo, one of its clerks, and on the next day transferred to him the remainder. It has ever since stood in his name. Waldo acquired by the transfer no beneficial interest in the stock, and there was an understanding between him and the officers of the bank that he should retransfer it at their request. The cashier has testified, in answer to the question, "Was not the transfer made (to Waldo) with the view to avoid the liability under the National Bank Act in case of suspension of the Crescent City Bank?" that it was not exactly in that way. "We simply transferred," says he, "because we are not in the habit of holding any bank stock. We did not want to have any bank stock in our name. That was the object." When further asked whether he was well aware of the fact that the stockholders of national banks were liable to contribute to the payment of their debts in case of insolvency he replied in the affirmative. When asked whether he did not have that in contemplation at the time of this transfer, he answered, "That may be one of the reasons why we did not want to own any stock." And when further asked, "Was not that one of the principal motives of this transfer to Waldo?" his reply was, "Yes."

From this testimony, as well as from other in the record, it is evident that Waldo held the stock as a cover for the Germania Bank; that notwithstanding the transfer to him, it remained subject to the bank's control, and that the transfer to him was made to evade the liability of the true owners. It was not a sale. The bank continued after it was made a pledgee with the legal title in itself or in its representative, and Phelps, McCullough, & Co., were no longer the owners.

Such being the facts of the case, there can be no serious controversy respecting the principles of law applicable to them. It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman v. Upton*, (96 U. S. 328); and like decisions abound in the

English courts, and in numerous American cases, to some of which we refer: *Adderly v. Storm* (6 Hill (N. Y.), 624), *Roosevelt v. Brown* (11 N. Y. 148), *Holyoke Bank v. Burnham* (11 Cush. (Mass.) 183), *Magruder v. Colston* (44 Md. 349), *Crease v. Babcock* (10 Metc. (Mass.) 525), *Wheelock v. Kost* (77 Ill. 296), *Empire City Bank* (18 N. Y. 199), *Hale v. Walker* (31 Iowa, 344). For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder. This subject is well treated in Mr. Thompson's recently published work on "The Liability of Stockholders," where may be found not only a full collection of authorities, but a careful analysis of what the authorities contain. (*Vide* c. 13.)

When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the bank became subject to the liabilities of a stockholder, and the liability accrued the instant the transfer was made. At that instant the liability of Phelps, McCullough, & Co. ceased. We have, then, only to inquire whether the bank succeeded in throwing off that liability by its transfer to its clerk, Waldo. It certainly did not thereby divest itself of its substantial ownership. It is not every transfer that releases a stockholder from his responsibility as such. While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares, and thus disconnect themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers, if they are made (as it is called) "out and out"; that is, completely, so as to divest the transferor of all interest in the stock. But even in them it is held that if the transfer is merely colorable, or, as sometimes coarsely denominated, a sham,—if, in fact, the transferee is a mere tool or nominee of the transferor, so that, as between themselves, there has been no real transfer, "but in the event of the company becoming prosperous the transferor would become interested in the profits, the transfer will be held for nought, and the transferor will be put upon the list of contributories." *William's Case* (Law Rep. 9 Eq. 225, note), where the transfer was, as in the present case, made to a clerk of the transferor without consideration; *Payne's Case* (id. 223), *Kintrea's Case* (Law Rep. 5 Ch. 95).

See also Lindley on Partnership (2d ed.), p. 1352; *Chinnock's Case* (1 Johns. (Eng.) Ch. 714), *Hyam's Case* (1 De G., F. & J. 75), *Budd's Case* (3 id. 296). The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: "A transfer of shares in a failing corporation, made by the transferor with the purpose of escaping his liability as a shareholder to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferor and the transferee it was out and out." *Nathan v. Whitlock* (9 Paige (N. Y.), 152), *McLaren v. Franciscus* (43 Mo. 452), *Marcy v. Clark* (17 Mass. 329), *Johnson v. Laflin*, by Dillon, J. (6 Cent. Law Jour. 131).

The case in hand does not need the application of so rigorous a doctrine. While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania Bank knew it, and made the transfer to escape responsibility, it establishes much more. The transfer was not an out and out transfer. The stock remained the property of the transferor. Waldo was bound to retransfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank. No case holds that such a transfer relieves the transferor from his liability as a stockholder. We are, therefore, compelled to rule that the decree of the Circuit Court against the Germania Bank was correct. Its case, no doubt, is a hard one; but it is not in our power to give relief, without a sacrifice of the well-established rules of law and equity both in this country and in England.

There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the National Banking Act that prohibits it. But if there were, the lender could not set up its own violation of law to escape the responsibility resulting from its illegal action.

In support of the other appeals which were taken from the decree of the court below, no argument has been submitted, and they require only brief remarks.

Alcus, Scherck, & Autey in their first answer to the bill, after setting forth several matters perfectly immaterial, admit that they were at one time the owners of seventy shares of the stock of the Crescent City National Bank, but aver that on the [blank] day of [blank], 1873, they sold them all to one Julius Fox, a white person, about twenty-one years old, and a clerk by occupation; that the price paid to them by Fox for the stock was five dollars, and that they never offered to Fox any money or other valuable consideration or promise to induce him to accept the stock. The utter worthless-

ness of this as a defence sufficiently appears in what we have said respecting the appeal of the Germania Bank. Subsequently what is called a supplemental and amended answer was filed, quite inconsistent with the one first made. It admits the ownership of the stock by the respondents at the time of the bank's insolvency and suspension, and merely denies any unlawful confederacy. That no defence was shown by this supplemental answer we need spend no time to prove.

The only material averment in the answer of the Crescent Mutual Insurance Company was, in substance, that they had owned shares of the stock of the Crescent City Bank before it became a national bank, and that though the State bank had become a national bank with their consent, and they had received dividends, they had not received new certificates. The stock ledgers of the bank, however, show that one hundred and thirty shares stood in their name when the bank failed, and, therefore, taking their averment to be true, it is impossible to find any reason why they are not subject to the liabilities of stockholders.

The appeal of Benjamin J. West is equally without merit. It was admitted by his answer and proved by his own testimony that on the 13th of March, 1873, the day before the bank ceased paying its depositors, he was the owner of fifty-eight shares of its stock. On that day he transferred it to one Vincent, whom he describes as a white man, about thirty-five years old, a salesman by trade, for the price of about ten dollars a share. Nothing more than the testimony of Mr. West himself is needed to show that this is what is called in the English books a sham sale, made to conceal his liability. Vincent was West's clerk at the time, and, so far as it appears, without any pecuniary responsibility. No certificate of the stock was issued to him. He paid nothing at the time of the alleged transfer, and never has paid anything since. He gave no note or other written acknowledgment of indebtedness and West continued to pay his salary as a clerk six or eight months after the transfer, without deducting anything for the price of the stock. Indeed, the price of the stock was never charged against Vincent in West's books. Add to this the fact plainly visible in his testimony, that the alleged transfer was made when Mr. West had become alarmed about the condition of the bank, and nothing more is needed to show that it was inoperative, as against the creditors of the bank, according to the doctrine of the cases hereinbefore cited.

There are some other averments in the answer of the appellants of which it is hardly necessary to say anything. Former decisions of this court have ruled that the determination of the Comptroller of the Currency and his order to the receiver are conclusive of the extent to which the liability of stockholders of insolvent banks may be enforced in suits against such stockholders.

Decree affirmed.

NATHAN v. WHITLOCK.

(3 Edwards' Ch. 215, 1838.)

On the third of April, 1824, the Mohawk Insurance Company was incorporated. Its capital was to be \$500,000, divided into shares of twenty dollars each. By its act of incorporation all the capital was to be subscribed for and paid in before the company could proceed. It was to act through directors (fourteen), and a majority was to make a quorum. Among the persons named in the act as first directors were the defendant Whitlock, and also John D. Brown.

When the directors first met they passed a resolution to reserve a majority of the stock for themselves, while the books of subscription for the residue were to be opened under the direction of a committee of the board.

In order to keep a control the directors resolved, as to the shares taken by themselves, that the amount of them should be considered as loaned at seven per cent interest, or, in case a director paid ten per cent towards his stock, the residue of the par value was to be loaned to him at six per cent interest; and no director was to sell other than to a codirector, and he should be allowed the actual value to be ascertained from the books.

Afterwards the directors fixed the interest on the directors' stock notes at six per cent.

Thirteen directors (one having resigned) subscribed each for 1,042 shares.

The directors gave notice that the company would go into operation on the first day of May, 1824, and that any stock not subscribed for would be assumed by the directors.

The defendant, Whitlock, gave to the Mohawk Insurance Company his promissory note for the sum of \$20,840, payable on demand, and bearing interest at six per cent; and he hypothecated his 1,042 shares of stock to the company to secure the payment of the note.

During the month of June, 1825, the Mohawk Insurance Company had insured a ship for J. Webb & Co., to the amount of \$19,000. She became a total loss; and the company being sued, a judgment was obtained against them for upwards of \$23,000, including interest and costs. By this and other losses the company became impaired in its capital.

John D. Brown was, at the time, the president of the company; and in the month of April, 1826, the defendant Whitlock (and he was still a director) agreed with Brown to sell him his stock and get up his stock note; and Whitlock was to give him good paper to the amount of \$6,000. This agreement was perfected on the fourteenth

day of the same April, but it did not take place with any concurrence of the board of directors. Brown had his note substituted for a similar amount (\$20,840), and hypothecated the stock which had been Whitlock's for its payment. And by way of consideration for this arrangement, Whitlock gave him two promissory notes, one for \$1,500, and the other for \$4,500.

The note of Brown, which had been substituted, was never paid, but Whitlock's promissory note for \$4,500 fell into the hands of some of the directors; and when it became due it was paid.

The present complainant became the receiver of the Mohawk Insurance Company; and he filed the bill in this suit to obtain satisfaction from the said Whitlock, of his stock note which had been given up to him by Brown under the arrangement aforesaid.

THE VICE-CHANCELLOR. —

After carefully considering this case in all its bearings and upon all the points that have been made, I cannot bring my mind to any other conclusion than that the defendant is liable and bound to make good the stock which he subscribed for in the company on its organization, and for which he gave his note in the sum of \$20,840. Those who dealt with the company and became its creditors had a right to rely upon the good faith of the directors, of whom the defendant was one, that the requisition of the third section of their charter was complied with, that the whole capital of \$500,000 was subscribed and actually paid before the company commenced business. The directors, indeed, advertised and announced it as a fact, and upon that ground solicited business and invited public confidence. Whatever coloring may be given to the manner of subscribing and paying for the stock, it is very manifest that the directors did not pay for the stock and then take back the money by way of loan from the company; but gave their notes in payment of the stock and called them stock notes, and then pledged the shares by way of security to the company for the notes. This mode of forming a capital stock, upon the mere personal responsibility of individuals, without any other security or basis, was found to be so fallacious and deceptive that in the year 1825 it was expressly forbidden by legislative enactment (see Act of April 21, 1825). Indeed, the propriety of such a law is strongly exemplified in the consequences which resulted to this company in about two years after its commencement from not having had its capital paid in. If the subscribers to the stock are permitted to go without paying, or securing the payment of their stock notes by something more than an hypothecation of the stock itself, it amounts not only to a breach of trust on the part of the directors, but to a fraud upon the community, in holding up an empty, hollow concern, instead of a solid and durable one.

This company, during its existence, had very little more than an exterior, — within it was almost vacuity. The directors (fourteen in number) had resolved to take a majority of the stock, and they

accordingly took to the amount of \$280,000 or thereabouts, giving their notes for \$20,840 each on interest; and they resolved further that if any director determined to withdraw or sell his stock, he should sell it to the remaining directors in preference to any others. Their motive in this was quite obvious. It was to keep the control of the company in their own hands, — to prevent the power over the notes they had given and over the stock they held from departing from them. In the progress of their business during the first two years (1824 and 1825) the company were unfortunate. Heavy losses occurred upon their policies, so as to cause a depreciation of the stock below par value, even if it had all been paid for. Most of the original directors, who had assumed so large a portion of the stock, were unable to pay their notes, with but a solitary exception; and the defendant in this cause formed that exception. They had, by the month of April, 1826, become insolvent, or were on the verge of insolvency. Certain it is that during the summer of that ill-fated year to many incorporated institutions as well as individuals, the directors alluded to, with but the one exception, became openly and confessedly insolvent, and their stock notes of little or no value. In proportion to the worthlessness of the notes was the diminution in value of the shares held by stockholders; and the prospects of the company, under these circumstances, could not be otherwise than discouraging. It was, then, natural enough for the defendant to resort to some expedient for extricating himself from the danger in which he was placed of being obliged to pay off his note, and losing his money in the sinking condition of the company. For this purpose he negotiated with John D. Brown, the president of the company, for a sale of his shares to him. The transaction, however, may more properly be characterized as a hiring of Brown to take his, the defendant's place, in relation to the stock, to assume his liability to the company by substituting Brown's note for \$20,840 in the place of the defendant's original stock note of the like amount for the consideration of \$6,000, to be paid by the defendant to Brown for so doing. A bargain to this effect was consummated between them on the fourteenth day of April, 1826, by the defendant's executing a transfer in the transfer book at the office of the company in the usual form, of his whole 1,042 shares of stock, and giving to Brown his two promissory notes amounting to \$6,000, — one for \$1,500, and the other for \$4,500, and thereupon Brown executed to the company his individual promissory note for the nominal par value of the shares, viz., \$20,840, and hypothecated his shares to the company as security for his note by executing the usual printed form of an instrument of hypothecation prepared in a book kept in the office of the company, and procured and delivered up to the defendant his original stock note.

At this time Brown was insolvent. It is in vain to attempt to disguise the fact; he confesses it himself. He had taken the benefit of

the insolvent act in 1823. Judgments to a large amount existed against him. The proofs show that he was unworthy of credit. He already owed the company, on his own original stock note, \$20,000 and upwards; and only a small part of this and not a dollar of the new or substituted note, except \$4,500, which I shall presently notice, was ever paid by him. The notes were afterwards, on the 28th day of September, 1828, given up to him, and cancelled on his securing to them \$800 by way of compromise, and on his executing to the company an absolute transfer of all the stock, being 2,412 shares, which then stood in his name.

As between the defendant and the company itself, his transaction with Brown might be permitted to stand, so long as the rights of creditors or third persons were not prejudiced by it. But the question is, can it stand when the rights of creditors intervene and are prejudiced? It is argued that the directors of the company and the finance committee knew of and approved and sanctioned the arrangement, and the giving up of the defendant's note on receiving that of Brown. But the testimony falls short of establishing the fact of a sanction by them in their official or corporate capacity. Some of the directors and members of the finance committee knew of the arrangement at the time, but others did not; and it is in evidence that the board of directors never met and passed upon the subject, nor does it appear that the finance committee ever acted upon it as such committee so as to render any sanction and approval, which individual members may have expressed, an official and binding act of the corporate body. But if the directors or any committee of the directors charged with the subject had met and officially authorized the giving up of the defendant's note in itself valuable, and a sufficient security for the note of Brown, having comparatively no value or responsibility attached to it, I am not prepared to say that it would not have been such a dereliction of duty on their part, such a want of good faith towards the creditors or persons having claims upon the capital and assets of the corporation, over which they were the trustees and managers, as would subject them to a personal liability to make good the loss to those injured by the act. This, however, is not the question at present with regard to the directors generally. But it is virtually the question as respects the defendant, who was himself a director and knew the condition of the company; was acquainted with its affairs; with Brown's circumstances; and the circumstances of other directors who owed for large amounts of stock, and knew also that claims existed for losses which had occurred in the year 1825. He was bound, therefore, to do no act which should defeat or impair the security upon which such claimants or creditors had a right to repose.

There is another feature of this case, which appears to me to be hardly reconcilable with fairness in the transaction towards those having claims upon the company. It is that part of the agreement

by which the defendant was to pay to Brown the \$6,000 for stepping into his shoes and assuming his liability for the stock. As the defendant was willing to lose \$6,000 on the stock he had subscribed for, why did he not offer to pay that money directly to the company on account, and then, if the company were willing to take Brown as paymaster for the balance, why not substitute Brown's note for the balance only, upon the defendant's transferring to him the whole of the stock? If Brown intended to act honestly towards the company by ultimately paying for the stock, this course would have been the same to him. It appears, however, that when the defendant's note of \$4,500, given to Brown, came to maturity, he consented to give it up to the company, and it was accordingly paid to them, and the amount was credited on the substituted stock note as part payment thereof. While, therefore, I hold the defendant to be equally liable now as he ever was to make good this portion of the capital stock of the company for which he subscribed and gave his note of \$20,840, I think he is clearly entitled to have credit for the \$4,500 which found its way into the company as a payment on account. The other sum of \$1,500, to make up the \$6,000, was paid to Brown, and does not appear to have been paid over to the company; and he is, therefore, not entitled, as against the company, to a credit for the amount.

It has been urged in argument that the receiver who files this bill represents the corporation, and stands in the place of the corporate body with respect to this suit, and that the decree now to be made can be made upon no other principle than if the corporation of the Mohawk Insurance Company was itself the complainant. I apprehend this is too limited a view to be taken of the case. The receiver was appointed at the instance of judgment creditors under the statute; and the court is bound to look beyond his mere appointment, and to the rights of those standing behind him, and to do justice to them, such being the object of this suit.

Decree: that the master compute the balance due from the defendant for principal and interest for the 1,042 shares which he held in the company, etc., and upon confirmation of the report, that the complainant have execution for the same, and for the costs of this suit to be taxed.

STEACY v. RAILROAD COMPANY.

(5 *Dillon*, 348. 1879.)

(*DILLON*, CIRCUIT JUDGE: —

It is not necessary to decide whether the company's contract with Warren Fisher, Jr., for the construction of the road, would have been held valid if it had been assailed by non-concurring shareholders or by the creditors of the company. A contract for the

construction of the whole road seems, however, to have been contemplated as permissible by the 19th section of the company's charter; and the 17th and 29th sections contained express authority to receive subscriptions for stock, "payable in labor or materials in and for the road;" . . . "bond being taken to the company, with security for the faithful performance of the work or furnishing of the materials." But it is not necessary to pass upon the validity of the Fisher contract, for the reason that the complainants' bills do not attack it either as being fraudulent or *ultra vires*. Nor has it been assailed in argument on either of these grounds, or on any ground, by the learned counsel for the complainants. In these causes the validity of that contract, so far as it authorized the issue of stock in payment for work done by Fisher, must, therefore, be assumed. Stock was thus issued purporting to be full-paid stock.

On September 2, 1869, the directors of the company ordered the secretary to issue \$35,000 in the common stock of the company at par "on account of work done and materials furnished under the contract for the construction of the road, previous to September 1, 1869."

On February 8, 1870, the engineers of the company were instructed, by the unanimous vote of the directors, to make a detailed estimate of all work done and materials furnished by Fisher, and report; and in July, 1870, the report having been made, the directors unanimously authorized the delivery to Fisher of \$787,500 first mortgage bonds, \$1,125,000 land grant bonds, \$675,000 in the preferred stock, and \$675,000 in the common stock of the company; "such being the estimate of the consulting engineer of the company of the amount now due him on his contract." It was also resolved, at the same meeting, "that the president might, in his discretion, advance to Fisher any greater amount of bonds or stock, upon his giving good and sufficient security under his contract."

On November 15, 1870, the directors authorized the executive committee to issue to Fisher "stock and bonds of this road in such amounts and at such times as they may deem expedient." Some stock was advanced, under authority thus conferred, without security being required; but this latter fact does not appear on the records of the company. The stock earned under the contract, and that issued in advance of being earned, was in the same form, and alike purported to be paid-up stock.

The defendants, Atkins and Converse, never made an original subscription to the stock of the company, and they became holders of its shares by the purchase of the same in Boston, through brokers in the market, without any actual knowledge of the facts connected with its issue. The shares thus purchased by the defendants, Atkins and Converse, were shares which had been issued to Fisher by the company, under the resolutions and circumstances hereinbefore set forth; but whether these shares were shares which had been fully earned by Fisher, or shares which had been advanced to him in anti-

cipation of work to be done, does not appear, nor is it possible, as counsel concede, ever to ascertain.

The ground of liability on the part of the defendants, Atkins and Converse, is that, in point of fact, none of the shares issued to Fisher were ever paid for; that he had received in bonds more in value than the work he performed under his contract was worth; that, not having complied with his contract, his agreement, contained in his construction contract with the company, to take the shares, must now be regarded and treated as an agreement to pay for the shares in cash; and that shares, not being negotiable in the sense of the law merchant, are open, in the hands of every holder, to all the equities which attach to them in the hands of the original taker; and, therefore, since Fisher, if he held the shares, could be compelled to pay for them by the company, or at all events, by its creditors, the present holders of such shares, although they are holders for value, and without actual notice of the equities in respect thereto as between Fisher and the company, are necessarily charged with the obligations which attach to the original subscriber or holder of the shares.

There is no allegation in the bills of complaint that the defendants, Atkins and Converse, were in any way interested in, or parties to, the contracts under which said shares of stock were issued, or that they had any knowledge of such contracts when they purchased their shares of stock. Neither is there any allegation in the bills of complaint that said defendants were parties or, privies to any over-issue or over-payment of bonds or stock by said company to Fisher, Jr., or that the defendants had any knowledge or information that such alleged over-issues or over-payments had been made. Neither is there any allegation that the defendants had any knowledge or information that the shares of stock owned by them had not been paid for in full, or that they had any knowledge or information that their certificates of stock were issued in fraud of the rights of creditors.

Upon the allegations of the plaintiff's bills, as well as upon the proofs, these defendants are to be treated as the *bona fide* purchasers and holders of the shares of stock by them severally owned.

The plaintiffs nowhere allege, indeed, that any shares of stock were issued to said Fisher, Jr., by said corporation, otherwise than in accordance with the terms of said contract, or that any shares were issued in excess of the stipulations of said contract.

It is our judgment, especially in view of the provisions of sections 17, 19, and 29 of the company's charter, before adverted to, that shares of stock issued as full-paid shares by authority of the board of directors, under the construction contract, which was never questioned by the company or its shareholders or creditors, and which is not assailed or impeached by the pleadings in the cause, and sold by the contractor as full-paid shares, to purchasers for value, without

actual notice of the equities between the contractor and the company, if any there be, cannot be held subject to such equities, and to a liability to have shares thus issued and thus purchased treated as unpaid stock. No case holding such a doctrine was referred to by the learned counsel for the complainants, and it is confidently believed that no such judgment has ever been pronounced. It is difficult to perceive any principle of reason or law on which such a judgment could rest. The company have the power to issue its shares. It cannot, without special authority from the Legislature, issue its shares as full-paid without actual payment in money, or, at least, in money's worth. A leading object of the creation of corporations and the issue of shares is that the shares may be transferred with all practicable facility. *Bank v. Lanier* (11 Wall. 369); *New York, etc. Railroad Co. v. Schuyler* (34 N. Y. 30, 82). The company's directors and officers are the guardians of the company's rights. They ought not to issue shares in violation of their duty. They know whether the shares have been paid for or not. This the public have no means of knowing, and no effectual means for ascertaining. If the company's directors, or other authorized officers, commit a fraud upon the company in this respect, they are undoubtedly liable therefor. But can any one point out wherein the equities of the creditor of a company thus defrauded by its officers is superior to the equities of those who have acted upon the representations of such officers within the scope of their powers, accredited by resolutions of the directors and authenticated by the corporate seal, and upon such solemn assurances purchased the shares of the company? Grant that the capital stock is a trust fund for the benefit of creditors, yet this trust cannot be followed, any more than other trusts, into the hands of *bona fide* purchasers for value. Per Swayne, J., in *Sanger v. Upton* (91 U. S. 56, 60).

What contract did the defendants Atkins and Converse make? They made a contract to buy, and did buy, what the company had issued and represented to be full-paid shares, without notice that this representation was untrue. If the representation thus made is true, they are under no liability again to pay for the shares. If the shares had been represented to have been unpaid, *non constat* that they would have purchased them. Clearly the company would be estopped to make the claim here advanced by its creditors.

Again, we ask, in what consists the superior equity of the creditor over the obvious equities which exist in favor of such a purchaser of the company's shares. The creditor trusted that the company's officers would not violate their duty; the purchaser trusted that they had not violated their duty.

The rights and obligations of a *bona fide* transferee of shares purporting to be full-paid shares are different from the rights and obligations of the transferee of shares which do not purport to be full-paid. In cases where the certificates show on their face that

the shares have been paid in part only, the law implies a promise by the transferee to pay the balance due upon the shares upon calls when he has come into privity with the company. *Webster v. Upton* (91 U. S. 65, 69); *Upton v. Tribilcock* (Ib. 45). Such an implied promise rests upon the reasonable and obvious ground that the transferee has knowingly and voluntarily assumed the liability of the transferor. But upon what ground can the law raise a promise to pay the balance due upon shares when the company has asserted, and the purchaser acts upon the assurance, that the shares have been fully paid?

The question here urged by the complainants is settled by the universal practice of business men, as well as by the judgments of the courts. Millions of dollars of stocks are sold in this country every week, and there is no practice on the part of purchasers, and no understanding that the law requires of them, that they shall ascertain *aliunde* the representations of the company's authorized officers that certificates of full-paid stock have in fact been fully paid. How could a purchaser ascertain this fact? Must he go to the records of the particular corporation, in a remote and distant State it may be, and make an examination before he can safely buy? What more value is to be placed upon facts stated in the records than upon those stated under the corporate seal, by the authorized officers, as respects matters *intra vires*? Officers who would state a falsehood on the certificate of stock would state it on the corporate records, if this were necessary to make the intended fraud effectual. And, hence, the duty so much insisted on in argument, that a purchaser is bound to know the facts appearing on the corporate records, in addition to its being an impracticable duty, would, if discharged, be valueless as a guaranty against frauds upon creditors. Besides, on what principle is it that a purchaser of the company's shares is to be held to be the guardian of the rights of the company's creditors and bound to protect them? But the exigencies of this case do not require us to go so far, since, if we concede that a *bona fide* transferee for value of full-paid shares is charged with knowledge of all the facts concerning those shares appearing on the records of the corporation, there is nothing therein disclosed which shows that the shares purchased by Atkins and Converse had not been paid for by Fisher under his contract. The company's records show that a large amount of stock had been earned by Fisher and ordered to be issued, and under the 29th section of the charter other stock was ordered to be advanced to him, on his giving bond to the company to pay for the same under his construction contract, the validity of which was not questioned by the company or any of its shareholders.

But the question here presented does not rest alone upon general reasoning. The subject was somewhat considered by the circuit court for the eastern district of Missouri, in *Phelan v. Hazard* (Cent. Law Jour. Feb. 8, 1878, p. 109; 5 Dillon, 45). That was

a suit brought by a single creditor of an insolvent corporation to enforce the liability of a stockholder for the unpaid balance of his stock. The shares had been issued in payment for a mining property which the corporation had purchased. The plaintiff did not undertake to impeach as fraudulent this transaction between the corporation and the original shareholders, but simply claimed that the shares of stock had not been paid for, either by the person to whom they were originally issued or by the defendant, the transferee and present holder of the shares. The court, after stating that the proof showed that the shares in question had been paid for precisely as they were originally agreed to be paid for, viz., by a conveyance of the mining property of the corporation, and that the conveyance had been received and recorded by the corporation, says: "Unless this agreement is rescinded or set aside for fraud, how can it be said that the stock has not been paid for? The parties have agreed that it has been paid for, and that agreement is conclusive unless it is rescinded or impeached for fraud, and this cannot be done unless the attack is directly made. Undoubtedly such an attack could be made while the stock was in the hands of the original takers of it; but it is not so clear that it could be made by a subsequent creditor of the corporation against a transferee of the stock for value, who purchased the same in good faith as full-paid stock, relying upon the records of the corporation, which showed the shares to have been fully paid for, and the manner in which the payment had been made."

Subsequently the similar case of *Foreman, Assignee, etc. v. Bigelow et al.* (Cent. Law Jour. Nov. 29, 1878, p. 430) came before the circuit court for Massachusetts, and it was decided that a *bona fide* purchaser of full-paid shares was not liable to be assessed upon his shares. The opinion of Mr. Justice Clifford is very full, and we forbear going over ground so exhaustively covered in his judgment.

A long line of English cases under the Companies Acts, referred to in the opinions in the two American cases last cited, had established the principle that stock need not necessarily be paid for in cash. — that it might be paid for in money's worth. This doctrine had led to such abuses as to cause Parliament to insert in the Companies Act of 1867 the following provision: —

"SECT. 25. Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies at or before the issue of such shares."

The construction and effect of this section came before the court in *Nichols' Case* (Law Rep. 7 Ch. 533). In that case a company issued certificates of shares as fully paid up, when in fact no payment had been made, nor contract registered under the provisions

of the Companies Act of 1867, section 25. At the date of the winding up of the company some of these shares were held by N., who had no notice that they were not fully paid up. It was held (reversing the decision of Hall, vice-chancellor) that by the issue of the certificates the company were estopped from alleging that the shares were not paid up, and that N. could not be placed on the list of contributories in respect of them as unpaid shares. .

An appeal was taken by the liquidator, and the appeal was dismissed by the House of Lords (26 W. R. 819). In giving judgment, Lord Cairns, after quoting the aforementioned section 25 of the Act of 1867, said: "The effect of the section is very simple. Before the passing of the act it was open to any holder of shares to say, 'I have made a contract that I shall not be called on to pay up the value of these shares;' but the abuse of such contracts led to a statutory provision, making it a condition that no shares be treated as fully paid unless their value is paid in cash, or unless publicity is insured by a written contract duly filed in the manner provided for. If Goulton had been called upon to pay up the value of his shares, this section would have deprived him of any defence; but we have now to consider the case of a *bona fide* transfer for value, and I want to know how the section can affect such a transaction. It leaves untouched the question of payment, and says nothing as to evidence of payment; but if the company gives a receipt for the amount of the shares, and this receipt passes to a purchaser who does not know that no actual payment has been made, his title must not be prejudiced by the statute. He receives a representation to the effect that the law has been complied with, and it would paralyze the whole trade in companies' shares if a person taking shares with a representation that they are fully paid up must disregard this assertion and satisfy himself of the fact by personal inquiry, especially as he might have considerable difficulty in obtaining accurate information as to the fact of payment or non-payment. Much was said as to the burden of proof and as to the necessity for showing an absence of notice. If the shares come, in the regular course of business, into the hands of a purchaser for valuable consideration, those who challenge the transaction must prove that such purchaser had notice of the fact." Lords Hatherley, Selborne, and Blackburn each gave opinions in concurrence, and Lord Gordon concurred without delivering a separate opinion.

As to other defendants, different questions are presented. Certain individuals and counties became original subscribers to the stock of the company. By the charter of the company it is provided that five per cent on each share shall be paid when subscribed, and subsequent payments shall be made upon calls by the board of directors, who are, however, required to give sixty days' notice of each call, and are prohibited from making a call for more than ten per cent at any one time, and from making more than three calls in any one

year. On December 2, 1869, the stockholders voted that no further calls be made upon the original stock subscriptions, and that certificates issue for stock to the extent to which the payment had been made, and that the balance of the subscriptions be cancelled; and on January 25, 1870, the directors, pursuant to the above-mentioned vote of the stockholders, instructed the secretary "to cancel seventy-three per cent of the original individual and county subscriptions, and to issue certificates of stock to all stockholders whose accounts shall on March 15, 1870, show credits to the amount of twenty-seven per centum of the stock now standing in their names." As respects certain individuals and counties made defendants, this was carried out.

The case as to the counties was submitted upon the bill and answers. The averments of the answers are to be taken as true. The counties had paid twenty-seven per cent of their subscriptions. The release was directed by the stockholders themselves. The company was then solvent. The release was made a matter of record in 1870. There was no secrecy and no fraud intended. It is averred in the answers that the original subscriptions had been made before there was any legislative authority for that purpose. The company decided in 1870 that it was "inexpedient to attempt the further collection of calls upon the original individual and county subscriptions to the capital stock," and ordered one share of \$25 to issue for each \$25 paid, "the stockholders to lose the fraction paid over a full share." This arrangement, it may fairly be inferred, was consented to by every person interested in the company. The amount of the old stock was thus ascertained, and the company had agreed to give the balance of its stock to the contractor for building its road, and undoubtedly the contractor knew of this arrangement and consented to it. The counties and the company acted on the faith of this release. The counties supposed they were out of the company, and subsequently had no voice and took no part in its affairs. No stockholder in the company ever complained of the action in releasing the counties. No creditors are in existence who were such at the time of the release of the counties, except those claiming under the Fisher contract; and no claim was made against the counties that they were liable as stockholders until 1877, nearly seven years after they were released, and long after the company was bankrupt and practically dissolved. Under the circumstances of the case as set forth in the answers of the counties, we are of opinion that the release was effectual; but if it is not, the counties ought to be protected by the creditors' laches from the liability which, at this late day, the creditors are now seeking to enforce against them.

In disposing of the case it may be well briefly to express our views concerning the claim of the creditor based upon the double liability clause of the constitution of 1868. The charter of the railroad company contained this provision: —

"SECT. 25. No stockholder in this company shall be in any event responsible for losses of the company to any greater amount or extent in the whole than the amount of stock subscribed for and taken by him."

Section 24 of the charter of the company was as follows:—

"The said company hereby reserved to itself the right either to accept or reject any act of the general assembly of this State, altering or amending this charter; which shall be decided by a vote of a majority of all the stock, exclusive of that taken by the State, at a meeting of the stockholders regularly convened for that purpose."

Afterwards the constitution of 1868 was adopted, containing the following:—

"The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; but all such laws may from time to time be altered or repealed. Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock. The property of corporations now existing or hereafter created shall forever be subject to taxation, the same as the property of individuals. No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

The provisions of the constitution were never accepted by the stockholders.

As respects the claim in the bill based upon the double liability clause of the constitution of 1868, we remain of the opinion heretofore expressed, that the measure of liability of the stockholders, at whatever time they become such, is fixed by the 25th section of the charter, and was not increased by any act of the State not assented to by the corporation.

The purpose of the provision in section 25 of the charter was not to declare a double liability, but to limit the liability of the stockholder to the duty of paying for the stock subscribed or held by him.

The State has passed no act, so far as relates to the liability here sought to be enforced, to carry the constitutional provision into effect.

The defendants contend that the constitutional convention of 1868 did not intend to legislate upon this subject of the personal liability of stockholders in corporations, but to leave the whole subject to

future Legislatures, with a limitation upon their powers, which limitation was fixed by the clause in question; and that the sole object and purpose of such clause is to declare the limitation, and not to create the liability. It cannot be denied that there are strong arguments in favor of this view.

If the constitutional provision is not self-executing, the same result is reached as that based upon sections 24 and 25 of the charter.

CALDWELL, J., concurs.

Bill dismissed.

CHAPTER XIX.

EFFECT OF IRREGULAR INCORPORATION UPON THE
STOCKHOLDERS' LIABILITY.

UTLEY v. UNION TOOL COMPANY.

GODFREY v. SAME.

(11 *Gray*, 139. 1858.)

ACTIONS of Contract against the Union Tool Company, described in the writs as "a corporation established according to law in Goshen," in the county of Hampshire. The principal defendants were defaulted, and several persons were summoned in as stockholders, pursuant to the St. of 1851, c. 315, and filed answers, upon which trials were had in the court of common pleas in Hampshire.

The plaintiffs proposed to prove by the records of the Union Tool Company that the respondents were stockholders therein. The respondents objected to the admission of this evidence before the existence of the corporation had been shown, and unless it was shown that it was a manufacturing corporation whose stockholders might become liable as such for its debts.

MORRIS, J., ruled that it was not necessary for the plaintiffs to prove the existence of the corporation, that being admitted by the default, but that it was necessary to show that it was such a corporation that its stockholders might become individually liable; and admitted evidence that the company had made by-laws and done other acts as a corporation, and the respondents had attended meetings as stockholders; without proof that the company had ever been incorporated by the Legislature, or by articles of association in writing, setting forth the amount of the capital stock, and the purpose of their establishment, as required by St. 1851, c. 133, §§ 1-3. Verdicts were taken for the plaintiffs, and the respondents alleged exceptions. The other facts sufficiently appear in the opinion.

BIGELOW, J.: —

There can be no doubt that the burden of proof was on the plaintiffs to show the legal existence of a corporation of which the persons

summoned in the action were members and for the debts of which they were personally liable. This is the precise issue which, by St. 1851, c. 315, § 2, it was intended should be open to a stockholder on his being admitted to defend the action as therein provided. It is to be made to appear that he is liable in the action; otherwise he is entitled to judgment in his favor "upon the issue joined." It has already been determined that under this provision an alleged stockholder cannot be allowed to make a general defence to an action against a corporation, by calling in question the validity of the debt which is sought to be recovered, or disputing the amount averred to be due, but that he has a right to a hearing and adjudication on the question whether he is a member of a corporation and liable as such for its debts. *Holyoke Bank v. Goodman Paper Manuf. Co.* (9 Cush. 582). It is obvious that the trial of the issue which is thus opened to an alleged stockholder necessarily involves the question of the legal existence of the corporation for the debt of which he is sought to be charged, because his liability depends on the nature of the corporate body and of the powers and duties with which it was clothed by law. Until these are shown, it cannot be known whether the stockholder is legally chargeable or not. Doubtless there may be cases where the existence of a corporation and the character and description of its functions and privileges may be shown by prescription or long user. In such case a charter or legislative grant of corporate powers may be presumed. But no such inference or presumption can exist in the present cases, nor do the plaintiffs attempt to maintain their claims to charge the persons summoned on any such ground. On the contrary, their whole case rests on the allegation that the respondents are liable as stockholders in a corporation created and established under the recent statute entitled "an act relating to joint stock companies." (St. 1851, c. 133.) But it seems to us that the evidence offered at the trial fails to show that the alleged corporation ever had any legal existence. By reference to the first section of the statute it will be found that, in order to establish a corporation under it, it is necessary that not less than three persons should enter into "articles of agreement in writing," for the purpose of carrying on business of the nature specified in the statute. By these articles, it is provided in §§ 2 and 3, the amount of the capital stock shall be fixed and limited, and the purpose for which and the place in which the corporation is to be established shall be distinctly and definitely set forth. By § 4, it is further provided that, before commencing business, a certificate shall be made of the name, purpose, capital stock, and other particulars concerning the constitution and objects of the corporation, to be published and recorded as therein required. And by § 5 it is provided that "when such persons are organized as aforesaid"—that is, by articles of agreement, as above set forth—"they shall become a corporation, with all the powers and privileges and subject to all the duties, restrictions and liabilities set

forth in the thirty-eighth and forty-fourth chapters of the revised statutes.”²⁶ There can be no doubt of the construction which ought to be given to these provisions. The implication is clear and unavoidable that, until the organization is completed according to the requirements of the statute, the association does not become a corporation, and does not possess corporate rights or privileges, nor is it subject to the duties and liabilities of a manufacturing corporation, among which is the liability of the stockholders for corporate debts, if certain provisions of law are not complied with. There is an obvious reason for making such organization by written articles of agreement a condition precedent to the exercise of corporate rights. It is the basis on which all subsequent proceedings are to rest, and is designed to take the place of a charter or act of incorporation, by which corporate rights and privileges are usually granted. If there were no such requirement, there would be an absence of any provisions by which the right to exercise corporate power could be definitely fixed and established, and there would be no means of ascertaining the rights of stockholders or of persons dealing with such associations.

Upon an examination of the evidence adduced at the trial there is nothing to show that any articles of agreement were ever entered into for the formation of a corporation under the statute. That some organization took place with a view to establish a corporation is abundantly shown. But the essential fact is wanting to show that the persons engaged in the enterprise ever complied with the condition precedent to their right to assume the name and functions of a corporation. It is not a case of a defective organization under a charter or act of incorporation, nor of erroneous proceedings after the necessary steps were taken to the assumption of corporate powers, but there is an absolute want of proof that any corporation was ever called into being, which had the power of contracting debts or of rendering persons liable therefor as stockholders.

We are not called on now to say whether the plaintiffs have any remedy for the collection of their debt against those who participated in the transactions connected with the attempted organization of the supposed corporation. It is sufficient for the decision of this case, that the respondents cannot be held liable in the action for the debts of a corporation which has never had any legal existence.

Exceptions sustained.

INDIANAPOLIS FURNACE COMPANY *v.* HERKIMER.

(46 Ind. 142. 1874.)

FROM the Marion Circuit Court.

WORDEN, J. : —

Complaint by the appellant against the appellee on the following paper subscribed by the defendant.

"Articles of association of the Indianapolis Furnace and Mining Company, organized for the purpose of operating in the Counties of Marion and Clay, in the State of Indiana.

"Article First. The name of said company shall be the Indianapolis Furnace and Mining Company.

"Article Second. The capital stock of said company shall be one hundred thousand dollars, and be divided into shares of fifty dollars each, to be paid for in such amounts and at such times as may be ordered by the board of directors.

"Article Third. The stockholders shall elect directors, who shall from their number elect a president, secretary, and treasurer, who shall hold their office for one year and until their successors are elected and qualified.

"Article Fourth. The board of directors shall have the control and management of the business of the company, except as they may appoint some one or more persons to take charge of the same, in which case the record of the action of the board in appointing them shall be evidence of their authority to act for said company.

"Article Fifth. The board of directors shall have power to make assessments on stock, collect the same, issue certificates therefor, and declare and pay dividends, which shall be at least twice a year.

"Article Sixth. All the expense incurred by the company shall be paid, and all the indebtedness of the same shall likewise be discharged before any dividends shall be paid to the stockholders, unless the directors shall direct otherwise.

"Article Seventh. We, the undersigned, hereby subscribe to all the foregoing articles, provisions, conditions, and stipulations, and agree to the organization of a company as therein stated, binding ourselves to take and pay for the number of shares of stock set opposite our names respectively, and pay for the same at such times and in such amounts as the board of directors may order the same to be paid for, without relief from valuation or appraisement laws.

"Subscribers' Names.

No. of Shares.

"J. D. Herkimer, by D. Root,

100."

There were three paragraphs in the complaint, each counting upon the same instrument, in each of which it was alleged that at the time

of the execution of the instrument by the defendant, the plaintiff was a duly organized corporation; but it is not alleged in either paragraph that after the execution of the instrument any steps were taken to perfect the organization.

The defendant demurred to each paragraph, assigning for cause the want of a statement of sufficient facts, but the demurrers were overruled, and the defendant excepted.

The defendant then answered, —

1. By general denial.
2. Nul tiel corporation.
3. Nul tiel corporation, setting out specially the omission of the performance of the acts required by the statute, in order to perfect the corporate organization.
4. A denial of the execution of the instrument, sworn to.

It appears by the entries of the clerk, though not by any bill of exceptions, that the plaintiff moved in writing to strike out the second and third paragraphs of the answer, "for the reason that the first and fourth present the whole question," but that the motion was overruled, and the plaintiff excepted. A reply in denial was then filed to the second and third paragraphs of the answer.

Trial by the court, finding and judgment for the defendant, the plaintiff having unsuccessfully moved for a new trial.

The overruling of the appellant's motion to strike out the second and third paragraphs of the answer is, amongst other things, assigned for error. Conceding that this question is in the record, the motion was properly overruled, because the ground on which it was made is not tenable. The first and fourth paragraphs, being mere denials, did not "present the whole question." The general denial does not put in issue the existence of the corporation. *Cicero Hygiene Draining Company v. Craighead* (28 Ind. 274), and authorities cited. Perhaps the paragraphs were in abatement, and should therefore, have been sworn to. See *Heaston v. The Cincinnati, etc., Railroad Co.* (16 Ind. 275). But no question was made in this respect, nor was the validity of the paragraphs in any way brought in question.

We may properly here notice another proposition, which, though not perhaps directly involved, is in some measure connected with the motion for a new trial. We are of opinion that a radical error was committed in overruling the demurrers to the several paragraphs of the complaint. The articles of association signed by the defendant, including his subscription for stock, were very clearly mere preliminary articles, contemplating a future perfection of the organization as a corporation. The defendant's contract did not purport to be with an existing corporation, but with one to be brought into existence in the future. The averment in the complaint that the plaintiff was, at the time the subscription was made, an existing corporation, cannot change the nature and legal effect of the defendant's contract. That contract was, in legal effect, that the defendant would take and pay

for the stock subscribed for, in case the organization should be perfected and the corporation brought into legal existence, and not otherwise. Such preliminary subscriptions seem to enure to the benefit of the corporation when formed. *Heaston v. The Cincinnati, etc., Railroad Co.*, (*supra*).

But unless the subsequent steps, necessary to bring into existence the corporation, were taken, there was no corporation to whose benefit the contract could enure, and the defendant could not be liable; and it should have been averred in the complaint that such steps had been taken. *Wert v. The Crawfordsville and Alamo Turnpike Co.* (19 Ind. 242); *Williams v. The Franklin Township Academical Association* (26 Ind. 310).

In such case the estoppel growing out of the contract with a party as an existing corporation does not apply. In the case last cited, the court say:—

“This rule of estoppel does not apply to a suit brought on a subscription made with a view to the organization of a corporation, and as preliminary thereto, where other acts are required by law as a condition precedent to the exercise of corporate powers.”

The first and second sections of the act for the incorporation of manufacturing and mining companies (1 G. & H. 425), under which the appellant claims to have been organized, are as follows:—

“Sec. 1. Be it enacted,” etc., “that whenever three or more persons may desire to form a company to carry on any kind of manufacturing, mining, mechanical, or chemical business, they shall make, sign, and acknowledge, before some officer capable to take the acknowledgment of deeds, a certificate in writing, which shall state the corporate name adopted by the company, the objects of its formation, the amount of the capital stock, the term of its existence, not, however, to exceed fifty years, the number of directors, and their names, who shall manage the affairs of such company for the first year, and the name of the town and county in which its operations are to be carried on, and file the same in the office of the recorder of such county, which shall be placed upon record, and a duplicate thereof in the office of the Secretary of State.

“Sec. 2. When the certificate shall have been filed as aforesaid, the persons who shall have signed and acknowledged the same, and their successors, shall be a body politic and corporate, and by their corporate name may take, hold and convey real estate necessary to carry on the operations named in such certificate.”

It will be seen by these provisions that the corporations contemplated by the act do not come into existence until the certificate provided for shall have been filed in the office of the proper recorder, and a duplicate thereof in the office of the Secretary of State.

Now, although the complaint was held good, the pleas of nul tiel corporation put in issue the existence of the corporation; and we think, under the issues, the plaintiff was bound to prove such exist-

ence by showing a compliance with the statutory requisites. The burthen was on the plaintiff, because the defendant was not estopped by his contract to dispute the existence of the corporation, and because the perfection of the organization was a condition precedent to the plaintiff's right to recover.

We now proceed to consider the ground upon which it is claimed that a new trial should have been granted. There were six reasons assigned for a new trial. The first, second, and sixth involve nothing but the question whether the finding was in accordance with the evidence.

With reference to these, it is only necessary to say that they are without foundation, for the reason, as we shall hereafter see, that the plaintiff failed to prove the legal organization of the corporation.

The other reasons are as follows:—

"3d. The court erred in refusing to allow the plaintiff to introduce in evidence the subscription articles and list signed by all the stockholders, including the defendant Herkimer.

"4th. The court erred in refusing plaintiff to introduce in evidence the certificate of association of members constituting their corporation, which was filed and recorded in the recorder's office of Clay County, Indiana, July 10, 1867.

"5th. The court erred in refusing to hear the testimony of Horace W. Hibbard, to the effect that the defendant told him that he had five thousand dollars of the stock of said company, and offered to trade the same to him."

A bill of exceptions shows that the evidence specified in the reasons set out was offered and rejected.

One of the objections made to the introduction of the articles of association containing the defendant's subscription was, that the plaintiff had offered no evidence of the filing of the certificate required by the statute above quoted in the offices of the recorders of Clay and Marion Counties, and of the Secretary of State. The ground on which the certificate filed in the office of the recorder of Clay County was rejected does not appear.

We have not examined this certificate carefully, in order to ascertain whether it meets the requirements of the statute, but it shows, like the articles of association, that the operations of the company were to be carried on in the Counties of Clay and Marion. There was no evidence given or offered that the certificate or a duplicate thereof had ever been filed, either in the office of the recorder of Marion County or of the Secretary of State.

It would seem that, under the statute quoted, where a company purports to be organized to carry on its operations in several counties, the certificate should be filed in all of them. This, however, need not be determined. The filing of the certificate in the office of the Secretary of State is an indispensable prerequisite to the legal existence of the corporation.

The evidence of Hibbard was properly rejected, because such recognition by the defendant of the existence of the corporation could not estop him to controvert the fact; nor could it supply the omission of an act which the law requires to be performed before the corporation can be called into being.

But the two documents offered and rejected were proper links in the chain of the plaintiff's evidence. It does not appear to have been claimed by the plaintiff, however, that she had the right to marshal her evidence, and introduce it in such order as might suit her convenience. There was no offer to prove, either in connection with the rejected evidence or otherwise, the necessary fact that the certificate had been filed in the office of the Secretary of State, or that it had been filed in the office of the recorder of Marion County.

Suppose all the evidence offered had been admitted, still the plaintiff would not have been entitled to recover, because of the failure to prove a fact essential to the existence of the corporation. Such being the case, it is difficult to see that the plaintiff was in any way injured by the rejection of the evidence. A party cannot complain of the rejection of testimony, unless the record show that he was injured by its rejection. *Lett v. Horner* (5 Blackf. 296).

We are of opinion, therefore, that the rejection of the evidence was not such an error as entitles the appellant to a reversal of the judgment.

*The judgment below is affirmed with costs.
On Petition for a Rehearing.*

WORDEN, C. J. —

The appellant has filed a petition for a rehearing of this case, claiming, as we understand the argument, that as it was shown by averment and proof, that the defendant's contract was made with an existing corporation, it should be treated as such; and therefore it was unnecessary for the plaintiff to show that the proper steps had been taken to perfect the organization of the corporation.

In the original opinion we set out in full the contract entered into by the defendant. That contract very clearly was not with an existing corporation. It contemplated a future organization of the corporation, to which he was to become liable on his subscription. To treat him as having promised to pay the amount of his subscription to a corporation which then existed, would be to make a new contract for him in place of the one which he made for himself. There may have been a corporation of the same name, and organized for the same purpose, in existence at the time the defendant made his contract; but if so, the contract set out was not made with such existing corporation. That contract was to pay a corporation of be thereafter organized and brought into existence. The ground upon which a party who had contracted with a corporation as such is estopped to deny its existence is that by his contract he has recognized the existence of the corporation.

The contract in question, instead of purporting to be made with an existing corporation, utterly excludes the idea of its present existence, but contemplates the future organization of the corporation, to which he was to pay the amount of his subscription.

The legal effect of a written contract cannot be thus changed by averment or parol evidence.

The petition for a rehearing is overruled.

EATON v. ASPINWALL.

(19 N. Y. 119. 1859.)

APPEAL from the Superior Court of the city of New York.

The action was against the defendant as a shareholder in the capital stock of the "Mexican Mail and Inland Company," alleged to have been incorporated under an act for the incorporation of companies formed to navigate the ocean by steamships, passed April 12, 1852, to recover the amount due upon three several promissory notes, given by the company to the plaintiffs. Upon the trial, before a referee, it appeared that on January 8, 1853, seven persons acknowledged and filed in the office of the clerk of the county of New York, and in the office of the Secretary of State, in pursuance of the act aforesaid, a certificate that they thereby formed themselves into a corporation by the name of the "Mexican Ocean Mail and Inland Company;" the capital stock of which was to consist of \$1,500,000, divided into shares of \$100 each. The objects of the company were properly specified in the certificate, from which it appeared that the principal office for managing its affairs was to be in the city of New York. The ten per cent of the capital stock required by the general act to be paid in, was not paid in; yet the company elected its officers, hired an office in the city of New York, and went into actual operation there, as a corporation, in January, 1853. On the 28th of March, in that year, the defendant became the owner of two hundred and fifty shares of the stock, a certificate for which was duly issued and delivered to him, as appears by the stock certificate book of the company. In April following, the company employed the plaintiffs to furnish coaches, etc., which they furnished and delivered to the company, and for which the company, by its president, in the name of the corporation, gave the plaintiffs several promissory notes.

In May following, the defendant attended a meeting of the stockholders and took part as a stockholder in their proceedings.

A judgment was recovered upon these notes in favor of the plaintiffs against the "Mexican Mail and Inland Company," on the 30th of June, 1854, in the Supreme Court of this State; upon

which execution was issued and returned wholly unsatisfied. The referee reported in favor of the plaintiffs the amount due upon the notes. The judgment entered on his report was affirmed at general term. The defendant appealed to this court.

H. GRAY, J. :—

The act authorizing the incorporation of companies to navigate the ocean by steamships, by its second section, provides that, where the certificate provided for in its first section shall have been filed as therein required, and ten per cent of the capital named paid in, the persons who shall have signed and acknowledged the same, and all others who shall thereafter become holders of any share or shares of said capital stock, and their successors, shall be a body politic and corporate, in fact and in name, by the name stated in such certificate. Sections 6 and 8 of the act make each stockholder, upon a failure to collect of the corporation, liable to its creditors to an amount equal to the stock held by him.

The certificate required by the first section of the act was in all respects properly made and filed. As to that, no question is made; and if ten per cent of the capital stock had been paid in, the "Mexican Ocean Mail and Inland Company" would have been a corporation *de jure*. No question could have existed in relation to the defendant's liability. It is, nevertheless, a corporation *de facto*, and may carry on its business, and sue in its corporate name. If the plaintiffs had failed to deliver their coaches, and for that reason had been sued by the corporation, and they had set up precisely the defence which the defendant has, or, in other words, pleaded null tiel corporation, a production of the certificate which had been filed and proof of user (if not of user alone) would have been sufficient, *prima facie*, to establish it a body corporate, in fact as well as in name. *Snow v. Peacock* (2 Carr. & Payne, 215); *Dutchess Co. Manuf. Co. v. Davis* (14 John. 238, 245); *U. S. Bank v. Stearns* (15 Wend. 315). When its corporate existence had been thus established, the plaintiffs would not have been permitted to prove, as a defence for them, the facts relied upon by the defendant; for the familiar reason that the right of a corporation to sue cannot be inquired into collaterally. *McFarlan v. The Triton Ins. Co.* (4 Denio, 392-397). Thus it will be seen that this corporation, though not a valid corporation in point of law, may carry on its enterprises, have its day in court, and divide its revenue among the holders of the shares of its capital, until the State shall interpose and ask that it be dissolved; and that the only real necessity of complying with the statute in relation to the payment of the ten per cent was to prevent proceedings in behalf of the people to put an end to its corporate functions.

This company had a public office in the city of New York, in which they transacted what purported to be the corporate business of the "Mexican Ocean Mail and Inland Company;" officers were

elected by the shareholders; books, usual and proper for such a corporation, were kept, in which its proceedings were entered; to the public, it had all the external *indicia* of being the corporation it assumed to be, and valid in point of law. The defendant was a shareholder of its capital stock; and that was apparent from the books of the corporation before the plaintiff gave it credit. This credit was given upon the faith, not only of the liability of the corporation as such but ultimately of the several shareholders of its capital. The plaintiffs' case, therefore, rests upon much stronger grounds than did either of the cases of *Ellis v. Schmoeck & Thomas* (5 Bing. 521); *Doubleday v. Muskett & Lousada* (7 id. 110); or, *Harvey and others v. W. Kay, Bart.* (9 Barn. & Cress. 356). In each of these, the defendant was held liable. It would be palpably wrong to permit the defendant, who is one of the owners of the capital stock of this corporation, which operates and sues for his benefit, to set up the failure of its organizers to perform a duty initiatory to its legal existence, when the plaintiffs, if sued by the corporation for the defendant's benefit, could not set up the same fact as a defence to them.

The judgment should be affirmed.

All the judges concurred in this conclusion, except STRONG, J., who took no part in the decision.

Judgment affirmed.

KAISER v. BANK.

(56 Iowa, 104. 1881.)

APPEAL from Muscatine District Court.

Service in this case was made only upon the defendant Hoag. The plaintiff, in April, 1877, became a creditor of the Lawrence Savings Bank by reason of a deposit of money made by him in the bank, which bank was located and doing business in the city of Lawrence, Kansas. As such creditor he seeks to recover of the defendant Hoag, upon the ground that the Lawrence Savings Bank was a partnership or unincorporated company, and that Hoag was a member of it. Hoag does not deny his ownership, but denies that the Lawrence Savings Bank was an unincorporated company or partnership, and avers that the same was duly incorporated under the laws of Kansas, by reason whereof he was exempt from personal liability for the debts of the bank. There was a trial without a jury and judgment for the plaintiff. The defendant Hoag appeals.

ADAMS, C. J.:—

The evidence tends to show that certain individuals attempted in good faith to become incorporated under the laws of Kansas for the purpose of doing business as a savings bank, and subscribed for

shares in the supposed corporation. For several years they did business as a savings bank, under the supposition that they were duly incorporated. Prior to the time that plaintiff became a creditor of the bank, the defendant Hoag purchased an interest in the bank, and remained owner of such interest from that time forward. The question presented is whether the shareholders so far complied with the incorporation laws of Kansas as to become incorporated and secure an exemption from individual liability, and if they did not strictly become incorporated whether the fact that they did business as a corporation, not only with the general public but with the plaintiff, was sufficient to secure to them exemption from individual liability.

If the Lawrence Savings Bank became incorporated, it did so under a general incorporation law, and not by reason of the grant of a special charter. The general incorporation law of Kansas constitutes chapter 23 of the statutes of Kansas, Section 8 provides that "the charter of an intended corporation must be subscribed by five or more persons, three of whom at least must be citizens of this State, and must be acknowledged by them before an officer duly authorized to take acknowledgment of deeds." Section 9 provides that "such charter shall thereupon be filed in the office of the Secretary of State."

A certificate of the Secretary of State of the State of Kansas was introduced in evidence, showing what papers, and what only, had been filed in his office pertaining to the incorporation of the Lawrence Savings Bank. The certificate shows that there were filed in his office what are denominated articles of association. The statute requires that a charter shall be filed. We are inclined to think, however, that the fact that the paper filed is denominated articles of association instead of a charter is not sufficient to invalidate it. We proceed, then, to inquire whether the paper complies with the statute in other respects, and we conclude that it does not. The statute requires that it shall be subscribed and acknowledged by five or more persons. The paper purporting to be articles of association is so informally drawn and executed that we cannot say that it is subscribed by any one. The paper consists of eight articles. The first six articles purport to be subscribed by twenty-three persons, but the seventh and eighth articles are not subscribed, and the seventh article is, under the statute, material. But if the articles had all been subscribed they would be fatally defective for want of acknowledgment by the subscribers, or a sufficient number thereof to comply with the statute.

The defendant, however, insists that neither a charter nor articles of incorporation are necessary to the incorporation of a savings bank. In §§ 127, 128, 129, and 130 of the general incorporation law are provisions in relation to savings banks. Section 130 provides that "before any such corporation (a savings bank) shall com-

mence business a majority of the shares thereof shall be subscribed for, and the entrance fee thereon shall be paid in, and the president and secretary thereof, under their hands and seals, shall make a certificate which shall specify, first, the corporate name of such association; second, the name of the city or town in which such corporation is to be located, third, the amount of capital stock and the number of shares into which the same shall be divided; fourth, the names and places of residence of the stockholders, and the number of shares held by each; fifth, the time when such incorporation was organized; which certificate shall be acknowledged before a notary public, and recorded in the registry of deeds for the county in which such corporation is to be located."

The defendant insists that the making and recording of such certificate constitutes the act of incorporation. But it seems to us otherwise. The making and recording of the certificate is by the terms of the provision a condition precedent to the commencement of business. We see very little if anything to indicate that it is to be deemed the act of incorporation. The certificate is to be made by the president and secretary. Before it can be made, then, there must be a president and secretary. But there cannot be a president and secretary until such officers have been duly chosen by a body of persons who have become associated under an agreement to become incorporated under a law authorizing them to become incorporated. Now, the agreement, which must not only precede the making of the certificate, but the choice of the president and secretary, who are to make the certificate, it appears to us would more naturally be deemed the act of incorporation, and we see nothing in the incorporation laws of Kansas inconsistent with this view.

Again, the certificate must state the time when the corporation was organized. This to our minds implies quite clearly that before the certificate is made organization must have taken place. Now, if organization must precede the making of the certificate, such organization must be effected by compliance with § 8, and other sections pertaining to general incorporations, and as we have seen § 8 was not complied with.

There are two other considerations, either of which, it appears to us, is still more fatal to the defendant's theory of individual exemption.

If we were to suppose that incorporation could take place by the simple making and recording of a certificate by the president and secretary, we should fail to find incorporation in this case, because we fail to find such certificate as the law requires. We have set out above what the certificate must show. The certificate upon which the defendant relied is in these words: "We, Andrew Terry, President of the Lawrence Savings Bank, and John K. Rankin, Secretary of said bank, do hereby certify that 10 per cent of the capital

stock of said bank has been paid in." Not one of the five things required to be certified to is certified to.

The certificate, to be sure, as set out in the abstract, follows the so-called articles of association. It is possible that the certificate was indorsed upon or attached to the articles of association. If so, it may be that the parties thereto considered that the articles were adopted into and made part of the certificate. But it appears to us that we should not be justified in importing into the certificate something not referred to by it, and which seems to have been made for an entirely different purpose.

Again, if the certificate were in due form it would fail, we think, to create an exemption from individual liability, because no exemption from individual liability is provided specifically for stockholders in savings banks, but for stockholders in corporations in general, and in connection with the provision for the incorporation of associations by the adoption by the corporators of a charter or articles of association.

The defendant insists, however, that in order to establish the corporate existence of the Lawrence Savings Bank as against plaintiff, it is sufficient to show authority to create the corporation, a *bona fide* attempt on the part of the corporators to become incorporated, and the doing of business as a corporation. In support of this proposition the defendant cites *The Buffalo & Alleghany Railroad Co. v. Cary* (26 N. Y. 77). In that case the court said, "that if the papers filed are colorable, but so defective that, in a proceeding on the part of the State against it, it would for that reason be dissolved, yet by the acts of user under such organization it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution collaterally by any person." Substantially the same doctrine was enunciated in *Kurz v. The Paola Town Co.* (20 Kansas, 403); and *Pope v. The Capital Bank* (20 Kansas, 440). It should be observed, however, that in those cases the defendant set up a want of incorporation of the plaintiff and sought to escape liability upon that ground. In the case at bar the defendant sets up exemption, averring that the attempt to become incorporated and the doing of business under a claim of incorporation were sufficient to create the exemption.

It will be seen at once that the principle involved in those cases is essentially different from that in the case at bar.

It is hardly necessary to say that where incorporation has once taken place no act of forfeiture can be set up in a collateral action, until forfeiture has been judicially declared in an action brought for that purpose. See Angell & Ames on Corporations, Sect. 636, and cases cited. But the principle involved in those cases is essentially different from that in the case at bar.

In *Humphrey v. Mooney* (1 Colorado, 193), a creditor of an assumed corporation sought to hold a member as a partner. It was held that

as his right of action was based upon an express contract with the assumed corporation he was estopped to deny that it was in fact a corporation. The doctrine of that case is substantially that relied upon by the defendant. But it seems to us that it is not sustained by the weight of authority. The court cited in support of the decision *Eaton v. Aspinwall* (19 N. Y. 121); and *Buffalo v. Cary* (26 N. Y. 77); but neither of the cases, it appears to us, is in point.

There may, indeed, be certain irregularities, or omissions to comply with provisions merely directory, which would be sufficient to sustain an action brought to declare a forfeiture, but insufficient to sustain a collateral action brought to enforce an individual liability of a member. But where the attempt at incorporation is under a general law, and there is a non-compliance with the law in a material respect, there is, we think, such want of incorporation that exemption from individual liability is not secured. In *Mokelumne Hill Mining Co. v. Woodbury* (14 Cal. 424), the court said: "There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can be properly called in question."

Hurt v. Salisbury (55 Mo. 310), was an action brought upon a promissory note, purporting to be executed by the directors of the Northern Missouri Central District Stock, Agricultural and Mechanical Association. The action was brought against the directors upon the ground that the association was not incorporated at the time the note was given, and that the directors were, therefore, individually liable. It appeared that the association at the time the note was given was fully incorporated in every respect except that it had failed to file its articles of incorporation with the Secretary of State, as the statute required. It was held that the directors were individually liable.

In *Bigelow v. Gregory et al.* (73 Ill. 197), the defendants were held liable as partners for goods sold to an assumed corporation of which they were members. The defect in the incorporation consisted in a failure to file the articles of incorporation with the clerk of the city where the corporation was to transact its business. In that case the court said: "There is a manifest difference where a corporation is created by a special charter, and there have been acts of user, and where individuals seek to form themselves into a corporation under a general law. In the latter case it is only in pursuance of the provisions of the statute for such purpose that corporate existence can be acquired. And there would seem to be a distinction between a case where, in a suit between a corporation and a

stockholder or other individuals, the plea of nul tiel corporation is set up to defeat a liability which he may have contracted with the other, and the case of a suit against individuals who claimed exemption from individual liability on the ground of their having become a corporation formed under the provisions of a general statute. In the latter case a stricter measure of compliance with statutory requirements will be required than in the former." This is a late decision, and seems to have been made with a full recognition of the authorities claimed to hold an adverse doctrine.

See, also, *Abbott v. Omaha Smelting Co.* (4 Neb. 416), and *Harris v. McGregor* (29 Cal. 125).

In our opinion, the proprietors of the Lawrence Savings Bank failed to become incorporated, and there was nothing in what they did or claimed which can properly be held as sufficient to secure them exemption from individual liability. The judgment, therefore, of the District Court must be

Affirmed.

MARTIN v. FEWELL.

(79 Mo. 401. 1883.)

APPEAL from Henry Circuit Court.

HOUGH, C. J.:—

This is an action of assumpsit, by plaintiffs as partners, against defendants as partners. There are three counts in the petition. The first is to recover judgment for goods alleged to have been sold by plaintiffs to defendants, March 30, 1877, amounting to \$553.89; the second count is for goods sold August 14, 1877, amounting to \$72.09; and the third is for goods sold October 9, 1877, amounting to \$422.40. In addition to the usual averments as to the sale and delivery of the goods, each count contains substantially the following allegations: That at the time of said sales the defendants were partners in the retail mercantile business in Calhoun, Henry County; that one M. Woods was the general agent of defendants, and was by them authorized to conduct, manage, and superintend said business, to buy and sell goods and merchandise, and to do all things in and about said business as fully as if he were himself sole owner thereof, and to do all things usual and customary to be done by merchants carrying on that sort of business; that M. Woods, as such agent, and with the knowledge and approbation of these defendants, carried on said business under the name "M. Woods," and the defendants had no other partnership designation; that prior to December, 1876, plaintiffs had had dealings with said defendants, and had sold and delivered to them goods and merchandise, through Woods as defendants' agent; that plaintiffs had at no time business transactions with Woods in any other capacity than as agent for defendants.

The answer contains a general denial, and also alleges that the goods in the petition mentioned were sold and delivered by plaintiffs to the "Calhoun Grange Store Company," a duly organized corporation of Missouri, and not to defendants; that the certificate of incorporation was duly filed in the recorder's office of Henry County, on the — day of —, 1876, and on May 8, 1877, a similar certificate was filed with the Secretary of State, and on the same day the said secretary executed to said Calhoun Grange Store Company a certificate of incorporation as provided by law. The replication is a general denial of the new matter pleaded in the answer.

It appears from the testimony that the defendants, together with M. Woods, and others not sued, engaged in merchandising at Calhoun, Henry County, some time in 1875; that they appointed a committee to organize a store, and subscribe money for shares; that M. Woods had \$20 stock in the concern from the beginning; that it was to be incorporated and managed by a board of directors; that M. Woods was one of the first board of directors, and bought the stock and managed the store; that the understanding and intention of all the parties interested was, that they were to have been incorporated from the beginning, and that they paid in their money with that understanding; that in 1875, before they commenced business, a committee was appointed from their number to attend to their incorporation; but that it never reported; that they knew that M. Woods was buying and selling in their behalf so far as they were interested; that from time to time they were at the store and talked with Woods about the business; that they talked with each other from time to time about the business after it was commenced; that in 1876 the goods were invoiced by M. Woods and the directors, who announced a profit over the expenses, etc., and that the store was out of debt; that they could have had access to the books if they had so desired; that in June, 1877, the directors had a meeting at the store and invoiced the goods, and called on M. Woods to show the condition of the business; that the books were examined; that they were in debt some; that they asked Woods how it came so, and he said he had to have more goods and had bought them on credit; that the directors took no action as to notifying creditors; that the store continued in operation and Woods continued in charge until the fire; that the results of the examinations made by the directors were communicated to the other stockholders.

The depositions of plaintiffs, Edward and John Martin, were read by plaintiffs, proving their partnership, the sale and delivery of goods to M. Woods, by their firm, for the store at Calhoun, in November, 1876; the payment therefor, partly on March 29, and the balance on June 7, 1877; the sale and delivery to Woods of the respective bills of goods mentioned in three counts of the petition; their non-payment; the keeping of the account on their books in the name of "M. Woods," Calhoun, Missouri; that plaintiffs had never

received any notification in any way that Woods was agent for and buying goods for a corporation during the time of their mutual dealings. John Martin deposed that he sold goods to M. Woods in November, 1876, for the first time in behalf of his firm, taking his order at Calhoun; that on that occasion Woods told him that he was personally worth nothing, but was representing a grange store, buying goods for it; that a lot of farmers had put him there to attend to the buying for them, and that the concern was worth from \$75,000 to \$100,000, and was good beyond any question; that this first sale was on four months' credit; that he had not at any time sold goods to Woods on his individual credit; that he sold to Woods twice afterward, in August, 1877, and October, 1877, the August sale at Calhoun and the October sale at St. Louis, all on the credit of four months; that nothing was said to him by Woods or by anybody else with respect to any change in the character of the concern at Calhoun, for which Woods was agent, at any time during the dealings testified to.

The defendants offered in evidence a certified copy of articles of association under the statute, authorizing the formation of corporations for manufacturing and business purposes, as recorded in the recorder's office of Henry County, by which it appears that certain of the defendants associate themselves as a corporation to carry on a retail store at Calhoun, the name of the corporation being the Calhoun Grange Store Company; the capital stock \$2,000, divided into 100 shares of \$20 each; the corporation to continue until January 1, 1882. These articles were acknowledged by the signers thereof, September 9, 1876, and were filed for record December 18, 1876. Defendants offered the certificate of the Secretary of State of Missouri, of date May 8, 1877, reciting the filing, by certain of the defendants, in his office, of a declaration in writing as provided in section 4, article I., chapter 37, Wagner's Statutes, etc., and certifying that said parties have become a body corporate under the corporate name of "Calhoun Grange Store Company," etc.

Defendants introduced M. Woods, who testified that he had informed one of the plaintiffs, John Martin, in the spring of 1877, that the store had been incorporated, and that he had offered to show him the articles of incorporation, and that Martin said it would make no difference. Max McCann also testified for the defendants, fixing the date of the alleged interview between Woods and Martin as after the return of Woods from his March visit to St. Louis in 1877.

At the instance of the plaintiffs, the court gave the following instructions:—

2. If the jury believe from the evidence that the plaintiffs were, prior to November, 1876, copartners under the firm name of Edward Martin & Co., and so continued up to the time of bringing this suit, and that the defendants or some of them were, prior to said date, copartners in the business of selling merchandise at Calhoun, Mis-

souri, through their duly authorized general agent, M. Woods, and that Woods, as such agent, purchased and received the goods and merchandise sued for by the plaintiffs in the first count, and agreed to pay the prices therefor in the itemized account annexed to the same, and four months from March 30, 1877, and that said goods have not been paid for, then the plaintiffs are entitled to a verdict for the amount of said account, with six per cent interest thereon from the 30th day of July, 1877, to this date, against the defendants, who at the date of such purchase were copartners in said business, unless the jury believe that such partnership had been dissolved prior to the date of said purchase.

7. With respect to the second and third counts of the petition, if the jury believe from the evidence that the plaintiffs, Edward Martin and John Martin, were copartners prior to November, 1876, and so continued up to the time of bringing this suit, and that the defendants, or some of them were, prior to said date, copartners in the business of merchandising, through their duly authorized general manager Woods, and that Woods, as such agent, purchased and received the goods and merchandise sued for in the second and third counts of the petition, and agreed to pay the prices there mentioned in the itemized account thereof annexed to the respective counts of the petition, and four months from the respective dates of said accounts, and if the jury believe that these goods have not been paid for, they will find a verdict on such counts for the amount thereof, and six per cent interest thereon from the expiration of four months from the respective dates of each of said accounts against the defendants who at the date of said purchase were copartners in said business, unless the jury believe that prior to the date of said purchase the partnership of said defendants was dissolved.

At the request of the defendants, the court gave the following instructions:—

1. If the jury believe from the evidence that prior to the sale of any goods by the plaintiffs to Woods for the grange store in question, the defendants had, for the purpose of organizing a business corporation for running and conducting what is commonly known as a grange store, agreed to subscribe and pay shares of stock to such organization, and did take such stock with such understanding and for such purpose, and took initiative measures for the incorporation of said business, and organized as if incorporated, and elected directors for the management and control of said association, and designated said Woods to conduct and superintend said store for such directors, and did make and acknowledge the articles of association read in evidence, and at the time of the first sale of any goods by plaintiffs to said Woods, said defendants, through directors, were acting under the said articles of association as a corporation and not otherwise, and the said Woods had no authority from them to buy goods except as the agent of said association, then, although said

articles of incorporation may not have been filed and recorded as by statute provided, the defendants are not liable as partners to the plaintiffs for any goods bought of them by said Woods.

2. Even though the articles of association read in evidence were not filed with the Secretary of State, yet, if defendants were acting alone under such articles of association, claiming to be a corporation, such omission to file the same with the Secretary of State did not, of itself, make the defendants liable as partners for any goods bought for the store after said articles were actually drawn up, signed, and acknowledged.

3. Before the plaintiffs can recover in this action it devolves upon them to prove that, at the time of the sales of the goods in question, either defendants were in fact copartners, and as such purchased the goods for such copartnership as such, and not for the defendants as an association, and it was so understood by plaintiffs in making the sale, or that defendants as a voluntary association had held said Woods out to the community as their agent for conducting and managing the store in question, and that the plaintiffs, in the belief and upon the faith of such conduct, and that said Woods was the authorized agent of defendants, sold him the said goods as the agent of defendants; and unless they have so proven to the satisfaction of the jury, the jury will find for the defendants.

4. If the jury believe from the evidence that at the time of the sales of the goods sued for, defendants were not, in fact, copartners, and that plaintiffs sold said goods to Woods upon his own individual credit, and not as the agent of defendants, then the plaintiffs cannot recover in this action.

5. No act or declaration of Woods can bind these defendants unless the same was authorized by defendants, or the defendants by their conduct or declarations had held Woods out to the public as their agent for the purpose, as claimed in the petition, and the plaintiffs in dealing with him acted upon the faith of such conduct and declarations on the part of defendants, unless there was a copartnership, and Woods was one of the copartners, and made the purchases as such.

6. The articles of association read in evidence by defendants, after the same were recorded in the office of the recorder of this county, and the issue of the certificate read in evidence from the office of the Secretary of State, constituted said association a corporation by the name of the "Calhoun Grange Store Company," and if defendants were stockholders therein, plaintiffs cannot recover in this action for any goods thereafter sold to Woods as the agent of said corporation; provided, from all the facts and circumstances, the plaintiffs had reason to believe they had organized as an association, and not as copartners, or had notice of said certificate.

8. If the jury believe from the evidence that defendants, at the time of the sales in question, were not in fact copartners, then,

although the jury may find from the evidence that prior thereto they had held themselves out to the community as joint-owners of the store in question, yet unless the jury further believe from the evidence that plaintiffs, at the time of said sales, made the same to Woods in the belief and in the reliance upon the fact that defendants were mere partners in said store, then plaintiffs cannot rely and recover upon such conduct of defendants.

The court, of its own motion, gave the following instruction to the jury:—

If you believe from the evidence that the defendants, or some of them, in the fall of 1875, or in the spring of 1876, made an agreement with each other to contribute money or capital for the purpose of carrying on the business of buying and selling merchandise for their mutual profit, and that they did so contribute and carry on said business, either personally or by their agent, then such of defendants as did these things became and were partners in such business, and each partner was individually liable for all the partnership debts, provided it does not further appear from the evidence that they did not intend to act and carry on business as partners, but that they intended to do business as an incorporated company and each one to be liable only for the amount of his stock.

Upon the giving of these instructions the plaintiffs took a non-suit, and on the refusal of the court to set the same aside, they appealed to this court.

It is contended by the defendants that the instructions of the court were not such as to preclude a recovery by the plaintiffs, and that the non-suit taken by them was, therefore, voluntary and cannot be disturbed; that although the instructions given by the court declaratory of the effect of the articles of association signed by the defendants, and of their intent and attempt to become a corporation, may have been erroneous, still under the second and seventh instructions given by the court for the plaintiffs, they might have obtained a verdict from the jury. It is unnecessary to determine in this case whether this court will review the action of the trial court on a judgment of non-suit where the instructions given are contradictory. We do not conceive that such a case is presented by the instructions before us. The second and seventh instructions authorize a recovery by the plaintiffs, if they find that at the dates of the said several sales the defendants were copartners. But the first, second, and third instructions given by the court at the instance of the defendants, and the instruction given by the court of its own motion, neutralize the second and seventh instructions and prevent a recovery thereunder, by declaring, upon the uncontradicted facts in evidence, that the defendants were not copartners. Nor can it be said that under the disjunctive clause which concludes the third instruction given for the defendants, the plaintiffs could have recovered. The testimony will not warrant a finding that the defendants, as a voluntary association,

held Woods out as their agent, that is, as the agent of a voluntary association; for the testimony of the defendants is explicit that they intended to act as a corporation and regarded themselves as so acting, and the testimony of the plaintiffs discloses no knowledge on their part of any articles of association whatever. We are of opinion, therefore, that the plaintiffs properly suffered a non-suit.

The only question remaining to be determined is, whether, on the facts stated in the first and second instructions given at the instance of the defendants, and in the instruction given by the court of its own motion, the defendants are liable as copartners. Neither the case of *Hurt v. Salisbury* (55 Mo. 311), nor that of *Richardson v. Pitts* (71 Mo. 128), relied upon by the counsel for the plaintiffs, furnishes a distinct answer to this inquiry. The first case was a suit upon a note executed by certain individuals as directors assuming to represent a corporation which had no legal existence, and this court held that the parties who signed the note were liable thereon. In the case last named, certain members of an inchoate corporation, whose incorporation was incomplete by reason of a failure to file the articles of association with the Secretary of State, advanced money for the benefit of the joint enterprise, under obligations incurred by them upon the supposition that the association was duly incorporated, and they were adjudged to be entitled to contribution from their associate members beyond the amount of stock severally subscribed for by such associates. The effect of this decision is to create the relation and liability of partners as between the members of an unincorporated association, so far as the debts of the association contracted in good faith and paid by any of its members are concerned, and to establish a different rule from that laid down in *Ward v. Brigham* (127 Mass. 24). The decision of this court is supported by the cases of *Hill v. Beach* (12 N. J. Eq. 31); *Hodgson v. Baldwin* (65 Ill. 532); *Flagg v. Stowe* (85 Ill. 164). *Vide also Ferris v. Thaw* (72 Mo. 446).

In *Pettis v. Atkins* (60 Ill. 454); *Bigelow v. Gregory* (73 Ill. 197); *Abbott v. Smelting Co.* (4 Neb. 416); *Frost v. Walker* (60 Me. 468); *Wells v. Cates* (18 Barb. 554); *National Union Bank v. Landon* (45 N. Y. 410); and *Tappan v. Bailey* (4 Met. 529), it is held that members of an unincorporated association, notwithstanding their subscription and payment for a specified number of shares of the capital stock of the association, are liable as copartners for the debts of the association. These decisions we regard as applicable to the case at bar. By reference to the testimony it will be seen that in 1875, more than a year before the articles of association were signed by the defendants, the store was established and shares of stock were subscribed for, and Woods was appointed to make the purchases and superintend the sales. All this was done, it is true, with the understanding that the promoters of the enterprise were to become a corporation, and the purpose of the promoters undoubtedly was

to limit their liability to the amounts severally subscribed by them.

If by reason of an unexecuted intention to become a corporation, the defendants could carry on the business of merchandising from 1875 until May, 1877, without incurring in the meantime the liability of partners, we do not see why they could not have continued so to act as a corporation for a much longer period, buying and selling through an agent, and enjoying all the privileges of a corporation without being liable to be sued as such. No mere intention on the part of the members of an unincorporated association, to be a corporation, will suffice to restrict their individual liability to that imposed by the statute upon corporate shareholders. Not being a corporation, their liability cannot be a corporate liability, but must be that of a joint-stock company, unless the provisions of the statute in relation to limited partnerships shall have been complied with, of which there is not even the slightest intimation in this case. There is no question but that the goods were purchased by Woods of the plaintiffs for the defendants, and went into the store of the defendants, and were sold by Woods for their benefit, and a ruling which would turn the plaintiffs out of court, and compel them to collect the whole amount of their claims from Woods, or the directors in charge, who could in turn go against the defendants for contribution under the decision of this court in *Richardson v. Pitts* (*supra*), would be not only manifestly unjust, but utterly indefensible. Under the logic of the case last cited, the defendants are liable as partners directly to the plaintiffs for the debts of the association incurred before they became incorporated.

For the debts incurred after they became a corporation, their liability will depend upon the fact of actual notice of their incorporation to the plaintiffs at the time such debts were incurred. When partners have dealt as such with a seller, and after becoming incorporated, continue to deal as before, having their bills made in the same way, without giving any notice of their altered condition, they will continue to be liable as partners, unless the seller have knowledge thereof derived from some other source. Whether the plaintiffs had such notice or knowledge is a question of fact for the jury.

For the reasons given, the judgment will be reversed and the cause remanded. All the judges concur.

STOUT v. ZULICK.

(48 N. J. Law, 599. 1886.)

ERROR to Essex Circuit Court.

THE CHANCELLOR: —

The plaintiffs in error, who were plaintiffs below, seek to recover

from the defendants the amount of a bill of goods sold by them to the New Jersey and Sonora Reduction Company. The goods were sold in New York to the company, September 16, 1884, upon the order of its purchasing agent, and were charged to the company upon the plaintiffs' books of account, and the plaintiffs accepted the note of the company at two months, signed by the treasurer for the price, and the goods were shipped to the company at Sonora in Mexico. The note has not been paid. The plaintiffs brought suit for the price of the goods against the defendants, who were the persons who signed, as stockholders, a certificate of incorporation, dated August 4, 1883, the object of which was to incorporate the company under the provisions of the act "concerning corporations." The ground upon which the plaintiffs base their claim of liability on the part of the defendants is that the proceedings for incorporation were not in compliance with the provisions of the act applicable to the subject. The act provides for the incorporation of any company of three or more persons associating themselves together for any lawful business or purpose. The steps to be taken are the making, recording, and filing of a certificate which is to be proved or acknowledged and recorded as required in case of deeds of real estate. In this case the certificate of acknowledgment of one of the defendants, Willard Richards, does not state that the contents of the certificate of incorporation were made known to him by the officer taking the acknowledgment (a notary public of Saratoga County, in the State of New York), and the accompanying certificate of authentication of the notarial act by the clerk of the courts of that county does not state that the notary was authorized by the laws of New York to take the acknowledgments and proofs of deeds or conveyances for lands, tenements, or hereditaments in that State, which statement is required by the supplement to the act respecting conveyances (Rev., p. 1280) in case of deeds for land, the acknowledgment or proof of which is taken in another State or territory before an officer so authorized. By reason and solely on account of those alleged defects, the plaintiffs insist that the certificate of incorporation is a nullity, and that the defendants are consequently liable as partners for the price of the goods.

It will have been seen that the goods were not sold to the defendants, but to the company to which the credit was given, and to which they were charged upon the plaintiffs' books, and for the price of which the plaintiffs accepted a note of the company, signed by the treasurer. The contract was not with the defendants, but with the company, and the defendants were guilty of no fraud. None is imputed, but, as before mentioned, the claim of liability is based entirely upon the proposition that the proceedings intended to effect the incorporation are, because of the alleged defects before referred to, a nullity. In the absence of a statutory provision making shareholders liable in case of failure to comply with the requirements of the charter, or with the requirements of the act under which the company

is incorporated, persons who have contracted with a *de facto* corporation as a corporation, cannot deny its corporate existence in order to charge its shareholders individually as partners. (Taylor on Corp., § 739.) See, also, *Fay v. Noble* (7 Cush. 188). Where it is shown that there is a charter or a law under which a corporation with the powers assumed might lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, and a user of the rights claimed under the charter or law, the existence of a corporation *de facto* is established. *Methodist Church v. Pickett* (19 N. Y. 482); *Buffalo and Allegheny R. R. Co. v. Cary* (26 N. Y. 75). And it is entirely settled that the corporate existence of such corporation *de facto* cannot be inquired into collaterally. It is, as to all who contract with it, to be assumed to be a corporation *de jure*. The legality of its corporate existence may be inquired into by the State, but not by any one else. And this is as true where the corporation is formed under a general law, as it is where the corporate existence is claimed under a special charter. *Cochran v. Arnold* (58 Penna. St. 399); *Eaton v. Aspinwall* (19 N. Y. 119). Had this suit been brought against the company, it could not have denied its corporate existence; neither can the plaintiffs, who contracted with it as a corporation, do so. (Taylor on Corp., § 146); *Swartwout v. Michigan Air Line R. R. Co.* (24 Mich. 389); *Rafferty, Receiver, v. Bank of Jersey City* (4 Vroom, 368). Our act provides that upon making the certificate and causing it to be recorded and filed, the persons so associating, their successors and assigns, shall be, from the time of commencement of the corporate existence, fixed in the certificate, and until the time limited therein for the termination thereof, incorporated into a company by the name mentioned in the certificate. The time fixed for such termination in this case was August 4, 1933. The law authorized the formation of the corporation; the proceedings purported to be in compliance with the requirements of the law; the certificate was made, recorded, and filed, and the company claimed the right to exercise the powers conferred upon corporations duly created under the law, and it exercised them accordingly. The transaction under consideration furnishes an instance of such user. The company was a corporation *de facto*, and the plaintiffs, who contracted with it, cannot be permitted to deny the legality of its existence. The State alone can call that in question. Nor are the cases *Hill v. Beach* (1 Beas. 31), and *Booth ads. Wonderly* (7 Vroom, 250), cited by the plaintiffs' counsel, in any wise opposed to the views above expressed. In the former, persons who associated themselves together for the purpose of carrying on the quarrying business in this State, took proceedings to incorporate themselves into a company under a general corporation law of New York. They were held liable as partners upon the ground that they were not a corporation, the Chancellor saying, that they were not a domestic corporation, and could not be sued as such, and that they were not a foreign

corporation, for it was perfectly manifest upon the face of their proceedings that their attempted organization under the general law of New York was a fraud upon that law. In *Booth v. Wonderly*, persons who had got control of a special charter creating a corporation to be located in Trenton, but who were not named as incorporators therein, attempted to use it to establish a company under it, to be located at Jersey City, and to give to such a company a corporate color under that charter. The court said that the company had some semblance of a corporation in name, form of organization, and assumption of a seal, yet not enough to give it a *de facto* corporate existence; that the attempt to establish the company in Jersey City under the charter was a palpable and entire perversion of the object of the act, and a fraud upon the act; that it gave no corporate color to the company; that the doctrine that the organization cannot be inquired into collaterally had no application to that case, because the charter did not fit the company and was not intended for it, and that the organization was entirely outside of the act and had no existence as a corporation, real or *de facto*. It will have been seen that in each case the *ratio decidendi* was that the pretended incorporation was a fraud upon the act under which the defendants claimed corporate existence. The judgment of the Circuit Court should be affirmed.

For affirmance. — THE CHANCELLOR, CHIEF JUSTICE, DIXON, KNAPP, MAGIE, PARKER, REED, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, COLE, MCGREGER, WHITTAKER — 14.

For reversal. — NONE.

CHAPTER XX.

RIGHTS OF CREDITORS CONCERNING THE MANAGEMENT
OF THE CORPORATION.

MILLS v. RAILWAY COMPANY.

(*L. R. 5 Ch. Ap.* 621. 1870.)

THIS was an appeal from an order of Vice-Chancellor Stuart, granting an interlocutory injunction against the Northern Railway of Buenos Ayres Company, Limited, under the following circumstances:—

The company was established in July, 1862, and registered under the Companies Act, 1862. Its main object was stated in the memorandum of association to be as follows:—

“The making, purchasing, or otherwise acquiring and maintaining, managing, and working of railways and tramways, and other roads and ways, in the State of Buenos Ayres, or in the States of the provinces of the Argentine Confederation, with branches therefrom respectively, and the making or providing of machinery, rolling and other stock, plants, stores, and conveniences for the purposes thereof, and the conveying passengers, animals, and goods on and to and from the railways, tramways, roads, ways, and branches of the company, and the carrying on the business of a railway and tramway company. But, unless and until the company shall increase their original capital of £250,000, the undertaking of the company shall be confined to a railway and tramway from Buenos Ayres to San Fernando, authorized by the Government concession of the 25th of February, 1862, and to the further extension of the said railway to the River Tigre, and to such of the several objects in the memorandum mentioned as the company shall think necessary, incidental, or advantageous thereto.”

Among other subordinate objects were mentioned “the doing of all other things whatsoever which the company shall think directly or indirectly incidental or conducive to any of these objects, or likely to be advantageous to the company in connection therewith, and the doing of all things, and the exercise of all powers contained in the articles of association of the company.”

The original capital of the company consisted of £250,000, divided into 1,500 guaranteed preference shares of £10 each, 600 deferred preference shares of £10 each, and 4,000 ordinary shares of £10 each. By the articles of association it was provided that the company, with the sanction of a general meeting, might increase the capital of the company by the issue of new shares; and power was given to the directors to borrow any sum or sums not exceeding £150,000, on debentures or other securities.

On the 22d of August, 1862, an agreement was made between the company and the firm of E. Murray & Co. which consisted of J. R. Croskey and Eugene Murray, that the firm should construct a single line of railway from the gasworks at Buenos Ayres to San Fernando, and a single line of tramway from the custom-house at Buenos Ayres to the station at the gasworks. The price fixed was £100,000, which was to be paid partly in cash and partly in ordinary shares of the company, with an option to the company to pay the whole in cash in lieu of shares. The agreement contained a clause for referring questions between the parties to arbitration.

The works were performed by Messrs. E. Murray & Co., and they received payments in money and shares on account of the contract; but they still claimed £64,849 from the company, partly under the contract and partly for extra works. This debt was disputed by the company, who, on the contrary, claimed that a large sum was due from the firm to the company.

On the 30th of April, 1870, the directors issued a report, in which they stated that they had a balance in hand of net profits of £32,681, 3s. 2d.; that the charge for interest upon the company's loan capital, &c., was £5,838 6s. 2d., leaving, after lending to the capital account £10,350 17s. 4d. for special expenditure, £16,491 19s. 8d. available for distribution. The directors recommended that this sum should be applied in payment of the arrears of dividend due to the guaranteed preference shareholders for the eighteen months ending the 30th of June, 1867.

The directors explained, in a subsequent paragraph of their report, that the payment of the arrears out of accumulations of revenue would occupy a considerable time, and that in order to accelerate the desired result a certain amount must be funded, and that as legal difficulties prevented this until the revenue was sufficient to enable the company to declare equivalent dividends, and as expenditure was being incurred in new works and additional plant, which might be legally charged to capital, it was recommended, under the advice of counsel, that the amount expended last year under the above-mentioned heads, as well as that to be expended in the present year and 1871, estimated at about £10,000, should be treated as a payment on capital account, which would be afterwards discharged out of a sum of £20,000, which they purposed to raise by issue of debentures at £6 per cent. The report also recommended the conversion of the

tramway from the custom-house to the principal station into a railway adapted for locomotive engines.

This report was adopted at the general meeting of the company held on the 16th of May, 1870; and the sum of £16,491 19s. 8d. was distributed according to the proposal contained therein.

The bill (par. 39) contained the following charge: "The effect of the proposal contained in the report is, that sums which have been paid out of revenue, and ascribed in the accounts of the company to revenue account, are now to be treated as payments on account of capital account, and considered as having been borrowed for the purpose of capital from the revenue, so as to create an apparent or fictitious fund for the payment of shareholders. The money for this purpose is proposed to be raised by means of the issue of debenture stock, and the effect of the proposal is to increase the liabilities of the company by the issue of debenture stock, for the purpose of borrowing money, in order to distribute the same among the shareholders under the guise of revenue."

The plaintiffs were Robert Mills, the executor of Eugene Murray, who was dead, and H. W. Spratt and J. R. Stebbing, the trustees of a deed of assignment executed by J. R. Croskey for the benefit of his creditors. The bill alleged that Mills, as the executor of E. Murray, held some fully paid-up deferred preference shares of £10 each. The bill prayed for an account and payment of what was due to the plaintiffs under the contract, and for other works; and for an injunction to restrain the company from carrying out the proposal in the report, and from issuing any debenture stock or applying any money raised by debenture stock on debentures in payment of any dividend to any of the shareholders, and from declaring or distributing any dividend until they had paid or made provision for paying what was due to the plaintiffs; and also from converting the tramway into a railway until the company had duly increased their original capital. The plaintiffs moved for an injunction in similar terms.

The defendants put in a plea and answer to this bill. They pleaded, first, that the plaintiff Mills had no shares in the company, alleging that he had parted with all the shares which he held as executor of E. Murray before the filing of the bill; and, secondly, that the firm of E. Murray & Co. had not performed the contract on their part, by reason of which default the company had a claim against them exceeding the amount due from the company; and, further, that arbitrators had been appointed by both parties in pursuance of the agreement, by whose arbitration the company were ready to abide.

The plaintiff Mills filed an affidavit, stating that, although it was true that he had transferred all the shares which he held as the executor of Murray, he had done so by way of mortgage only; and that, since the filing of the bill, in order to avoid the objection

raised by the plea, he had taken a retransfer of some of the shares from the mortgagor. He also stated that other shares were held by other persons in trust for him and the other plaintiffs.

The Vice-Chancellor granted an injunction as prayed till further order; and from this order the company appealed.

LORD HATHERLEY, L. C.:—

The Vice-Chancellor appears to have formed his judgment in this case, partly at least, upon the view which he took that one of the plaintiffs, Mr. Mills, was a shareholder in the company, and therefore had a right to interfere. But, so far as the case rests on the simple fact of the plaintiffs being creditors of the company, it seems to me hardly capable of argument. Work is done for a limited company; no engagement is taken from them by way of security; no debenture or mortgage is granted by them; but the work is done simply on the credit of the company. The only remedy for a creditor in that case is to obtain his judgment and to take out execution; or it may be that he may have a power, if the case warrants it, of applying to wind up the company. But it is wholly unprecedented for a mere creditor to say, "Certain transactions are taking place within the company, and dividends are being paid to shareholders which they are not entitled to receive, and therefore I am entitled to come here and examine the company's deed, to see whether or not they are doing what is *ultra vires*, and to interfere in order that, as by a bill *quia timet*, I may keep the assets in a proper state of security for the payment of my debt whensoever the time arrives for its payment."

The case must have occurred, of course, many years ago, before joint stock companies were so abundant, but certainly within the last twenty or thirty years the money due to creditors must have been many millions, and the number of creditors must have been many thousands; yet I have never before heard — and I asked in vain for any such precedent — of any attempt on the part of a creditor to file a bill of this description against a company, claiming the interference of this court on the ground that he, having no interest in the company, except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful authority for this court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he had demands, which he had not established in a court of justice, but which he was about to proceed to establish. If there is this power in any case, of course it would apply not only to the raising of money by debentures and to paying shareholders, but it would extend to an interference in every possible way with the dealings of the company.

That being beyond any doubt, I come next to the question whether these persons are shareholders or not. But I do not pro-

pose to decide that question, for this reason, that I cannot find even an averment — and the bill appears to be demurrable upon that ground — of anything being done *ultra vires* by the company.

There are two things complained of, — one, that the company are going to raise debentures for purposes illegitimate; the other is, that they are about to establish what is called a railway instead of the existing tramway. Now let us look at what the objects of the company are. The objects of the company are stated in the memorandum of association to be to have a railway and tramway within certain definite points. Then it proceeds to say: “Unless and until the company shall increase their original capital, the undertaking of the company shall be confined to a railway and tramway from Buenos Ayres to San Fernando, authorized by the Government concession of the 25th of February, 1862, and to the further extension of that railway to the River Tigre.” I apprehend that it is perfectly clear that what is intended is, that the company shall not undertake works of a totally different character, — that is to say, a railway more extensive, going to different points, or the like, — but they shall be contented with this railway and tramway within these definite termini. To say that the condition that £250,000 is to be raised before anything is done with reference to their exceeding these works, is a provision which is to extend to preventing their making a railway or tramway between the points in question more useful by turning the tramway into a railway, or *vice versa*, seems to me a perfectly idle controversy.

Then comes the only other question arising as to the proper application of the money. The bill sets out a report which has been made to the shareholders, by which it appears that the balance in hand of net profits amounted to £32,681 3s. 2d. The charge for interest upon the company's loan capital, &c., for 1869, and for some old claims of previous years, was £5,838 6s. 2d., leaving, after lending to the capital account £10,350 17s. 4d. for special expenditure, £16,491 19s. 8d. available for distribution. Then they proceeded to say that they propose paying that over to the guaranteed shareholders. Those guaranteed shareholders had a right to carry on their surplus debt, beyond what they were paid *de anno in annum*, to following years, the consequence of which was that arrears of debt had accrued upon the income due to the guaranteed preference shareholders, and therefore the company intended to reduce that debt, which then amounted to about £25,000, by raising money under their borrowing powers. Then they say, “When we have raised the money under our borrowing powers” (and they are keeping considerably within the limit of their borrowing powers), “we shall apply that capital so to be raised in paying off £10,000 of this guaranteed debt, because we find that we have really to our credit in respect of capital £10,000 as against this arrear of interest, this £10,000 having been taken from revenue account formerly,

and applied to purposes which were really and in fact capital purposes." That is what they state. The only averment in the bill with respect to the illegality of this proceeding is the following, and there is nothing stronger in the affidavit: "The effect of the proposal contained in the report is, that sums which have been paid out of revenue, and ascribed in the accounts of the company to revenue, are now to be treated as payments on account of capital account, and considered as having been borrowed for the purpose of capital from the revenue, so as to create an apparent or fictitious fund for the payment of shareholders." The only words that would at all point to anything wrong are the words "apparent or fictitious." But the substance of the averment does not point to anything of the kind, because the substance is only this, that some sums which formerly were carried to revenue account are now going to be treated as capital. There is no averment that they ought not to be so treated. We are left to find out whether it was wrong or not as well as we can by looking into the accounts; and from them it appears that, as to certain locomotive engines and certain other stock, they were formerly charged to revenue; and it seems, as far as I can collect—for the accounts are not very clear—that these are now to be carried to capital. No doubt many great frauds have been practised by companies both upon themselves and sometimes, unfortunately, upon the public, by carrying to capital account things which ought to go to revenue account, and thereby leaving an imaginary profit, which is not a profit at all. But the bill avers nothing of this kind distinctly and definitely, and the affidavit does not go beyond it. The affidavit verifies a quantity of reports, out of which I am to pick the items as I best may, to ascertain whether they should or should not have been charged to capital or revenue account. If I saw anything grossly extravagant or fraudulent in them—such as the working expenses of the year, or the wages of the men, carried to capital account, in order to make things look pleasant, as it is called—I should have to pause, and consider how it might be proper for this court to deal with transactions of that kind. But the only thing pointed out to me is the purchase of new locomotives. I do not know exactly on what principle railway companies proceed in their accounts with respect to their locomotives, whether the whole value should be credited, or whether a deduction should be made annually for the stock wearing out, or whether the value of the stock should be taken, which would be the more regular course, at the end of every year. But, certainly, that new rolling stock is in a sense capital as long as it lasts, and that its value on each succeeding stock-taking is capital, there is no doubt whatsoever. Then, why am I to assume that in doing this the directors are acting fraudulently? In the answer it is sworn that things which were properly capital had been paid out of revenue. If that is the case, I have no hesitation in saying that the circumstance that they had

been paying what ought to be charged to capital out of revenue does not prevent their right or their duty to the persons who are looking for their payment out of revenue, to credit back to revenue those things which have been carried for the time to capital account. Mr. Dickinson started a very curious theory, which, I apprehend, never found its way into any mercantile arrangement, — that there never can be any available income, or any profit, as long as there is any debt remaining unpaid. If that be so, I suppose there is hardly a railway company in the kingdom which could pay any dividends at all to their shareholders. I fancy there are very few indeed which have not debentures out in some shape or other; and if all those are to be paid before a single sixpence could be paid in dividend, of course the companies would be in a very different position from what they suppose themselves to be in. The whole scheme of railway arrangements, as I have understood them, has always been this, that the companies are authorized to raise part of their capital by shares and to raise further capital by means of borrowing to the amount of one third of the whole share capital. They expend that money in executing the works, and the works having been executed, the capital of the company remains in the shape of the station-houses, the permanent way, the warehouses, and everything else which requires expenditure of capital. The shareholders, especially those who are guaranteed preference shareholders, are not to be told that all these things are to be paid for before they are to have any dividend out of the income.

Therefore the whole of the averment, as I read it here, is really this, that the directors have said in their report that they are going to carry back to revenue what they borrowed from it for the purposes of capital, and when they have carried that back to revenue, then they are going to make a dividend. I do not see anything *ultra vires* in what is either there alleged or suggested. Therefore, even if we assume the plaintiffs to be shareholders, as to which more argument and more investigation might be required if it were necessary to determine that question, the plaintiffs have shown nothing *ultra vires*; and, counting them as creditors, the case is utterly unfounded as regards both principle and authority. I think, therefore, that the motion for an injunction ought to have been refused with costs; and I make an order to that effect.

In re WINCHAM SHIPBUILDING COMPANY.

POOLE, JACKSON, AND WHYTE'S CASE.

(L. R. 9 Ch. Div. 322. 1878.)

THIS was an application on behalf of the official liquidator of the Wincham Shipbuilding, Boiler, and Salt Company, Limited, to place Messrs. Robert Poole, J. Jackson, and J. G. Whyte on the list of contributories of the company.

In March, 1876, the company was formed and registered without articles of association for the purpose of acquiring and taking over the works, plant, and business of Mr. Joseph Parks at Wincham in Cheshire.

Messrs. R. Poole, Jackson, and Whyte signed the memorandum of association for fifty £5 shares each, and became directors of the company, but did not pay any deposit on their shares.

On the 1st of May, 1876, at a meeting of the company, R. Poole, as chairman, reported as the result of an interview with the manager, that Parr's Banking Company would not allow any overdraft without the personal guarantee of the directors; and it was resolved that the directors should give their personal guarantee for £5,000 to the bank, and that R. Poole should carry out the arrangement.

The guarantee was given by the directors, including Poole, Jackson, and Whyte, and the money obtained from the bank was expended in carrying on the business of the company, and no call was made.

The company got into difficulties, and in May, 1877, the bank recovered judgments against the guarantors, including Poole, Jackson, and Whyte.

At a meeting on the 6th of August, 1877, a minute was made that, "In order to reduce the balance due to Parr's Banking Company, it is recommended that the directors do pay up the amount of their shares as authorized by Art. 7 in Table A, and as contemplated in the company's prospectus." At the same meeting it was resolved to close the business of the company, and to advertise for sale the plant, &c., and the company had from that time ceased to carry on business.

No call was made, but on the 4th of September, 1877, Messrs. R. Poole, Jackson, and Whyte tendered to Enoch Johnson, the person who had been appointed as *pro tem.* secretary, three several sums of £250 as the amount due on their shares, and asked him to sign a receipt as secretary for these sums as share money. Johnson declined to receive the money or to give a receipt, "as he did not understand why he should be called upon then to give a secretary's

receipt for share money at that lapse of time." The £750 was then paid to W. Poole, who was the son of R. Poole, and had, as it appeared, attended the directors' meetings and made the entries in the minute books, and described himself as having "discharged the duties of acting secretary" up to the time when the winding-up petition was filed. The receipt was signed "*pro* secretary, William Poole," and the three sums of £250 each were paid to Parr's Banking Company, and entered in the pass-book as payments to the credit of the company.

On the 6th of September a petition was presented for winding up the company, and on the 10th of November, 1877, a winding-up order was made.

The question was whether by this payment (which amounted to the full amount due upon their shares) Messrs. R. Poole, Jackson, and Whyte had discharged themselves from liability.

The application was heard before Vice-Chancellor Bacon on the 12th of April, 1878.

Sir H. Jackson, Q. C., and H. B. Buckley, for the official liquidator: By the payments made on the 4th of September, 1877, which were received by the bank as payments on account of, and in reduction of, the amounts owing by Messrs. Poole, Jackson, and Whyte in respect of their personal guarantee and in part satisfaction of the judgment recovered against them, these directors did not discharge themselves from liability for the amount due on their shares. Being under the double liability of £750 in respect of their shares and £750 in respect of their guarantee to the bank, they have attempted, by paying the sum of £750, to discharge themselves from their liability for £1,500. Having regard to the circumstances — the time when the payment was made, two days before the commencement of the winding-up, when the company was to their knowledge insolvent, and the receipt given by an unauthorized person after the refusal of the regular secretary — the whole thing was a mere contrivance by persons, in a fiduciary position as directors, to gain an advantage to themselves at the expense of creditors of the company; and as such is invalid as a fraudulent preference under the Companies Act, 1862, s. 164. *Habershon's Case* (Law Rep. 5 Eq. 286); *Gaslight Improvement Company v. Terrell* (Law Rep. 10 Eq. 168); *Sykes' Case* (Law Rep. 13 Eq. 255). No doubt, as in the *Gaslight Improvement Company v. Terrell*, these directors have advanced money for the benefit of the company, but they are not entitled on the verge of liquidation to give themselves a preference. They must each pay the £250 due on these shares, and then they will be entitled to a dividend *pari passu* with the other creditors in respect of the £750 paid on account of the company.

Hemming, Q. C., and Babcock, for Poole, Jackson, and Whyte: There has been no fraudulent preference so as to render this payment invalid under the Companies Act, 1862, s. 164. The debt was

due from the company, whose account was at the time overdrawn, to the bank; and to enable the company to pay that debt these directors, in pursuance of the request by the company contained in a minute of the 6th of August, 1877, make this payment to the extent of their own liability. Then how is such payment affected by the authority of William Poole? The company have had the benefit of the payment, and whatever may have been William Poole's formal position, it is admitted that he did the actual work of secretary in the place of Enoch Johnson. In the *Gaslight Improvement Company v. Terrell* (Law Rep. 10 Eq. 168), and *Habershon's Case* (Ibid. 5 Eq. 286), the directors were themselves creditors of the company, and applied the payment in discharge of their own debt, and the test was whether the company was insolvent or not; but in considering the allegation of fraudulent preference, the date of the recommendation or agreement pursuant to which this subsequent payment was made, and not the date of actual payment, must be regarded. *Ex parte Hodgkin* (Ibid. 20 Eq. 746, 754); *Ex parte Kevan* (Law Rep. 9 Ch. 752, 758). The company was not insolvent, and did not contemplate liquidation on the 6th of August, 1877, but was taking measures to stave it off. *Ex parte Tempest* (Ibid. 6 Ch. 70). Even assuming, as regards the other creditors, that there was a fraudulent preference, the money paid can be recovered from the bank, but these directors, having fully discharged themselves from the amount due on their shares, cannot be called upon to pay twice over. Moreover, as directors in the position of trustees, they were entitled and bound to pay debts of the company and to apply the trust moneys for that purpose, and having incurred liability as sureties of the company, they were entitled to indemnify themselves out of the assets. *In re German Mining Company* (4 D. M. & G. 19).

BACON, V. C.:—

The difficulty in this case arises from one set of persons having different duties and different interests, their duty as directors and their interest as guarantors being in conflict. It is an undoubted and uncontroverted fact that the company was insolvent. There was no money of the company to pay creditors, and urgent representations had been made by the creditors for payment of these debts, to meet which the company had no means and no banking account on which they could draw. It is established, therefore, that the company was clearly in a condition of insolvency. Under these circumstances a resolution was passed on the 6th of August, 1877, recommending the directors to pay up the amount of their shares, which had never been called up and which they had never offered to pay. No demand was made on the directors, and nothing was done until the 4th of September, when the money was paid at the office of William Poole, who took upon himself to act in the matter without any authority. Then three directors hit upon this plan of paying their own debt to the bank and at the same time discharging the

liability on their shares. They bethink themselves of the pretence of paying £750 to the company, but in reality of handing it over to the bank. It was a mere contrivance, and there was no reality or substance in the transaction, except that by means of it £750 was paid by them in discharge of their own guarantee. The right of the company to receive £750 was thwarted and frustrated by this act of the directors. It was the duty of the directors to maintain the assets of the company, and to distribute them according to law, and not to give any one creditor a preference over another; and any contrivance by which, in contemplation of bankruptcy or winding-up, the assets were intercepted in favor of one creditor to the exclusion of others, was unlawful and invalid under the Companies Act, 1862, s. 164. What these directors have done was just that invalid or unlawful transaction pointed at by this section. For whose good was this payment made? Not that of the company, but of themselves. *Sykes' Case* (Law Rep. 13 Eq. 255) [to which his Lordship referred] was very similar. Here there was a contrivance to create a fund by means of which their guarantee should be discharged; and here, as there, there was a contrivance by which the directors seemed to pay, but did not in fact pay, the amount owing on their shares. It has been contended that these directors were trustees, and had a right to be indemnified in respect of payments made by them on behalf of the company. But this contention has no application to the present case. The money of the directors went to discharge the directors' own debts without any benefit to the company, their *cestuis que trust*, and therefore they owed this £750 to the company in respect of their shares as much as ever they did. The bank, if sued on the ground that this payment was a fraudulent preference, would say in defence that it was not a payment by the company but by the guarantors. These gentlemen must remain liable, as the £750, which ought to have been assets of the company, had been applied for the benefit of these directors and not of the company. Messrs. Poole, Jackson, and Whyte must be settled on the list of contributories without crediting them for anything in respect of their payment of £750 to the bank.

From this decision Poole, Jackson, and Whyte appealed.

The same line of argument was followed as before the Vice-Chancellor. The following cases were referred to by the counsel for the Respondent: *Gilbert's Case* (Law Rep. 5 Ch. 559); *Habershon's Case* (Ibid. 5 Eq. 286); *Sykes' Case* (Law Rep. 13 Eq. 255); *Gaslight Improvement Company v. Terrell* (Ibid. 10 Eq. 168).

JESSEL, M. R.:—

The Vice-Chancellor has decided that these gentlemen are liable to pay £250 each in respect of a call on their shares, although they allege that they have paid the whole value of their shares. The real question is, whether the payment actually made by the appellants before the winding-up was a valid payment or not. They were

directors of the company, and they had given a personal guarantee for the balance of the company's account with their bankers; and in May, 1877, the bank had brought an action on the guarantee against these three directors, and had recovered judgment in the action. On the 6th of August, 1877, there was a meeting of the directors, at which this resolution was passed: "In order to reduce the balance due to Parr's Banking Company, it is recommended that the directors do pay up the amount of their shares, as authorized by Art. 7 in Table A, and as contemplated by the company's prospectus." There is no question that at this time the company was insolvent. On the 5th of September, 1877, the three directors paid the amounts in question. The secretary had some difficulty in giving a receipt for the money, and W. Poole accordingly gave a receipt without having any right to do so. But the fact is not disputed that the money was paid and received on account of the shares, that it was remitted in due course to the bankers of the company and carried by them to the company's credit, thus reducing the balance against the company and relieving the directors from their guarantee. The Vice-Chancellor decided the question on this ground, that the directors were trustees of all their powers. So, no doubt, they were. But it is further said that they exercised their powers in breach of trust and for their own benefit, and, therefore, that the act which they did was nugatory. But it appears to me that the question is, for whom were they trustees? It does not appear that the Vice-Chancellor considered this point; but it makes all the difference whether they were trustees for the persons who were injured by what had been done in this case, namely, the other creditors of the company. It has always been held that the directors are trustees for the shareholders, that is, for the company. They are the managing partners of the company, and if they abuse their powers, which they hold in trust for the company, to the damage of the company, for their own benefit, they are liable to make good the breach of trust to their *cestuis que trust* like any other trustees. But directors are not trustees for the creditors of the company. The creditors have certain rights against a company and its members, but they have no greater rights against the directors than against any other members of the company. They have only those statutory rights against the members which are given them in the winding-up.

That being so, there was nothing to impose a duty on the directors not to pay a debt of the company, for which they were themselves liable, in priority to other debts, unless sect. 164 of the Act of 1862 applied, which it certainly does not in the present case. The payment to the bank was not a fraudulent preference; it was made in the ordinary course of business. It was a good payment, and could not be recovered back; therefore the directors, although they derived a collateral advantage to themselves, did not injure their *cestuis que*

trust. The payment was not any breach of duty to the only persons for whom they were trustees. The appeal must therefore be allowed with costs.

JAMES and BRAMWELL, L. JJ., concurred.

POND v. RAILROAD COMPANY.

(130 Mass. 194. 1881.)

MORTON, J. : —

This is a bill in equity, the substantial allegations of which are, that the plaintiffs are creditors of the defendant corporation; that the corporation is insolvent; that all its property is mortgaged to trustees for the benefit of one class of creditors; that it owes large amounts to other creditors, one of whom has attached all its property; that it is about to execute a lease to said attaching creditor for the term of 999 years, at a rental which will not pay the interest upon its indebtedness; and that the execution of said lease would be injurious to the interest of its creditors and stockholders. The prayer is for an injunction to restrain the defendant from further prosecuting its business, and for the appointment of receivers.

There is no statute giving this court equity jurisdiction in such a case as this, and the bill does not state a case within the general equity powers of a court of chancery. As is stated in *Treadwell v. Salisbury Manuf. Co.* (7 Gray, 393), "it is too well settled to admit of question, that a court of chancery has no peculiar jurisdiction over corporations, to restrain them in the exercise of their powers, or control their action, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief."

The plaintiffs cannot maintain this bill, unless upon the ground that any creditor can maintain a bill in equity against an individual debtor upon like allegations. But there is no allegation of fraud or breach of trust, or any other ground of jurisdiction, which brings the case within the general equity powers of a court of chancery. The bill is an attempt by a creditor to restrain his debtor from making what is alleged to be an improvident contract. The rights of the parties are governed by the rules of the common law. The plaintiffs as creditors might by an attachment have obtained security which would take precedence of the contemplated lease; but if they could not, the court has no power to restrain the debtor from making a disposition of his property which is permitted by the common law, unless fraud or a breach of trust is alleged and shown.

The allegation that the defendant corporation is insolvent does not

aid the plaintiffs. In the absence of any statute giving the power, this court has no authority to act as a court of insolvency for the liquidation of the affairs of an insolvent railroad corporation.

Decree dismissing the bill affirmed.

GRAHAM *v.* RAILROAD COMPANY.

(102 U. S. 148. 1880.)

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

This is a bill in equity filed by Lawrence G. Graham and Donald D. Scott against the La Crosse and Milwaukee Railroad Company, the Milwaukee and St. Paul Railway Company, Moses Kneeland, James Ludington, Byron Kilbourn, and others, to subject certain real estate in the city of Milwaukee, Wisconsin, to the satisfaction of certain judgments recovered by the complainants against the first-named company for an indebtedness on contracts arising after its sale and conveyance of that real estate, to Charles D. Nash. The defendants deraign title through him.

The court below dismissed the bill, whereupon the complainants appealed here.

MR. JUSTICE BRADLEY delivered the opinion of the court:—

In September, 1855, the La Crosse and Milwaukee Railroad Company not being at that time, so far as appears, indebted in any considerable amount, sold certain lands in the city of Milwaukee not then wanted for railroad purposes to Charles D. Nash for the sum of \$25,000. The officers of the company who took a leading part in negotiating the sale are charged to have been interested in the purchase, and to have furnished Nash the means for effecting it. At all events, shortly after it was made, Nash conveyed the property, for the original consideration, to Moses Kneeland, one of the officers referred to, and Kneeland, retaining one-third part, subsequently conveyed the other two-third parts to Ludington and Kilbourn, they all being directors of the company, and members of the executive committee. The company itself never questioned the fairness of this transaction; on the contrary, the sale was subsequently (in March, 1858) expressly confirmed by the board of directors, and a further quitclaim deed executed by the company in confirmation thereof. In September and November, 1858, the appellants recovered two judgments against the company for indebtedness on contract, arising after the sale of the lands, and issued executions thereon, under which levies were made on said lands, as lands of the company. In January, 1860, the appellants, having sued on these judgments in the United States Court, recovered a second judgment for upwards

of \$40,000, issued execution thereon, and made another levy on the lands. Being unwilling to attempt a sale under their said execution in consequence of the deeds for the lands being recorded, the appellants, in June, 1860, filed the bill in this case against Kneeland, Kilbourn, Ludington, and the railroad company, setting forth their said judgments, executions, and levies, stating the fact of the said sale to Nash, and his conveyance to Kneeland, and the latter's conveyance to the other parties; alleging that the transaction was a fraud against the corporation and its creditors, and complaining that the said conveyances of lands were a cloud upon their right to sell the lands under execution, and an impediment in the way of the execution of their writ of *fiery facias*; and prayed that the lands might be decreed subject to the lien of their judgment; that they might be decreed to be authorized to sell the same, or so much as might be necessary for the purpose of satisfying their judgment; and that Kneeland, Kilbourn, and Ludington might join in the conveyance, and might be restrained from claiming the land; and that the conveyances to them might be declared null and void. The bill, amongst other things, averred that the lands were sold to Nash for much less than their real value; but it contained no allegation that the company was insolvent, or that it had not other assets available under an execution; nor was any offer made to repay the consideration which the purchaser had given for the lands.

To this bill the defendants severally filed answers, denying that the lands were worth more than \$25,000 at the time of sale; averring that the sale was made in good faith, and with the company's concurrence, and setting forth in detail many circumstances tending to show that the title was involved and embarrassed; that they required large outlays of money to render them available; that the company had offered them for sale in the market; and was unable to get from any other person the price paid for them by Nash; that although Nash was requested to purchase the lands by Kneeland, and was aided by him in paying therefor, yet Nash had the option to keep them; but after making the purchase and inquiring into the title and situation of the lands, he asked to be relieved from the purchase, and that thereupon Kneeland, Kilbourn, and Ludington took them off his hands.

The parties went into proofs, and it appears that the company had, for months prior to the sale, been endeavoring to dispose of the lands, and could get no purchaser at the price offered by Nash; and the leading statements of the answer, as to the title and situation of the lands, were verified. It also appeared that the railroad company never objected to the sale, but that it was expressly confirmed in March, 1858, by a resolution of the board of directors, as before noticed.

Various transactions subsequently took place, by which other parties became interested in the lands, and in the affairs and

property of the railroad company, which are fully developed in the supplemental proceedings and proofs; but it is unnecessary to notice them further. The foregoing statement exhibits the leading features of the case as presented for our consideration.

The main question is, whether the sale to Nash, made before the railroad company became indebted to the appellants, and when for all that appears it was perfectly solvent, even though made for the use and benefit of the officers referred to, can be set aside at the instance of the complainants, for the purpose of subjecting the lands to sale under their execution. And this question, we think, must be answered in the negative.

It is a well-settled rule of law that if an individual, being solvent at the time, without any actual intent to defraud creditors, disposes of property, for an inadequate consideration, or even makes a voluntary conveyance of it, subsequent creditors cannot question the transaction. They are not injured. They gave credit to the debtor in the status which he had after the voluntary conveyance was made.

The authorities on this subject are fully collected in the notes to *Sexton v. Wheaton* (1 Am. L. Cas. 1), and in the opinion of Mr. Chief Justice Marshall in that case; and the general doctrine is affirmed in *Mattingly v. Nye* (8 Wall. 370).

It is true that if a debtor dispose of his property, with intent to defraud those to whom he expects to become immediately or soon indebted, this may be a fraud against them, which they may have a right to unravel. But that is a special case, to which the present bears no resemblance. It is not pretended that the railroad company disposed of the property in question for the purpose of defrauding creditors, much less for the purpose of defrauding those who afterwards in due course of business might become its creditors.

But it is contended that this is a case in which the debtor corporation was defrauded of its property, and that as the company had a right of proceeding for its recovery, any of its judgment and execution creditors have an equal right; that it is a property right, and one that inures to the benefit of creditors.

Conceding that creditors who were such when the fraudulent procurement of the debtor's property occurred, — and cases to that effect have been cited, — the question still remains, whether, the debtor being unwilling to disturb the transaction, subsequent creditors have such an interest that they can reach the property for the satisfaction of their debts. We doubt whether any case going as far as this, can be found. No such case has been cited in the argument. Dicta of judges to that effect may undoubtedly be produced, but they are not supported by the facts of the cases under consideration.

It seems clear that subsequent creditors have no better right than subsequent purchasers, to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has

acquiesced in, and which he has manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such right. In *French v. Shotwell* (5 Johns. (N. Y.) Ch. 555), Chancellor Kent decided, upon full consideration, that when a party to a judgment entered upon a warrant of attorney, voluntarily waives his defence or remedy on the ground of fraud or usury, and releases the other party, a subsequent purchaser under him, with notice of the judgment, will not be allowed to impeach it, or to investigate the merits of the original transaction between the original parties; and he dismissed a bill filed by the subsequent purchaser for relief in such a case. The Chancellor said: "If the party himself who is the victim of fraud or usury chooses to waive his remedy and release the party, it does not belong to a subsequent purchaser under him to recall and assume the remedy for him. If a judgment was fraudulent by collusion between the parties to it, on purpose to defraud a subsequent purchaser, the case would present a very different question. But if the judgment was fraudulent only as between the parties, it is for the injured party alone to apply the remedy. If he chooses to waive it and discharge the party, it cannot consist in justice or sound policy, that a subsequent voluntary purchaser, knowing of that judgment, should be competent to investigate the merits of the original transaction as between the original parties. *Quisque potest renunciare jure pro se introducto* . . . It is stated to have been a principle of the common law that a fraud could only be avoided by him who had a prior interest in the estate affected by the fraud, and not by him who subsequently to the fraud acquired an interest in the estate. *Upton v. Basset* (Cro. Eliz. 445, and recognized in 3 Co. 83 a)."

This decision of Chancellor Kent was afterwards nearly unanimously affirmed by the Court of Errors. (20 Johns. (N. Y.) 668.)

When the question of the right of a creditor to set aside a conveyance procured from the debtor by fraud first came before the courts in England, it was held that the debtor's own right was merely the right to file a bill in equity against the fraudulent grantee adversely; and if he did not see fit to take such a proceeding, his creditor had no such privity with the transaction as to enable him to obtain relief, even though the debtor should assign his supposed right to the creditor; that the transaction savored of champerty, and was opposed, at least, to the spirit of the law against champerty and maintenance. This was the substance of the decision by the Court of Exchequer in 1835, in *Prosser v. Edmonds* (1 Y. & C. 481). Lord Abinger treated the case as a new one, and at the close of the argument remarked that his impression was that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. He afterwards gave a deliberate opinion upon the point. In that case, an executor and trustee had fraudulently procured an assignment of his brother-in-law's interest in the

estate, knowing its value, which was unknown to the assignor. A subsequent creditor of the assignor, to whom he assigned his whole interest in the estate, filed a bill to set aside the assignment to the trustee. Lord Abinger distinguished the case from that of an assignment of a chose in action, as a note not negotiable, or a bond, or a mortgage, or an equity of redemption, where possession of the thing assigned is delivered to the assignee; and treated it as an assignment of a mere naked right to file a bill in equity, in which the last assignee purchased nothing but a hostile right to bring parties into a court of equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. "What is this," says the Lord Chief Baron, "but the purchase of a mere right to recover? It is a rule, not of our law alone, but of that of all countries (Voet ad Pandect, lib. 41, tit. 1, sect. 38), that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount properly to maintenance or champerty, yet of which, upon general principles, and by analogy to such acts, a court of equity will discourage the practice." "Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity." These remarks are very broad, and would apply to the case of existing as well as subsequent creditors; though the case itself was that of a subsequent creditor. It forms the subject of a section in Story's Commentaries on Equity (sect. 1040 *h*), where, in a note, Lord Abinger's opinion is extensively quoted; and it has been followed by other very respectable authorities, and, as applied to subsequent creditors, at least, we think that the reasoning is sound.

The principle established in *Prosser v. Edmonds* has been adopted by the Supreme Court of Wisconsin, in which State the lands in question are situated. In *Crocker v. Belangee et al.* (6 Wis. 645), decided in 1858, it was held that a deed obtained from the grantor, through fraudulent representations made by the grantee, is not void, but voidable only, at the election of the grantor; and that the conveyance of the same land by the grantor to another person is not the exercise of such election, and does not avoid the former deed; that, in order to avoid such former deed, some proceeding must be had by the grantor to which the grantee is a party; and that a subsequent purchaser from the grantor cannot set up the alleged fraud of the first grantee to defeat his title, — the court holding that the right of a vendor to avoid a sale or deed on the ground of fraud practised by the vendee is not a right or interest capable of sale and transfer,

so as to enable a subsequent vendee of such right, for such cause, to attack the title of the first vendee; that it is a mere personal right, incapable of sale or transfer.

In *Milwaukee & Minnesota Railroad Co. v. Milwaukee & Western Railroad Co.* (20 Id. 174), the latter company had covenanted to pay a certain portion of an incumbrance on railroad property afterwards purchased by the complainant company under a subsequent mortgage. A release of the obligation had been fraudulently, as alleged, procured from the original mortgagor company owning the road. The complainant purchased under a mortgage which conveyed "all causes of action, demands, and choses in action, of whatever nature," of the mortgagors; and claimed to have purchased the right to set aside the alleged fraudulent release, and filed a bill for that purpose; but the bill was dismissed on the ground that such a right of action could not be thus assigned. The court say: "Admitting that the facts alleged present a case which would entitle the La Crosse and Milwaukee Company [the mortgagor] to have the release set aside on account of these acts of fraudulent concealment by one of its directors of his interest in the defendant company, and assuming that the further fact appears that this right of action has been assigned by the La Crosse and Milwaukee Company to the plaintiff, the question would then arise, whether the release could be avoided on the application of such plaintiff, the La Crosse and Milwaukee Company making no complaint of the fraud whatever. In other words, is this mere right to litigate the question, and to set aside the deed of release on account of fraud practised upon the assignor, a subject of assignment and transfer, and will a court of equity allow the assignee to stand in the shoes of the assignor in respect to the remedies?" And then referring to the previous case of *Crocker v. Bellungee et al.*, and to *Prosser v. Edmonds*, the court expresses its approbation of those decisions, and adds: "A reference to these authorities is all which probably need be said at this time in regard to the allegations above cited [referring to the contention of counsel] and upon the point whether the plaintiff company could avoid the release for the alleged fraudulent act of concealment, even if this right of action had been assigned to it by the La Crosse and Milwaukee Company."

It seems to us that those cases, which, so far as it appears, declare the settled law of Wisconsin, are conclusive of the present case.

It is contended on the part of the appellants that *Prosser v. Edmonds* has been overruled by the subsequent cases of *Dickinson v. Burrell* (Law Rep. 1 Eq. 337) and *McMahon v. Allen* (35 N. Y. 403). We have examined these cases, and others which are supposed to be in conflict with *Prosser v. Edmonds*. In *Dickinson v. Burrell*, the Master of the Rolls, Lord Romilly, expressly disavows any intention to overrule the former case. He says: "The demurrer is mainly supported on the case of *Prosser v. Edmonds*, which was

decided, after long deliberation, by Lord Abinger; but I am of opinion that the case before me does not fall within the rule established by that decision." The case then before the court was, that a conveyance of an interest in an estate had been fraudulently procured from Dickinson, by his own solicitor, to a third party for the solicitor's benefit, and for a very inadequate consideration. Dickinson, ascertaining the fraud, by a conveyance which recited the facts, and that he disputed the validity of the first conveyance, transferred all his share in the estate to trustees for the benefit of himself and his children. The trustees filed a bill to set aside the fraudulent conveyance upon repayment of the consideration-money and interest, and to establish the trust. The Master of the Rolls sustained the bill, observing: "The distinction is this: if James Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A. B., to maintain this bill; but if A. B. had bought the whole interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed." "I think that the distinction between the conveyance of the property itself and the conveyance of a mere right to sue, or what in substance is a right to sue, is taken by Lord Abinger in the case of *Prosser v. Edmonds*. The distinction is also taken in *Cockell v. Taylor* (15 Beav. 103) and in *Anderson v. Radcliffe* (Ell. B. & E. 806), and has been adopted and approved in many other cases; and it is, I think, founded in reason and good sense."

Surely there is here no overruling of *Prosser v. Edmonds*, even if such overruling could avail against the Wisconsin decisions. It leaves that case in full force as to assignments of the mere right to sue. In the case before us there is not even that. The railroad corporation acquiesced in the sale, and confirmed it. The conveyance, which, perhaps, might have been set aside had the company seen fit, became absolute as between the parties and carried the title. It is as valid between the parties as if the corporation had conveyed to a stranger. The appellant then becomes a creditor, and afterwards obtains judgment, and simply makes a levy; and then comes into court and asks its aid to remove a cloud from its title. What title? Has he acquired any title? Was there any title for him to acquire? There had been a right to file a bill in equity, and that right had been remitted by the company's acquiescence in the sale, — probably for the reason that it obtained all that the property was worth at the time. The contrary, at least, is not established. And if it were established, it would only make out a case of voluntary conveyance as against a subsequent creditor, which has already been considered. We think that there is nothing in the case of *Dickinson v. Burrell* to overrule the effect of *Prosser v. Edmonds*, so far as the present case is concerned.

Then, as to *McMahon v. Allen* (35 N. Y. 403), decided in 1866. One Harrison, in March, 1852, being in debt, was induced by the fraudulent contrivance of his agent and attorney, and to the prejudice of his creditors, to convey to said agent for a very inadequate consideration, his interest in his mother's estate and in certain other property, he being ignorant of the fraud practised upon him. In August, 1852, Harrison made a general assignment for the benefit of his creditors of all his property and rights of action, with full power to sue for and collect the same. The assignee filed a bill to set aside the conveyance to the agent. The bill was sustained. The court, Mr. Justice Hunt delivering the opinion, relied on *Dickinson v. Burrell*, saying: "In the recent case of *Dickinson v. Burrell*, this precise question was presented;" and, after quoting largely from the opinion in that case, added: "This was a well-considered case, is of high authority, and, in my opinion, is an accurate exposition of the law. I think it should control the present case." In the New York case, it is true, there was no express repudiation of the fraudulent conveyance, as in *Dickinson v. Burrell*, but there was a conveyance of the estate to the assignee, with a power to sue for the benefit of creditors; and those creditors had been directly defrauded. Without further comment, it seems to us clear that *McMahon v. Allen* cannot control the present case.

The principle that subsequent creditors cannot question a voluntary or fraudulent disposition of property by their debtor, not intended as a fraud against them, is especially applicable in cases of constructive fraud, like that charged in the present bill. Suppose it be true, that the purchase of the lands in question by or for the benefit of officers of the company actively concerned in the transaction could be set aside at the instance of the company as a constructive fraud, yet if there was no actual fraud, if the company received full consideration for the property sold, how can it be said that subsequent creditors of the company are injured?

In the present case we are satisfied from the evidence that the property was sold for its fair value at the time, and that no actual loss accrued to the railroad company's estate.

It would be unjust and a great hardship; therefore, on the mere ground of the constructive fraud, to allow creditors who had no interest at the time to seize and dispose of the property sold.

It is contended, however, by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

When a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds which, in other circumstances, are as much the absolute property of the corporation as any man's property is his. We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each.

We think that the present bill cannot be maintained.

Decree affirmed.

CURRAN v. STATE OF ARKANSAS.

(15 Howard (U. S.) 304. 1853.)

MR. JUSTICE CURTIS delivered the opinion of the court:—

This is a writ of error to the Supreme Court of the State of Arkansas.

The plaintiff in error filed his bill in equity in the Circuit Court of that State for the county of Pulaski, against the State of Arkansas, the State Bank of Arkansas, and the financial receiver and the attorney of the bank; and the defendants having demurred thereto, the Circuit Court overruled the demurrers, and, as the defendants elected to rest thereon, the court made a decree in favor of the complainant. The defendants appealed to the Supreme Court, where the demurrers were sustained, and the bill ordered to be dismissed. This decree the plaintiff has brought here for re-examination, under the 25th section of the judiciary act.

As the questions to be determined arise on a demurrer to the bill, the substance of the case, therein made and confessed by the demurrer, must be stated, to exhibit the grounds on which our decision rests.

The bill shows that the Bank of the State of Arkansas was incorporated by the Legislature of that State in 1836, with the usual banking powers of discount, deposit, and circulation, and that the State in fact was, and was designed by the charter to be, its sole stockholder. That the capital stock of the bank consisted of \$1,146,000, raised by the sale of bonds of the State, together with certain other sums paid in by the State as part of the capital stock, amounting in the aggregate to the sum of \$350,753, being in the whole \$1,496,753; all which was in specie, or specie funds. That the bank was required by its charter to have on hand at all times sufficient specie to pay its bills on demand. That the plaintiff, being the owner and bearer of bills of this bank, amounting to upwards of \$9,000, which the bank had refused to pay, instituted suits and recovered judgments thereon at law, upon which executions, running against the goods, chattels, and lands of the bank, have been duly returned wholly unsatisfied. The general scope of the bill, therefore, is to obtain the aid of a court of equity to reach such assets of the bank as ought to be appropriated to satisfy this judgment debt. The parties in whose hands it is alleged these assets are, are the State of Arkansas and two other defendants, who are alleged to have charge of certain effects of the bank, in behalf, and under the authority of, the State.

To make a case against these parties, and show that they hold property which in equity belongs to its creditors, and ought to be appropriated to pay their debts, the bill states, that the bank having gone into operation, and issued bills to a large amount, which were then in circulation, gave public notice on the 7th day of November, 1839, that the payment of specie was definitely and finally suspended; and thenceforward, with some comparatively trifling exceptions, has refused to redeem any of its bills.

That in January, 1843, the bank still continuing insolvent, an act was passed by the Legislature to liquidate and settle its affairs. That the assets of the bank then amounted to \$1,832,120, of which the sum of \$1,000,000 was good and collectible; and that it had then on hand the sum of \$90,301 in specie. This act expressly continued the corporate existence of the bank; its affairs were subjected to the management of a financial receiver and an attorney, who were to apply the moneys collected by them to redeem the outstanding circulation of the bank; but, at the same time, bonds of the State, held by the bank, for money borrowed by the State, amounting to at least \$200,000, were required by this act to be given up and cancelled, and their amount to be credited to the bank against a part of the capital stock put in by the State. The bill further shows, that by another act passed at the same February session, in 1843, the officers of the bank were required to transfer to the State the sum of \$15,000 in specie, which was appropriated by the act to pay the members of that Legislature. That on the 4th day of January, 1845, another

act was passed, authorizing the officers of the bank to compromise its debts receivable, and take specific property in payment, and requiring those officers to receive in payment the bonds of the State, issued to raise capital stock for the bank, notwithstanding the bills of the bank might not have been taken up.

That on the 10th day of January, 1845, another act was passed, depriving the bank of all its specie and par funds, and appropriating the specie, first, to pay the members of that Legislature, and declaring that certain funds which had been placed in the bank, and made by the charter to form a part of its capital stock, should be deemed to be deposited there to the credit of the State, subject to be drawn out by appropriations.

That by another act, passed on the 23d day of December, 1846, the title to all real estate and property of every kind, purchased by said bank, or taken in payment of debts due to it, was declared to be vested in the State, and titles to property received on account of debts due to the bank were required to be thereafter taken in the name of the State; and the bill avers, that many different parcels of land, specifically mentioned and described, have been conveyed to the State, under this law, by debtors of the bank, in satisfaction of their indebtedness.

The bill further states, that, by another act, passed on the 9th day of January, 1849, the officers of the bank were required to receive in payment of its debts, bonds of the State, issued to raise capital for the Real Estate Bank of Arkansas, and other banking corporations theretofore chartered by the General Assembly, and then insolvent; which last-mentioned bonds amounted to at least \$2,000,000.

The bill prays, among other things, for satisfaction of the plaintiff's judgment debt out of the assets of the bank thus shown to have come into the custody, or to stand in the name, or to have gone to the use of the State by force of the laws above-mentioned; and the jurisdiction of this court, under this writ of error, is invoked, upon the ground that these laws, or some of them, impair the obligation of a contract, and that the highest court of the State has held them valid, and by reason of such decision, dismissed the complainant's bill.

It follows, that there are three questions for our consideration.

1. What would have been the rights of the complainant under the contracts shown by his bill, if uncontrolled by the particular laws of which he complains?

2. Do those laws, or either of them, impair the obligation of any contract with the complainant?

3. Does it appear, by the record, that the Supreme Court of Arkansas held these laws to be valid, and by reason thereof made a final decree against the complainant?

The first of these questions may be answered without much diffi-

culty. The plaintiff is a creditor of an insolvent banking corporation. The assets of such a corporation are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of others than *bona fide* creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts.

This has been often decided, and rests upon plain principles. In 2 Story's Eq. Jur. § 1252, it is said: "Perhaps, to this same head of implied trusts upon presumed intention (although it might equally well be deemed to fall under the head of implied trusts by operation of law) we may refer that class of cases where the stock and other property of private corporations is deemed a trust fund for the payment of the debts of the corporation; so that the creditors have a lien, or right of priority of payment on it, in preference to any of the stockholders of the corporation. Thus, for example: The capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation; and no stockholder can entitle himself to any dividend or share of such capital stock until all the debts are paid, and if the capital stock should be divided, leaving any debts unpaid, every stockholder receiving his share of the capital stock would, in equity, be held liable *pro rata* to contribute to the discharge of such debts out of the fund in his own hands." In conformity with this is the doctrine held by this court in *Mumma v. The Potomac Company* (8 Pet. 281).

The cases of *Wood v. Dummer* (3 Mason, 308); *Wright v. Petrie* (1 Sm. & M. (Miss.) 319); *Nevitt v. Bank of Port Gibson* (6 Id. 513); *Hightower v. Thornton et al.* (8 Ga. 493); *Nathan v. Whitlock* (3 Edw. (N. Y.) 215), affirmed by the chancellor (9 Paige (N. Y.), 152), contain elaborate examinations of this doctrine, and it has been affirmed and applied in many other cases.

So far, therefore, as the property of this bank has become vested in the State or gone to its use, it is so vested and used, charged with a trust in favor of this complainant, as an unpaid creditor, unless there is something in the character of the parties, or the consideration upon which, or the operation of the laws by force of which, it has been transferred, taking the case out of the principles above laid down.

And, first, as to the character of the parties. By the charter of this bank, the State of Arkansas became its sole stockholder. But the bank was a distinct trading corporation, having a complete separate existence, enabled to enter into valid contracts binding itself alone, and having a specific capital stock, provided, and held out to the public as the means to pay its debts. The obligations of its contracts, the

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funds provided for their performance, and the equitable rights of its creditors were in no way affected by the fact, that a sovereign state paid in its capital, and consequently became entitled to its profits. When paid in and vested in the corporation, the capital stock became chargeable at once; with the trusts, and subject to the uses declared and fixed by the charter, to the same extent, and for the same reasons, as it would have been if contributed by private persons.

That a State, by becoming interested with others in a banking corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives, that it lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege in respect to those transactions not derived from the charter, has been repeatedly affirmed by this court, in the *Bank of the United States v. The Planters' Bank* (9 Wheat. 904); *Bank of Kentucky v. Wistar et al.* (3 Pet. 431); *Briscoe v. The Bank of Kentucky* (11 Id. 324); *Darrington et al. v. The Bank of Alabama* (13 How. 12). And our opinion is, that the fact that the capital stock of this corporation came from the State which was solely interested in the profits of the business, does not affect the complainant's right, as a creditor, to be paid out of its property; a right which, as we have seen, follows the fund into the hands of every person, save a *bona fide* creditor or purchaser, and which a court of equity is bound to enforce by its decree against any party except such a creditor or purchaser capable by law of being brought within its jurisdiction.

That the State of Arkansas is capable of being thus sued, has been decided, after a careful examination, by the Supreme Court of that State, in this suit; and as this is purely a question of local law, depending on the constitution and statutes of the State, we follow that decision, and hold, in conformity therewith, that by its own consent the State has become liable to a decree in favor of the complainant in this suit, if the complainant has valid grounds entitling him to the relief prayed.

Whether there was anything in the consideration or circumstances of the transfers of the property of the bank to the State, or to its use, which relieved that property from the trust in favor of creditors, may best be examined under the next question, which is, do the laws, by force of which these transfers were made, impair the obligation of any contract with the complainant.

/ This question can be answered only by ascertaining what contracts existed, and what obligations were attached to them, and then by examining the actual operation of those laws upon those contracts and their obligations.

The plaintiff was the bearer of bills of the bank, by each of which the bank promised to pay him, on demand, a certain sum of money. Of course these payments were to be made out of the property of

the bank. By the laws of the State, existing when these contracts were made, their bearer had the right, by legal process, to compel their performance by the levy of an execution on the goods, chattels, lands, and tenements of the bank, by garnisheeing its debtors, and by resorting to a court of equity to reach equitable assets, or property conveyed to others than creditors and *bona fide* purchasers.

Such were these contracts and their obligations; and it would seem to require no argument to prove that a law authorizing and requiring such a corporation to distribute its property among its stockholders, or transfer it to its sole stockholder, leaving its bills unredeemed, would impair the obligation of the contracts contained in those bills. The cases of *Bronson v. Kinzie et al.* (1 How. 311) and *McCracken v. Hayward* (2 Id. 608), which will be more particularly adverted to hereafter, leave no doubt on that point. Indeed, it has not been attempted to maintain, that such a law, operating on the property of a mere private corporation, whose charter the Legislature could not repeal, would be valid. But it is argued that this is a different case. That the Legislature has power to destroy this corporation and thereupon its contracts are no longer in existence, and cannot be enforced against the property of the corporation, which, upon the repeal of its charter, reverts to the grantors of its lands and escheats, so far as it is personalty, to the State, and that, if it be in the power of the State thus to destroy the remedies of creditors, by repealing the charter, their rights must be considered to be entirely subject to the will of the State, and no law can impair the obligation of their contracts, because subjection to any law which may be passed belongs to the very existence of such contracts. Or, to express the same ideas in different words, that the State created and can destroy the corporation and all its contracts, and, as it can thus destroy them by repealing the charter, it can modify, obstruct, and abridge the rights of creditors and the obligations of their contracts, without repealing the charter.

Neither these premises, nor the conclusion deduced from them, can be admitted.

This banking corporation having no other stockholder than the State, it is not doubted that the State might repeal its charter; but that the effect of such a repeal would be entirely to destroy the executory contracts of the corporation, and to withdraw its property from the just claims of its creditors, cannot be admitted. If such were the effect of a repeal of an act incorporating a bank containing no express power of repeal, it might be difficult to encounter the objection, that the repealing law was invalid, as conflicting with the Constitution of the United States. This argument was pressed on this court, in the case of *Mumma v. The Potomac Company* (8 Pet.) and it was met by the following explicit language:—

“We are of opinion, that the dissolution of the corporation, under the acts of Virginia and Maryland, cannot in any just sense be con-

sidered, within the clause of the Constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those States any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws."

Indeed, if it be once admitted that the property of an insolvent trading corporation, while under the management of its officers, is a trust fund in their hands for the benefit of creditors, it follows, that a court of equity, which never allows a trust to fail for want of a trustee, would see to the execution of that trust, although by the dissolution of the corporation, the legal title to its property had been changed. *Mumma v. The Potomac Company* (8 Pet. 281); *Wright v. Petrie* (1 Sm. & M. (Miss.) Ch. 319); *Neritt v. The Bank of Port Gibson* (6 Sm. & M. (Miss.) 513); 1 Edw. (N. Y.); S. C. (9 Paige); *Reed v. Frankfort Bank* (23 M. 318). And, in this point of view, the decision of this court in *Lennox et al. v. Roberts* (2 Wheat. 373) is applicable.

It was a suit in equity, brought by persons to whom, at the expiration of the charter of the Bank of the United States, its effects were conveyed by deed, in trust for creditors and stockholders. Among these effects were certain promissory notes indorsed by the defendant, which the bill prayed he might be compelled to pay. The complainants had not the legal title transferred to them by indorsement upon the notes. This court held that the suit was maintainable. And this decision necessarily involves two points. First, That the expiration of the charter had not released the indorser. Second, That a court of equity would lend its aid to trustees for creditors of the bank, to enforce payment of the notes. We do not think that the omission of the bank to appoint a trustee would vary the substantial rights of creditors in a court of equity.

Whatever technical difficulties exist in maintaining an action at law by or against a corporation after its charter has been repealed, in the apprehension of a court of equity, there is no difficulty in a creditor following the property of the corporation into the hands of any one not a *bona fide* creditor or purchaser, and asserting his lien thereon, and obtaining satisfaction of his just debt out of that fund specifically set apart for its payment when the debt was contracted, and charged with a trust for all the creditors when in the hands of the corporation; which trust the repeal of the charter does not destroy. Chancellor Kent, in 2 Com. 307, n., says: "The rule of the common law has in fact become obsolete. It has never been applied to insolvent or dissolved moneyed corporations in England. The

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sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund, and see that it be duly collected and applied." The case of *Hightower v. Thornton* (8 Ga. 491), and other cases before referred to in this opinion, are in conformity with this doctrine; and, in our judgment, a law distributing the property of an insolvent trading or banking corporation among its stockholders, or giving it to strangers, or seizing it to the use of the State, would as clearly impair the obligation of its contracts as a law giving to the heirs the effects of a deceased natural person, to the exclusion of his creditors, would impair the obligation of his contracts.

But if it could be maintained, that the repeal of the charter of this corporation would be operative to destroy the obligation of its contracts, it would not follow that anything short of a repeal could have that effect. The only ground upon which such a power could be claimed is, that inasmuch as the power of repeal exists when the contract is made, and inasmuch as the necessary effect of a repeal is to put an end to the obligation of the contracts of the corporation, all its contracts are made subject to this contingency, and with an inherent liability to be thus destroyed. We have already said, that it is not the necessary effect of a repeal of the charter to destroy the obligations of contracts; but if it were, and they were entered into subject to this liability, upon what ground could it be maintained, that merely suspending certain powers of the corporation, its existence being preserved, can be followed by any such consequence? Surely it is not the necessary effect of a prohibition to transact new business, to destroy contracts already made; and if not, how can the right and power to destroy them be considered to grow out of a power to make such a prohibition? or how can it be fairly assumed, because the creditor knew when he received the contract of the bank that the Legislature could at any time deprive it of power to enter into new engagements, and therefore must be taken to have assented to the exercise of that power at the discretion of the Legislature, that he must also be considered as assenting to the exercise of a totally different power, viz. the power to destroy contracts already made? Legislative powers, over contracts lawfully existing when the contracts are formed, affect the nature and enter into the obligations of those contracts. But such powers can be exerted only in the particular cases in reference to which they have been reserved; and they are inoperative in all other cases. And, until such a case arises, the obligation of such a contract can no more be impaired than if it were under no circumstances subject to legislative control. The assumption that, because the Legislature may destroy a contract by repealing the charter of the corporation which made it, therefore such a contract may be impaired, or altered, or destroyed, in any

manner the Legislature may think fit, without repealing the charter, is wholly inadmissible.

Now the charter of this bank has never been repealed. On the contrary, the 28th section of the act of the 31st day of January, 1843, expressly provided, "That nothing in this act shall be so construed as to impair or destroy the corporate existence of the said Bank of the State of Arkansas, but the charter of the said institution is only intended to be so limited and modified as that said bank shall collect in and pay off her debts, abstain from discounting notes, or loaning money, and liquidate and close up her business as is hereinafter provided." Subsequent laws have still further limited and modified the corporate powers, but the corporate existence has not been touched, and the corporation is made a party to this suit, and appears on the record.

We do not consider, therefore, that the power of the State to repeal this charter enables the State to pass a law impairing the obligation of its contracts.

We have thus far considered only the contracts between the complainant and the bank, arising out of the bills of the bank held by him, and some of the obligations of those contracts. But this is not the only contract with the complainant. It is true that, as the State was the sole stockholder in this bank, the charter cannot be deemed to be such a contract between the State and the corporation as is protected by the Constitution of the United States. But it is a very different question whether that charter does not contain provisions which, when acted upon by the State and by third persons, constitute in law a binding contract with them, the obligation of which cannot be impaired.

If a person deposit his property in the hands of an agent, he may revoke the agency and withdraw his property at his pleasure. But if he should request third persons to accept the agent's bills, informing them, at the same time, that he had placed property in the hands of that agent to meet the bills at their maturity, and upon the faith of such assurance the agent's bills are accepted, the principal cannot, by revoking the agency, acquire the right to withdraw his property from the hands of the agent.

It is no longer exclusively his. They who, on the faith of its deposit, have changed their condition, have acquired rights in it. The matter no longer rests in a mere delegation of a revocable authority to an agent, but a contract has arisen between the principal and the third persons from the representation made, and the acts done on the faith of it, and the property cannot be withdrawn without impairing the obligation of that contract.

Now the charter of this bank provides, (§ 1) that it shall have a capital stock of one million of dollars, to be raised by the sale of the bonds of the State, and also, (§ 13) that certain other funds, which are specifically described, shall be deposited therein by the State,

and constitute a part of the capital of the bank, and the bill avers that the bonds of the State, amounting to one million of dollars, and also other bonds of the State amounting to one hundred and forty-six thousand dollars, authorized by a subsequent act of the Assembly, were sold, and their proceeds, together with the other funds mentioned, were paid into the bank to constitute its capital stock.

The bank received this money from the State as the fund to meet its engagements with third persons, which the State, by the charter, expressly authorized it to make for the profit of the State. Having thus set apart this fund in the hands of the bank, and invited the public to give credit to it, under an assurance that it had been placed there for the purpose of paying the liabilities of the bank, whenever such credit was given, a contract between the State and the creditor not to withdraw that fund, to his injury, at once arose. That the charter, followed by the deposit of the capital stock, amounted to an assurance, held out to the public by the State, that any one who should trust the bank might rely on that capital for payment, we cannot doubt. And when a third person acted on this assurance, and parted with his property on the faith of it, the transaction had all the elements of a binding contract, and the State could not withdraw the fund, or any part of it, without impairing its obligation.

We proceed, therefore, to examine the laws complained of, to ascertain what is their operation upon the obligations of the several contracts with the State and with the bank, which are above declared to exist. The learned counsel for the State of Arkansas has, with great ability, presented a view of these laws which requires consideration. It is this. That so far as these laws withdraw specie and funds from the bank, and appropriate them to the uses of the State, the State acted in the character of a creditor, taking a preference over other creditors, and paying itself a debt; and that the other laws, by force of which all the real property of the bank was vested in the State, are not to be deemed to have been passed in denial of the rights of creditors, but only the better to protect and give effect to those rights; that the trust in favor of creditors still subsists, to be worked out in such manner as the State shall deem proper.

To maintain the first proposition, it must appear that the State stood in such a relation to this bank and its creditors at the time these laws were passed; that it was a creditor, and could provide by law for the payment of its debt in preference to other creditors; and secondly, that these laws do not withdraw and apply to the use of the State any greater sum than the amount of such debt.

In our judgment, the State cannot be considered to have occupied this position. It had placed its bonds in the possession of the bank, with authority to sell them and hold their proceeds as capital. It had also paid over to the bank certain other funds, with an express declaration, contained in the 13th section of the charter, that

these also were to be part of its capital, and were to have credited them to their proportion of dividend of the profits of the business. All these moneys were thus set apart in the hands of the bank, as a fund, upon the credit of which it was to issue bills, and which was to be liable to answer the engagements of the bank contracted to its creditors, in the course of the business which it was authorized to transact for the profit of the State. Such is the necessary effect of the express declaration in the charter, that these funds constitute the capital of the bank.

When this bank became insolvent, and all its assets were insufficient to perform its engagements, it is manifest that every part of these assets stood bound by the contracts which had been made with the bank upon the faith of the funds thus set apart by the charter; and it is equally clear, that the bank had no longer in its possession any capital stock belonging to the State. Whatever losses a bank sustains, are losses of the capital paid in by its stockholders; that is the only fund it has to lose. When it has become insolvent, it has lost all that fund, and has nothing belonging to its stockholders. In some sense a bank may be said to be indebted to its stockholders for the capital they have paid in. With the leave of the State, they have a right to withdraw it, after all debts are paid, and, if the State is itself the sole stockholder, it may withdraw its capital while any of it shall remain. But, from the very nature of things, it cannot withdraw capital from an insolvent bank, because it has none of their capital remaining. When insolvent, its assets belong solely to its creditors.

It is unnecessary, therefore, to decide what were the rights and powers of the State, in respect to any portion of these funds, while the bank continued solvent. When it became insolvent, when its entire property was insufficient to pay its debts, it no longer had any capital stock belonging to the State, and, therefore, none could be withdrawn without appropriating by law to the use of the State what by the charter stood pledged to creditors, and such a law impairs the obligations of the contracts of the bank, and also the obligation of the contract between the State and the creditors, arising from the provisions of the charter devoting these funds to the payment of the debts of the bank.

In addition to this, it must be observed that the averments of the bill, which are confessed by the demurrer, show that the whole amount of the funds mentioned in the 13th section of the charter, which it is claimed the State had the right to withdraw, was \$350,753; and that the amount actually withdrawn and appropriated to the use of the State, was at least \$400,000. On an investigation of the accounts, these averments might appear to be erroneous; but we are obliged to consider them to be true, as they are confessed on the record.

Our opinion is, that these laws, which withdraw from the bank

the sum of \$400,000, according to the averments in the bill, cannot be supported upon the ground that the State had the right, as a creditor of the bank, to appropriate these funds to its own use.

Nor can we find sufficient support for the other position, that the laws divesting the bank of its property and vesting it in the State, do not impair the obligations of the plaintiff's contracts, because they were not passed in denial, but in furtherance of the rights of creditors, and to afford them a remedy, and for the prevention of further loss.

Passing over the laws which, upon their face, not only withdrew funds from the bank, but appropriated those funds to the use of the State, and which, therefore, cannot be supposed to be in furtherance of the rights of creditors, or intended to protect them from loss, or not to be in denial of their rights, to so much of the property of the bank as was thus withdrawn, there are four acts complained of by the bill, which require examination, with a view to see whether they can be considered as remedial only, and in that point of view consistent with the obligations of the contracts of the plaintiff. The first is the act of January 4, 1845. The 17th section of this act is as follows: "That said financial receivers be required to receive, in whole or in part payment of any debt due the bank, the bonds of the State which were sold in good faith to put said bank and branches in operation, notwithstanding the outstanding circulation of said bank and its branches may not be taken up."

We cannot attribute to this provision of the law any other meaning or effect than what is plainly apparent on its face. It authorizes and requires the assets of the bank to be appropriated to pay debts of the State; and we cannot conceive how this can be reconciled with the rights of creditors to those assets, or how it can consist with the execution of a trust in their favor, or how it differs from the other laws appropriating the property of this insolvent bank to the use and benefit of the State.

The circumstances that these bonds were sold by the State, through the agency of the bank, do not make them debts of the bank. They were bonds under the seal of the State, signed by the governor, and countersigned by the treasurer, containing an acknowledgment that the State of Arkansas stood indebted, and a promise by the State to pay. The president and cashier of the bank are empowered to transfer them by indorsement; but no liability, even of the conditional character which arises from the indorsement of negotiable paper by the law merchant, is attached by the charter to these indorsements, and from the nature of the case, we do not see how any such could have been intended. We do not deem it necessary to determine, whether, under the 15th section of the charter, the bank was made liable for the accruing interest on the bonds. It would seem that this section is merely directory to the general board, and was intended to provide for the payment of interest out of ex-

pected profits; but however this may be, to suppose that the charter intended the fund raised by the sale of these bonds, and which it held out to creditors as capital of the bank, could, at any time, be appropriated to pay these bonds, leaving the creditors, who had dealt with the bank on the faith of that capital, wholly unpaid, would be to give it a construction not supported by any provision which we have been able to discover in it, and directly in conflict with its manifest purpose and meaning. For in no fair sense can the bank be considered to have had the proceeds of these bonds as so much capital, if it was liable, at the pleasure of the State, to be swept away at any moment to pay the debts which the State had contracted to borrow it. In such a condition of things, these proceeds would be nothing more than a deposit, payable on demand; and to call them capital, and allow the public to trust to them as such, would involve a plain contradiction.

Indeed, upon this construction of the charter, taken in connection with the alleged right to withdraw at pleasure all the other funds deposited, the bank had no proper capital which was bound by its contract; and this would render it extremely difficult to maintain the validity of the charter under the 10th section of the first article of the Constitution of the United States, prohibiting the States from emitting bills of credit. It is well known that the power of the several States to create corporations, to issue bills, and transact business for the sole benefit of the State which appointed the corporate officers, and was alone interested in the bank, has been from time to time seriously questioned. The cases of *Briscoe v. The Bank of Kentucky* (11 Pet. 257) and *Darrington et al. v. The Bank of Alabama* (13 How. 12) have settled this question, in reference to such banks as were involved in those cases. But the principal ground on which such bills were distinguished from bills of credit emitted by the State, was, that they do not rest on the credit of the State, but on the credit of the corporation derived from its capital stock.

But if the charter of the bank has not provided any fund, effectually chargeable with the redemption of its bills, if what is called its capital is liable to be withdrawn at the pleasure of the State, though no means of redeeming the bills should remain, then the bills rest wholly upon the faith of the State, and not upon the credit of the corporation, founded on its property. We do not perceive, in the charter of the State Bank of Arkansas, an intention to create such a bank and emit such bills; on the contrary, we think it plainly appears to have been intended to make a bank having a real capital, on the credit of which its business was to be transacted; and this intention is necessarily in conflict with the existence of the power anywhere to appropriate the funds of the bank, after it became insolvent, to pay debts of the State contracted to borrow the money which constituted that capital.

By the act of December 23, 1846, the financial receivers were

authorized in certain cases to pay judgment creditors in notes of non-resident debtors, provided such judgment creditors would convey to the State all lands of the bank on which they had levied; and by another act, passed on the same day, all conveyances of real estate purchased for, or taken in payment of, any debt due to the bank, were required to be made to the State, and all such titles were declared to be vested in the State. The 2d section of this law is in the following words: "That the governor is hereby authorized to exchange any property, so taken by the said bank, for an equal amount of the bonds of the State executed for the benefit of said institution; provided that such property shall not be exchanged with the holders of such bonds at less prices than were allowed by the bank for the same, and that the governor be authorized to make titles and give acquittances for the same; and this act shall take effect and be in force from and after its passage."

If this law had contained only the 1st section, vesting the real property of the bank in the State, and providing no remedy by which this complainant, as a creditor of the bank, could reach it, we think it would have impaired the obligation of his contracts. True, it does not touch the right of action against the bank; it only withdraws the real property from the reach of legal process, and thus affects the remedy. But it by no means follows, because a law affects only the remedy, that it does not impair the obligation of the contract. The obligation of a contract, in the sense in which those words are used in the Constitution, is that duty of performing it, which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same.

This has been the doctrine of this court from a very early period. In *Green v. Biddle* (8 Wheat. 1), Mr. Justice Washington, delivering the opinion of the court, said: "It is no answer that the acts of Kentucky now in question are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." In *Bronson v. Kinzie* (1 How. 311), Mr. Chief Justice Taney, delivering the opinion of the court, and speaking of the above rule as laid down in *Green v. Biddle*, said: "We concur entirely in the correctness of the rule above stated. The remedy is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which this clause in the Constitution was mainly intended to secure."

The difficulty of determining, in some cases, whether the change in the remedy has materially impaired the rights and interest of the creditor, must be admitted. But we do not think any such difficulty

exists in this case. The decision of this court in *McCracken v. Hayward* (2 How. 608) must be considered as settling this question. In that case the law under consideration provided that a sale should not be made of property levied on under an execution, unless it would bring two-thirds of its valuation by three householders. It was held that such a law so obstructed the remedy as to impair the obligation of the contract. The law now in question certainly presents a far more serious obstruction, for it withdraws the real property of the bank altogether from the reach of legal process, provides no substituted remedy, and leaves the creditor, as is truly said by the Supreme Court of Arkansas, in its opinion in this case, "in a condition in which his rights live but in grace, and his remedy in entreaty only."

But not only does this law withdraw the real property from the bank, and vest it in the State, but by the 2d section, the terms of which have been given, the property so withdrawn is expressly appropriated to pay the bonds of the State, — an appropriation, which, as has been above stated, cannot be reconciled with the preservation of the rights of creditors, whether those rights are to be protected by existing legal remedies, or in any other manner.

The same observations apply to so much of the act of the 9th of January, 1849, as required the officers of the bank to receive in payment of debts due to the bank, bonds of the State issued to obtain capital to put in operation the Real Estate Bank of the State of Arkansas, which bonds are averred in the bill to have amounted to \$2,000,000. If a law which withdrew assets of the bank to pay bonds sold to raise its capital, impaired the obligation of the complainant's contracts, it would probably not be supposed that a law applying such assets to pay bonds of the State sold to raise capital for another bank, could be free from that objection.

It only remains to consider the third question; whether it appears by the record that the Supreme Court of Arkansas held these laws to be valid, and by reason thereof dismissed the complainant's bill.

Each of these laws is specifically referred to in the bill, and its operation upon the property of the bank averred, and made a subject of complaint. If a private person had received assets of the bank in the same manner they are alleged in the bill to have been received by the State, he must have been held amenable to the complainants as a creditor of the bank, in a court of equity. We have already stated that, by the local law of Arkansas, the State stands in the same predicament as a private person, in respect to being chargeable as a trustee, unless it is exempted by force of the laws in question. It necessarily follows, therefore, that the Supreme Court of the State held these laws valid, and that by force of them the State was not subject to the principles upon which it would otherwise have been chargeable.

It is sufficient, to give this court jurisdiction under the 25th section of the judiciary act, that it appears by the record that the question, whether a law of a State impaired the obligation of a contract, was necessarily involved in the decision, and that such law was held to be valid, and the decision made against the plaintiff in error by reason of its supposed validity. *Armstrong v. The Treasurer of Athens County* (16 Pet. 281); *Crowell v. Randall* (10 Pet. 392); *McKenny v. Carroll* (12 Pet. 66).

The result is, that so much of each of the said laws of the State of Arkansas, as authorized and required the cancellation of the bonds of the State, given for money borrowed of the Bank of the State of Arkansas, or authorized and required the withdrawal of any part of the specie or other property of that bank, and the appropriation thereof to the use of the State, or authorized and required the application of any part of the assets or property of that bank to pay bonds issued by the State and sold to raise capital for the Bank of the State of Arkansas, or for the Real Estate Bank of the State of Arkansas, or authorized and required real property purchased for the Bank of the State of Arkansas, or taken in payment of debts due to the Bank of the State of Arkansas to be conveyed to and the title thereof vested in the State of Arkansas, impaired the obligation of contracts made with the complainant as the lawful holder and bearer of bills of the Bank of the State of Arkansas, and so were inoperative and invalid. And, consequently, the judgment of the Supreme Court of that State must be reversed, and the cause remanded, that it may be proceeded in as the Constitution of the United States requires.

MR. JUSTICE CATRON, MR. JUSTICE DANIEL, and MR. JUSTICE NELSON, dissented.

MR. JUSTICE CATRON:—

As this case comes up from a State court under the 25th section of the judiciary act, the first question presented is, whether we have jurisdiction to decide the merits; and I am of opinion, that no violation of any contract rendered, which the complainant sets up a right to recover, has occurred within the sense of the Constitution, by the laws passed by the State of Arkansas, and which laws are complained of in the bill.

On the merits, I have formed no opinion, not having authority to inquire into them, as I apprehend.

MR. JUSTICE DANIEL:—

From the decision of this court, just announced, I am constrained to declare my dissent. According to my apprehension there is no legitimate ground of jurisdiction, and of course for the interference of this court in this case, within the just intent and objects of the 10th section of the 1st article of the Constitution. By the Legislature of the State of Arkansas, which has been assailed, the obligation of no contract is denied. The claims of every stockholder and

every noteholder of the Bank of the State of Arkansas, are, in reference to that corporation, fully recognized. The utmost that can be objected to the action of the State is, that in a contest amongst the creditors of a failing corporation, the State, as one of those creditors, and the largest creditor of the number, may have appropriated to herself a portion of the assets of that corporation greater than would have been warranted by perfect equity, or other equality, amongst all the creditors. But should this conclusion be conceded, the concession implies no attempt to deny or impair any obligation of the bank to satisfy every creditor. It might raise a question of fraud or unfairness in the action of the State in reference to the other creditors of the bank, but it carries with it no interference with the obligation or the sanctity of their contract with the corporation, whatever that might be. The mere question of fraud, in the execution or non-performance of contracts, surely the Constitution never intended to constitute as a means by which the federal authorities were to supervise the polity and acts of the State governments. Such a claim of power in the federal government would justify the interference with, and the supervision by this court of any act of the State Legislatures, and of every transaction of private life, and in the necessarily imperfect attempts to exercise such a power, would encumber it with a mass of business, which would disappoint and entirely prevent the performance of its legitimate duties.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of Arkansas, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Supreme Court, in order that such further proceedings may be had therein, in conformity to the opinion of this court, as to law and justice, and the Constitution of the United States, shall appertain.

CASES

ON

PRIVATE CORPORATIONS

ARRANGED FOR USE AS A TEXT-BOOK

BY

G. M. CUMMING

Professor of Law in Columbia College

VOLUME II.

SUPPLEMENTARY CASES

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CASES ON PRIVATE CORPORATIONS.

(1)

PEOPLE ex rel. WINCHESTER, Treasurer, v. COLEMAN et al., Tax Commissioners.

(31 N. E. 96, 133 N. Y. 279.)

Court of Appeals of New York. May 24, 1892.

Appeal from supreme court, general term, first department.

Proceedings on the relation of Locke W. Winchester, as treasurer of the National Express Company, to review the action of the tax commissioners in taxing the company on its capital stock as a corporation. From a judgment of the general term, affirming a judgment of the special term vacating the assessment, the commissioners appeal. Affirmed.

FINCH, J. The relator was taxed upon its capital, on the ground that it had become a corporation, within the meaning of the provision of the Revised Statutes which enacts that "all moneyed or stock corporations deriving an income or profit from their capital, or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed." 1 Rev. St. pt. 1, c. 13, tit. 4, § 1. The company was formed as a joint-stock company or association, in 1853, by a written agreement of eight individuals with each other, the whole force and effect of which, in constituting and creating the organization, rested upon the common-law rights of the individuals, and their power to contract with each other. The relation they assumed was wholly the product of their mutual agreement, and dependent in no respect upon the grant or authority of the state. It was entered into under no statutory license or permission, neither accepting nor designed to accept any franchise from the sovereign, but founded wholly upon the individual rights of the associates to join their capital and enterprise in a relation similar to that of a partnership. A few years earlier the legislature had explicitly recognized the existence and validity of such organizations, founded upon contract, and evolved from the common-law rights of the citizens. Laws 1849, c. 258. That act provided that any joint-stock company or association which consisted of seven or more members might sue or be sued in the name of its president or treasurer, and with the same force and effect, so far as the joint property and rights were concerned, as if the suit should be prosecuted in the names of the associates; but the act explicitly disclaimed any purpose of converting the joint-stock associations recognized as existing into corporations by a section prohibiting any such construction. Section 5. In 1851 the act was amended in its form and application, but in no respect material to the present inquiry. There is no doubt, therefore, that, when the company was formed and went into operation, the law recognized a distinction and substantial difference between joint-stock companies and corporations, and never confused one with the other; and that the existing statute which taxed the capital of corporations had no reference to or operation upon joint-stock com-

panies or associations. But two things have since occurred. The legislature, while steadily preserving the distinction of names, has, with equal persistence, confused the things, by obliterating substantial and characteristic marks of difference; until it is now claimed that the joint-stock associations have grown into and become corporations by force of the continued bestowal upon them of corporate attributes. It is said, and very probably correctly said, that the legislature may create a corporation without explicitly declaring it to be such, by the bestowal of a corporate franchise or corporate attributes, and the cases of banking associations are referred to as instances of actual occurrence. *Thomas v. Dakin*, 22 Wend. 9; *Bank v. Watertown*, 25 Wend. 686; *People v. Niagara*, 4 Hill, 20. It is added that such result may happen even without the legislative intent, and because the gift of corporate powers and attributes is tantamount to a corporate creation. It is then asserted that a series of statutes, beginning with the act of 1849, has ended in the gift to joint-stock associations of every essential attribute possessed by and characteristic of corporations, (Laws 1853, c. 53; Laws 1854, c. 245; Laws 1867, c. 289;) that the lines of distinction between the two, however far apart in the beginning, have steadily converged, until they have melted into each other and become identical; that every distinguishing mark and characteristic has been obliterated; and no reason remains why joint-stock associations should not be, in all respects, treated and regarded as corporations. Some of this contention is true. The case of *People v. Wemple*, 117 N. Y. 77, 22 N. E. Rep. 1046, shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations, until the difference, if there be one, is obscure, elusive, and difficult to see and describe. And yet the truth remains that all along the line of legislation the distinctive names have been retained as indicative and representative of a difference in the organizations themselves. As recently as the acts of 1880 and 1881, which formed the subject of consideration in the *Wemple* Case, the legislature, dealing with the subject of taxation, and desiring to tax business and franchises, imposed the liability upon "every corporation, joint-stock company, or association whatever, now or hereafter incorporated or organized under any law of this state." It is significant that the words "or organized" were inserted by amendment, and evidently for the understood reason that joint-stock companies could not properly be said to be "incorporated," but might be correctly described as "organized" under the laws of the state. This persistent distinction in the language of the statutes I should not be inclined to disregard or treat as of no practical consequence, when seeking to arrive at the true intent and proper construction of the statute, even if I were unable to discover any practical or substantial difference between the two classes of organizations upon which it could rest or out of which it grew; for the distinction

so sedulously and persistently observed would strongly indicate the legislative intent, and so the correct construction.

But I think there was an original and inherent difference between the corporate and joint-stock companies, known to our law, which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical, and well supported by authority. It is that the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed in *Supervisors of Niagara v. People*, 7 Hill, 512, and in *Gifford v. Livingston*, 2 Denio, 380, by the statement that the corporators lost their individuality, and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined, on behalf of the respondents, to be "an artificial person created by the sovereign from natural persons, and in which artificial person the natural persons of which it is composed become merged and nonexistent." I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted, if it successfully bears some sufficient test. In putting it on trial, we may take the nature of the individual liability of the corporators on the one hand, and of the associates on the other, for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character. It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing by the intervention of an express command the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. The penalties sometimes imposed are of course new statutory liabilities which never, at common law, rested upon the individual members. The retained liability occasionally established is in the nature and a parcel of such original liability, as we had occasion to show in *Rogers v. Decker*, 131 N. Y. 490, 30 N. E. Rep. 571, but is retained by force of the ex-

press command of the statute, and in that manner saved from the destruction which otherwise would follow the simple creation of the corporation. Ordinarily these individual liabilities exist upon other than common-law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since in general their liability arises after the usual remedies against the corporation have been exhausted. But, where that is not so, the invariable truth is that the creation of the corporation necessarily destroys the common-law liability of the individual members for its debts, and requires at the hands of the creating power an affirmative imposition of new personal liabilities, or a specific retention of old ones from the destruction which would otherwise follow. Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common-law liability for the debts contracted. Those debts are their debts, for which they must answer. Permission to sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or saves it. The statute of 1853 did interfere with it. That act required, in the first instance, a suit against the president or treasurer, and so a preliminary exhaustion of the joint property. But that act was modal, and determined the procedure. It suspended the common-law right, but recognized its existence. We so held in *Witherhead v. Allen*, 4 Abb. Dec. 628, and at the same time said that the associations were not corporations, but mere partnership concerns. Even that mode of procedure has been modified by the Code, (sections 1922, 1923,) so that the creditor, at his option, may sue the associates without bringing his action against the president or treasurer. These last and quite recent enactments show that the legislative intent is still to preserve and not destroy the original difference between the two classes of organizations; to maintain in full force the common-law liability of associates, and not to substitute for it that of corporators; and, preserving in continued operation that normal and distinctive difference, to evince a plain purpose not to merge the two organizations in one, or destroy the boundaries which separate them. That intent, once clearly ascertained, determines the construction to be adopted, and may be the only reliable test in view of the power of the state to clothe one organization with all the attributes of the other. The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand, corporations have been created with positive provisions retaining more or less the individual liability of the members, and on the other, the joint-stock companies have been clothed with most of the corporate attributes; but enough of the original difference remains to show that our legislation not only carefully preserves the distinction of names, but sufficient, also, of the original difference of character and quality to disclose a clear intent not to merge the two. We may thus see upon what the legislative intent to

preserve them as separate and distinct is founded, and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new, or retention of the old, liability by an affirmative enactment which avoids the inherent effect of the corporate creation; in the other the common-law liability remains unchanged and unimpaired, and needing no statutory intervention to preserve or restore it. The debt of the corporation is its debt, and not that of its members; the debt of the joint-stock company is the debt of the associates, however enforced. The creation of the corporation merges and drowns the

liability of its corporators; the creation of the stock company leaves unharmed and unchanged the liability of the associates. The one derives its existence from the contract of individuals; the other, from the sovereignty of the state. The two are alike, but not the same. More or less they crowd upon and overlap each other, but without losing their identity; and so, while we cannot say that the joint-stock company is a corporation, we can say, as we did say, in *Van Aernam v. Bleistein*, 102 N. Y. 360, 7 N. E. Rep. 537, that a joint-stock company is a partnership, with some of the powers of a corporation. Beyond that we do not think it is our duty to go. The order should be affirmed, with costs. All concur.

SHAW v. QUINCY MIN. CO.

(12 Sup. Ct. 335, 145 U. S. 444. May 16, 1892.)

Petition by John O. Shaw, Jr., trustee, for writ of *mandamus*, and motion therefor. Petition and motion denied.

STATEMENT BY MR. JUSTICE GRAY.

This was a petition for a writ of *mandamus* to the judges of the circuit court of the United States for the southern district of New York to command them to take jurisdiction against the Quincy Mining Company upon a bill in equity filed in that court on September 3, 1891, by the petitioner, described in the bill as a citizen of Massachusetts, in behalf of himself and other stockholders of the Quincy Mining Company, against "the Quincy Mining Company, a corporation duly organized under the laws of the state of Michigan, and having a usual place of business in the city, county, and state of New York," and against certain individuals described in the bill as citizens of the state of New York. Upon that bill a subpoena was issued, directed to the Quincy Mining Company, and, as appeared by the marshal's return thereon, was served upon it within the southern district of New York by exhibiting to its secretary the original subpoena and leaving with him a copy. The Quincy Mining Company appeared specially, and moved for an order to set aside the service.

At the hearing of the motion it appeared that the Quincy Mining Company was a corporation organized for the purpose of mining in the county of Houghton in the upper peninsula of the state of Michigan, under the statute of Michigan of May 11, 1877, c. 113, by section 30 of which "it shall be lawful for any company associating under this act to provide in the articles of association for having the business office of such company out of this state, and to hold any meeting of the stockholders or board of directors of such company at such office so provided for, but every such company having its business office out of this state shall have an office for the transaction of business within this state, to be also designated in such articles of association;" and that this company, in its articles of association, did provide as follows: "The business office of the company hereby constituted and formed shall be in the city, county, and state of New York, and another business office is hereby established at the Quincy mine, in the county of Houghton and state of Michigan."

The order to set aside the service was granted by the court, upon the ground (as stated in its return to the rule to show cause why the writ of *mandamus* should not issue) "that said Quincy Mining Company is a corporation created and existing under the laws of the state of Michigan, and is an inhabitant of the western district of Michigan, and not an inhabitant of the southern district of New York."

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The single question in this case is whether under the act of March 3, 1887, c. 373, § 1,

as corrected by the act of August 13, 1888, c. 866, (the material parts of which are copied in the margin,¹) a corporation incorporated in one state of the Union, and having a usual place of business in another state in which it has not been incorporated, may be sued, in a circuit court of the United States held in the latter state, by a citizen of a different state.

This question, upon which there has been a diversity of opinion in the circuit courts, can be best determined by a review of the acts of congress, and of the decisions of this court, regarding the original jurisdiction of the circuit courts of the United States over suits between citizens of different states.

In carrying out the provision of the constitution which declares that the judicial power of the United States shall extend to controversies "between citizens of different states," congress, by the judiciary act of September 24, 1789, c. 20, § 11, conferred jurisdiction on the circuit court of suits of a civil nature, at common law or in equity, "between a citizen of the state where the suit is brought and a citizen of another state," and provided that "no civil suit shall be brought" "against an inhabitant of the United States," "in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." 1 St. pp. 78, 79.

The word "inhabitant," in that act, was apparently used, not in any larger meaning than "citizen," but to avoid the incongruity of speaking of a citizen of anything less than a state, when the intention was to cover not only a district which included a whole state, but also two districts in one state, like the districts of Maine and Massachusetts in the state of Massachusetts, and the districts of Virginia and Kentucky in the state of Virginia, established by section 2 of the same act. 1 St. p. 73. It was held by this court from the beginning that an averment that a party resided within the state or the district in which the suit was brought

¹ "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 25 St. p. 434.

was not sufficient to support the jurisdiction, because in the common use of words a resident might not be a citizen, and therefore it was not stated expressly and beyond ambiguity that he was a citizen of the state, which was the fact on which the jurisdiction depended under the provisions of the constitution and of the judiciary act. *Bingham v. Cabbot*, 3 Dall. 382; *Turner v. Bank*, 4 Dall. 8; *Abercrombie v. Dupuis*, 1 Cranch, 343; *Hodgson v. Bowerbank*, 5 Cranch, 303; *Brown v. Keene*, 8 Pet. 112, 115. The same rule has been maintained to the present day, and has been held to be unaffected by the fourteenth amendment of the constitution, declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." *Robertson v. Cease*, 97 U. S. 646; *Grace v. American Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. Rep. 207; *Timmons v. Land Co.*, 139 U. S. 378, 11 Sup. Ct. Rep. 585; *Denny v. Pironi*, 141 U. S. 121, 11 Sup. Ct. Rep. 966.

By the act of May 4, 1858, c. 27, § 1, it was enacted that, in a state containing more than one district, actions not local should "be brought in the district in which the defendant resides," or, "if there be two or more defendants residing in different districts in the same state," then in either district. 11 St. p. 272. The whole purport and effect of that act was not to enlarge, but to restrict and distribute jurisdiction. It applied only to a state containing two or more districts, and directed suits against citizens of such a state to be brought in that district thereof in which they or either of them resided. It did not subject defendants to any new liability to be sued out of the state of which they were citizens, but simply prescribed in which district of that state they might be sued.

These provisions of the acts of 1789 and 1858 were substantially re-enacted in sections 739 and 740 of the Revised Statutes.

The act of March 3, 1875, c. 137, § 1, after giving the circuit courts jurisdiction of suits "in which there shall be a controversy between citizens of different states," and enlarging their jurisdiction in other respects, substantially re-enacted the corresponding provision of the act of 1789, by providing that no civil suit should be brought "against any person" "in any other district than that whereof he is an inhabitant, or in which he shall be found" at the time of service, with certain exceptions, not affecting the matter now under consideration. 18 St. p. 470.

The act of 1887, both in its original form and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: "But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 St. p. 552; 25 St. p. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than

that whereof the defendant is an inhabitant; and the effect is that, "where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides." *McCormick Co. v. Walthers*, 134 U. S. 41, 43, 10 Sup. Ct. Rep. 485. And the general object of this act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the circuit courts of the United States. *Smith v. Lyon*, 133 U. S. 315, 320, 10 Sup. Ct. Rep. 303; *In re Pennsylvania Co.*, 137 U. S. 451, 454, 11 Sup. Ct. Rep. 141; *Fisk v. Henarie*, 142 U. S. 459, 467, 12 Sup. Ct. Rep. 207.

As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject and of the judicial construction thereof, is that the phrase "district of the residence of" a person is equivalent to "district whereof he is an inhabitant," and cannot be construed as giving jurisdiction, by reason of citizenship, to a circuit court held in a state of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the state of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district "in which he shall be found," requires any suit, the jurisdiction of which is founded only on its being between citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident.

In the case of a corporation, the reasons are, to say the least, quite as strong for holding that it can sue and be sued only in the state and district in which it has been incorporated, or in the state of which the other party is a citizen.

In *Bank v. Earle*, 13 Pet. 519, 588, Chief Justice TANAY said: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another."

This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it.

In *Insurance Co. v. French*, 18 How. 404, in which an Indiana corporation was sued in Indiana upon a judgment recovered in an action against it in a state court of Ohio upon a contract made in that state, this court, speaking by Mr. Justice CURTIS, and referring to *Bank v. Earle*, said: "This corporation, existing only by virtue of a law of Indiana, cannot be deemed to pass personally beyond the limits of that state;" and held that it was bound by the judgment, because it had been allowed by the state of Ohio to make contracts in that state only upon the reasonable and lawful condition of its agent, residing and making contracts there, being deemed its agent to receive service of process in suits upon such contracts; and therefore that such a judgment, recovered after such a notice, was "as valid as if the corporation had had its habitat within the state." 18 How. 407, 408.

"A corporation," said Chief Justice WAITE, "created by and organized under the laws of a particular state, and having its principal office there, is, under the constitution and laws, for the purpose of suing and being sued, a citizen of that state." "By doing business away from their legal residence they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad." *Railroad Co. v. Koontz*, 104 U. S. 5, 11, 12. See, also, *Paul v. Virginia*, 8 Wall. 138, 181; *Railroad Co. v. Harris*, 12 Wall. 65, 81; *St. Clair v. Cox*, 106 U. S. 350, 354, 356, 1 Sup. Ct. Rep. 354; *Railway Co. v. Gebhard*, 109 U. S. 527, 537, 3 Sup. Ct. Rep. 363.

The same doctrine has been constantly maintained by this court in applying to corporations the judiciary acts conferring on the circuit courts of the United States jurisdiction of suits between citizens of different states.

Those acts have never named corporations; and for half a century after the passage of the first act corporations were allowed to sue and be sued in the circuit courts only when all the members of the corporation were, and were alleged to be, citizens of the state which created the corporation. *Bank v. Deveaux*, 5 Cranch, 61; *Insurance Co. v. Boardman*, 1d. 57; *Sullivan v. Steamboat Co.*, 6 Wheat. 450; *Breithaupt v. Bank*, 1 Pet. 238; *Bank v. Slocumb*, 14 Pet. 60.

But in *Railroad Co. v. Letson*, in 1844, it was adjudged, upon great consideration, that it is sufficient to sustain the jurisdiction that the corporation is created by a different state from that of which the opposite party is a citizen; and Mr. Justice WAYNE stated that the court rested its judgment upon the ground "that a corporation created by and doing business in a particular state is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person," and "is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued." 2 How. 497, 558. And it has ever since been treated

as settled that for these purposes the members of a corporate body must be conclusively presumed to be citizens of the state in which the corporation is domiciled. *Marshall v. Railroad Co.*, 16 How. 314, 328; *Drawbridge Co. v. Shepherd*, 20 How. 227, 233; *Railroad Co. v. Wheeler*, 1 Black, 286, 296; *Muller v. Dows*, 94 U. S. 444; *Steamship Co. v. Tugman*, 106 U. S. 118, 121, 1 Sup. Ct. Rep. 58; *Railroad Co. v. Alabama*, 107 U. S. 581, 585, 2 Sup. Ct. Rep. 432.

In *Insurance Co. v. Francis* it was held that the act of March 2, 1867, c. 196, (14 St. p. 558; Rev. St. § 639, cl. 3,) authorizing the removal into the courts of the United States of suits "between a citizen of the state in which the suit is brought and a citizen of another state," did not warrant the removal of an action brought in a court of the state of Mississippi, in which the plaintiff, a citizen of Illinois, alleged that the defendant was a corporation created by the laws of New York, located and doing business in Mississippi under its laws; and Mr. Justice DAVIS, in delivering judgment, said: "This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there." 11 Wall. 210, 216.

In *Ex parte Schollenberger*, 96 U. S. 369, 377, Chief Justice WAITE said: "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter, or excluded by local laws." The jurisdiction of the circuit court in that case, as well as in *Insurance Co. v. Woodworth*, 111 U. S. 138, 146, 4 Sup. Ct. Rep. 364, was maintained upon the ground that the defendant corporation, though incorporated in another state, yet, by reason of doing business in the state in which the suit was brought, and having appointed an agent there as required by its laws, upon whom process against the company might be served, was found in that state, within the meaning of the act of March 3, 1875, c. 137, § 1, then in force, and hereinbefore cited.

The statute now in question, as already observed, has repealed the permission to sue a defendant in a district in which he is found, and has peremptorily enacted that, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." In a case between natural persons, as has been seen, this clause does not allow the suit to be brought in a state of which neither is a citizen. If congress, in framing this clause, did not have corporations in mind, there is no reason for giving the clause a looser and broader construction

as to artificial persons who were not contemplated than as to natural persons who were. If, as it is more reasonable to suppose, congress did have corporations in mind, it must be presumed also to have had in mind the law, as long and uniformly declared by this court, that, within the meaning of the previous acts of congress giving jurisdiction of suits between citizens of different states, a corporation could not be considered a citizen or a resident of a state in which it had not been incorporated.

The Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the southern district of New York by a citizen of another state, there can be no question of waiver, such as has been recognized where a defendant has appeared generally in a suit between citizens of different states, brought in the wrong district.

Gracie v. Palmer, 8 Wheat. 699; Railway Co. v. McBride, 141 U. S. 127, 131, 11 Sup. Ct. Rep. 982, and cases cited.

This case does not present the question what may be the rule in suits against an alien or a foreign corporation, which may be governed by different considerations. Nor does it affect cases in admiralty, for those have been adjudged not to be within the scope of the statute. In re Louisville Underwriters, 134 U. S. 488, 10 Sup. Ct. Rep. 587.

All that is now decided is that under the existing act of congress a corporation, incorporated in one state only, cannot be compelled to answer, in a circuit court of the United States held in another state in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different state.

Writ of *mandamus* denied.

Mr. Justice HARLAN dissented.

DEMAREST v. FLACK et al.

(28 N. E. 645, 128 N. Y. 205.)

Court of Appeals of New York. Oct. 6, 1891.

Appeal from common pleas of New York city and county, general term.

Action by Frances E. Demarest, an infant, by her guardian, etc., against Hugh J. Grant, James A. Flack, Alfred de Cordova, Frank Hardy, and Gabriel Case, composing the America's Winter Carnival Company. At the trial the complaint was dismissed, and plaintiff's exceptions were ordered to be heard in the first instance at the general term, which overruled the exceptions, and ordered judgment for defendants. From the judgment plaintiff appealed. Code W. Va. c. 54, § 10, provides that, "when a certificate of incorporation shall be issued by the secretary of state pursuant to this chapter, the corporators named in the agreement recited therein, and who have signed the same, and their successors and assigns, shall, from the date of the said certificate until the time designated in the said agreement for the expiration thereof, unless sooner dissolved according to the law, be a corporation by the name and for the purposes therein specified."

PECKHAM, J. The plaintiff alleged in her complaint that the defendants were a joint-stock company doing business in New York city under the name and style of "America's Winter Carnival Company." It was further alleged that they were the owners of the toboggan slides used at Fleetwood park, in the city of New York, and that such slides were under their management and control. The plaintiff also alleged that she had, while riding on one of the toboggans upon one of the slides in the possession and management of defendants, been accidentally and seriously injured through the carelessness of defendants or their employes, and she demanded judgment for \$25,000 damages. The defendants, by answer, denied that they were a joint-stock company, and also denied the allegations that they were the owners of the toboggan slides mentioned, or that they were under their control; and they denied all allegations of negligence, either on their own part or on that of any of their employes. Upon the trial the plaintiff gave no evidence as to the defendants being a joint-stock association, but endeavored to prove a joint or partnership liability of defendants, based upon the allegation that the grounds where the accident occurred were owned by the New York Driving Club, and that in the fall of 1887 the grounds were leased by it to the defendants for the purpose of putting up these toboggan slides. The evidence tending to show even a *prima facie* liability on the part of the defendants is of the most meager character. We will assume, however, that the plaintiff proved enough to call upon the defendants for an answer to her cause of action. This answer was, in brief, that the defendants were nothing but individual members of and stockholders in an incorporated company which had hired the grounds, owned the tobog-

gans, and operated the slides; and that whatever liability there was, if any, in favor of the plaintiff, was borne by the incorporated company, and not by the individual stockholders therein. To prove this defense the counsel for defendants offered in evidence a certificate of incorporation of the America's Winter Carnival Company, as organized under the laws of West Virginia, and at the same time he offered the Code of West Virginia in evidence. The certificate and the Code were objected to by the plaintiff's counsel on the ground that there was no allegation in the answer of the existence of a corporation or the incorporation of the America's Winter Carnival Company, and that it was necessary to plead such fact before defendants could avail themselves of the defense. The certificate was further objected to as incompetent, immaterial, and illegal. The objections were overruled, and plaintiff's counsel duly excepted.

The first ground of objection, as to the necessity of pleading the defense founded on the incorporation, was properly overruled. It was not a defense necessary to be pleaded. It went to the root of the cause of action, and tended to show there never had been any liability on the part of defendants. It was not an affirmative defense which in substance admitted an original cause of action, but showed facts which operated as a satisfaction thereof. It was not like a defense of payment, or a release, or an accord and satisfaction. If operative, it showed there had never been any liability; and hence it was admissible under the defendant's denial of any liability as set out in the complaint. The certificate, when read in evidence, showed that it was signed by the secretary of state of West Virginia, and that it was issued under the great seal of that state, and in it the secretary declared that the corporators therein named, and their successors and assigns, were from the 12th day of December, 1887, until the 1st day of January, 1935, a corporation by the name and for the purpose set forth in the certificate. It was subsequently proved, under objection and exception, that this company was at the time of the happening of the accident in possession of the toboggan slide in question, and was the owner thereof.

As to the second ground of objection taken by plaintiff's counsel to the introduction of the certificate,—that it was incompetent, immaterial, and illegal,—we may assume that it raises the question of the validity of the incorporation itself, and of its sufficiency as a defense. Upon this issue a few additional facts must be stated. The Code of West Virginia, which was received in evidence, shows that a corporation of the kind herein spoken of could be formed under the general laws of that state by five or more persons signing an agreement to the effect stated in the statute, and by the payment by each corporator of at least 10 per cent. of the par value of the stock subscribed for by him. Affidavits on the part of at least two of the corporators, stating necessary facts, were also required by the statute. It is further therein provided that the agreement, acknowledgment,

and affidavits are to be delivered to the secretary of state, and he issues to the corporators his certificate, under the great seal of the state, declaring, among other things, that they and their successors and assigns are a corporation from that date until a time therein specified. The effect of the certificate is provided for by the statute, which says that the corporators and their successors and assigns shall, from the date of the certificate until the time designated therein, be a corporation, and the certificate shall be received as evidence of such incorporation. The statute provides for the holding of meetings of the corporation, including the first general meeting for purposes of organization, out of the state, and it also provides for keeping the principal office of the corporation in any state or territory of the United States, and it permits the corporation to adopt by-laws, and to prescribe the qualifications of directors, and, if it be not otherwise provided, every director must be a stockholder and a resident of the state of West Virginia. The certificate in question in this case embodies an agreement among five corporators, by which they agree to become a corporation by the name of "America's Winter Carnival Company," for the purpose of leasing premises for amusement,—among others, for toboggan slides; and they agree that its principal office shall be in the city of New York; and in this agreement they recite that they have subscribed a certain sum (named therein) to the capital of the company, and have paid 10 per cent. thereof, and that the capital so subscribed was divided into shares of \$100 each, which were held by them. The names of the corporators were signed to the agreement, and their residences were therein stated as being in the city of New York. The agreement, properly signed and acknowledged, was presented to the secretary of state of West Virginia, and a certificate of incorporation duly issued, as already stated. From the evidence it is clear, upon the question of user, that there was a person who acted as president of this company under a so-called election, although it does not appear how or when he was elected. That person was a resident of New York. There was also a person who acted as treasurer of the company, and he also resided in New York. The treasurer kept a check-book, and made disbursements for the company by check, and received what money came to it, and put it in the bank. There were no by-laws. The treasurer once had charge of the stock-book of the company, though at the time when he was sworn on the trial he did not know where it was, and he supposed the company was not then in existence. Admission to the grounds occupied and possessed by this company was charged, and the money that was paid for admission to the toboggan slides went through the treasurer's hands. No one could get in without paying toll, excepting members of the driving club. The president and vice-president were directors, as was also the treasurer and one other stockholder. This company was in possession of the toboggan slides when the accident occurred, "and no oth-

er concern or individuals or anybody else." The defendant Grant said he had stock in the company, which he paid for, and that he refused to go into the business at all unless under an incorporation. The books of the company were not produced, and it did not appear what, if any, books had been kept by it, other than the stock and check books spoken of by the treasurer.

This is substantially all that appears in regard to user by the corporation; and the counsel for plaintiff, upon this evidence, moved to strike out the certificate of incorporation, and all the testimony relating thereto, on the ground "that the directors of the concern were residents of New York, and that under the statute of West Virginia it was necessary, in order that the corporation be duly incorporated, that the directors of the concern should be residents of West Virginia, unless a special resolution were passed by the corporation permitting persons of any other state to be such directors." The motion was denied; and thereupon, on motion of counsel for defendants, the complaint was dismissed because no cause of action was proved against the defendants personally. There was sufficient evidence of user to make it clear that the company had accepted its charter, with all its privileges and liabilities, whatever they might be. This question of user, although not specifically taken in the above objections, has been urged upon us here by the counsel for the appellant, and we think it well enough to say what we have upon the subject. As to the other points which have been actually raised by the motion to strike out the certificate, we think a proper disposition was made of them by the court below.

By the statute of West Virginia the incorporation precedes the election of directors. After the incorporation, and subsequent to the issuing of the certificate thereof by the secretary of state, the corporators named therein, or a majority of them, are directed by statute to appoint a time and place for holding a general meeting of the stockholders to elect directors, make by-laws, and transact other business. A failure to adopt a by-law at the first meeting, permitting the election of non-resident directors, and the election of non-resident directors at such meeting or at a subsequent one, in the absence of a by-law permitting it, would not *ipso facto* dissolve the corporation, or take away its corporate rights or franchises. The company would still remain a legal entity, notwithstanding its failure to adopt the proper by-law, or, in its absence, to elect resident directors. The counsel for plaintiff was therefore in error in his statement as to the law of West Virginia.

We come, then, to the question whether, upon the facts already set out, this corporation was so far valid as to be entitled to recognition as such in the courts of our state. The plaintiff says it clearly appears that the corporators thereof were citizens of New York, and the corporation was formed by them in the state of West Virginia for the sole purpose of doing business out of that state and in the state of New York, in which latter

state the principal office was also to be located. These facts, he says, conclusively prove the invalidity of the West Virginia corporation, so far at least as this state and its citizens are concerned. If mistaken in that view, he still urges that such facts render it a question for the determination of the jury whether the incorporation was attempted to be made in good faith, or as a mere evasion and in fraud of the laws of West Virginia or of New York. He claims, if the jury should find the purpose was one of evasion, that in such case the incorporation would furnish no defense, and the plaintiffs would be liable as individuals. We are quite clear the case should not be submitted to a jury to pass upon the question of evasion as matter of fact. If it were, we might find different juries coming to different conclusions upon the same facts, and we should have a corporation or no corporation according to the view a jury might take of such facts. One plaintiff might prove the evasion to the satisfaction of one jury, and another plaintiff fail on precisely the same facts; and thus we should have a corporation as to A., and no corporation as to B., and the same question constantly arising as often as the corporation or its members were sued. This would be intolerable. It must be a corporation as to all persons with whom it has business dealings, or to none. In other words, it must be a question of law, instead of fact. The courts of any country recognize foreign corporations through what is termed "national or state comity." (*Merrick v. Van Santvoord*, 34 N. Y. 208; *Bank v. Earle*, 13 Pet. 519; *Christian Union v. Yount*, 101 U. S. 352;) but whether such recognition shall be given must be decided by the courts of the country where the corporation seeks to do business. In our state, as in others, it is a question of domestic policy, and what that policy is must be determined by an examination of our own legislation. If we find any direct enactment upon the subject, it is our duty to obey it; and in its absence we must determine the question with reference to our general legislation, and to the circumstances which surround us as a great and growing commercial community, having need of and employing large amounts of combined capital, and for whose prosperity and growth it is of the utmost importance that such capital should have the greatest facilities extended it for useful employment, with reasonable and proper personal exemptions from liability. We can find no reason for a domestic policy that should exclude from recognition by our courts foreign corporations generally. It may be safely said there can be no such domestic policy at the present day in a civilized state. The question then arises, shall we go behind the certificate of incorporation or charter of a foreign corporation for the purpose of inquiring under what circumstances, and for what purpose outside the charter, it was incorporated? This can only be claimed on the ground that the charter was obtained in fraud or evasion of the laws of the state which granted it, or for the purpose of evading the provisions of our own laws. It is

plain there was in regard to the procurement of this charter no fraud upon or evasion of the laws of West Virginia, even if we should admit that such fact would constitute good ground for our refusal to recognize such corporation, although no proceedings had been taken to annul its charter in the state which granted it. This point is by no means clear. However that may be, it is impossible not to see that the state of West Virginia has adopted a policy which favors the formation of corporations within her borders, and pursuant to her laws, while the members and officers may be non-residents, and where the principal business of the corporation is to be performed outside the confines of the state.

The agreement which was signed by the corporators in this case, and duly acknowledged and presented to the secretary of state of West Virginia, showed that the corporators were residents of New York, and that the principal office of the corporation was to be in New York; and the inference was a fair one that the principal business of the corporation was also to be conducted in New York. The secretary of state, to whom the papers for the organization of the corporation were presented, was compelled to pass upon and decide the question whether they conformed to the laws of West Virginia, before he received or filed them, or gave the certificate of incorporation. He did pass upon the question and did thereupon issue the certificate of incorporation under the great seal of the state, and attested by his official signature. So far as the laws of West Virginia are concerned, it is plain that the corporators thereupon became a corporation, and in that state the certificate was, by the laws thereof, evidence of the existence of such corporation. There was no fraud or evasion of the law of West Virginia in thus becoming incorporated. The references to her laws above made show conclusively that the formation of corporations thus composed, and for the purpose of doing their principal business outside the limits of that state, was contemplated in those laws. This corporation was beyond all question legally incorporated, and entitled to recognition, in the state of West Virginia. Unless, therefore, it can be said that the acts of our citizens in procuring an incorporation under the laws of West Virginia for the purpose of doing business here were, as matter of law, a fraud and an evasion of our own laws, and hence in conflict or inconsistent with our domestic policy, such foreign corporation is entitled to recognition and protection in our own tribunals. *Merrick v. Van Santvoord*, supra. It is urged that such acts are thus inconsistent and in conflict with our policy, because citizens of our own state are in that way enabled to evade our own laws relative to home corporations, and to avoid personal liability by incorporating under the laws of foreign states, which may be more favorable to members than are our own laws. I think, when this claim is examined in the light of our own legislation, it will be seen that there is no substantial basis for it to rest upon. An examination of our laws shows that it is, and for many

years has been, the policy of this state to enlarge the facilities for the formation of corporations. General laws are on our statute-book for the formation of corporations of almost every conceivable kind, and under some one of them a corporation of the kind mentioned in this case could readily be formed. The freedom from personal liability would be as great, and could be as easily attained, under our own as under the laws of West Virginia. The security of the creditor would not be substantially greater in the case of the domestic than in that of the foreign corporation. In the latter the creditor has the remedy by attachment, and he can obtain about as easy access to its property as if it were domestic instead of foreign. There is really nothing to evade by incorporating under a foreign law. No harmful results flow to a creditor or to the community here by such incorporation. Where the corporation formed under another jurisdiction comes here to do business of a kind which we permit to be done by corporations, and where our laws provide for incorporating individuals for the purpose of doing that business, it is difficult to see how the terms "evasion" and "fraud" can be properly applied to acts of our citizens whereby they obtain incorporation in another state. When they come in our state to do business, they must conform to our laws relating to foreign corporations, and comply with the terms laid down by us as conditions of allowing them to transact business here. In the case of many kinds of corporations such conditions have already been imposed by our laws; and, if there be any kind where none is imposed, it is conclusive evidence that up to this time the legislature has not thought it conducive to the true interests of the state and its citizens to impose them. I do not intimate that it is necessary for a state to expressly, by statute, exclude foreign corporations from acting within its jurisdiction. The policy of the state may exclude them, and that policy may be clearly established by a reference to the general legislation of a state. I find none such in the laws of this state.

It has been urged that the easy way which our laws provide for forming corporations is itself a reason why we should not recognize as a corporation those of our own citizens who have gone to another state for the purpose of incorporating themselves under the laws thereof, to do business in our own state as such corporation. We think there is very little force in the argument. The public policy which we see in our own state, as evidenced by her laws upon the subject of the formation of corporations, is one which looks to their ready and easy formation as a means of transacting business with an accumulation of capital, and an exemption from personal liability to the largest extent consistent with reasonable supervision by the state. The facilities for incorporation offered by this state are not the result of any desire to promote the formation of corporations here as against their formation in other states. They are offered because of a policy on our part which urges upon the state the propriety of furnishing them as one means of controlling the busi-

ness done by them, and keeping it within our borders. If, in any particular case, it is thought by those interested in the matter that the business can be done in our own state and by our own citizens with greater facility under the form of a foreign corporation than under that of a domestic one, there is no public policy which forbids its transaction under such form. The supervision of a foreign corporation by this state may easily be exercised by imposing terms as a condition of permitting it to do business here. The absence of any such terms in our legislation forms no reason for refusing to recognize the corporation. The power rests with the legislature to say whether any, and, if so, what, terms shall be imposed upon such corporations as a condition of granting them permission to do business here. Those terms can only be imposed by the legislature; and in their absence our courts ought not, merely on that account, to refuse to recognize a foreign corporation. In the absence of legislation, our courts must either refuse absolutely, or else they must recognize the right of such corporations to come to this state and do business here. The courts cannot themselves impose terms or conditions.

The case of *Montgomery v. Forbes*, 148 Mass. 249, 19 N. E. Rep. 342, is not necessarily in conflict with these views. In that case, the defendant, a resident of Massachusetts, went to New Hampshire, and there executed and filed certain papers, for the purpose of forming a corporation in that state, for the reason that its tax-laws were more favorable than those of Massachusetts, and because he desired to avoid personal responsibility. The whole business was to continue to be done in Massachusetts, and these steps were taken in order to avoid the laws of that state. The court held that the defendant had not complied with the terms of the New Hampshire act, and hence had never become incorporated. There was no tribunal in New Hampshire to which the papers in regard to a proposed corporation could be submitted, and which had power to decide whether the law had been complied with, and, upon compliance, to issue a certificate of incorporation. But all persons filed their papers at their peril. If the question ever arose as to a compliance with the law, it had to be decided by comparing the papers with the statute. The Massachusetts court did that, and decided that the defendant did not comply with the New Hampshire statute, and that no corporation had ever been formed. In *Hill v. Beach*, 12 N. J. Eq. 31, the court of chancery of New Jersey, in a proceeding for an accounting, said that certain persons who had entered into an agreement with a view to form a company to do business in New Jersey, and who thereupon undertook to form themselves into a corporation under the general act of this state relative to the formation of manufacturing corporations, passed in 1848, and who complied with the forms of such act, would nevertheless not be recognized by the courts of New Jersey as a legally constituted corporation. The chancellor said they were not a foreign corporation, "for it is perfectly manifest upon the face of

their proceedings that their attempted organization under the general law of New York respecting corporations was a fraud upon the laws of that state." In what respect it was a fraud does not appear, unless it were one because the corporations were residents of New Jersey, and intended to do business in that state under the New York incorporation. From what has already been said, we do not think those facts make out a case for a refusal to recognize a corporation legally constituted and existing in the foreign state.

We recognize corporations formed by the citizens of a foreign state under its laws for the purpose of doing business, among other places, in our own state. Where is the essential difference between such a corporation and one legally incorporated under such foreign state for the same purpose, but the members of which are citizens of our own state? Whose rights are jeopardized more in the case where the members of the corporation are our own citizens than where they are citizens of the foreign state? What enlightened policy is violated by the recognition of the foreign corporation composed of residents of this state which would not also and equally suffer by the recognition thereof when composed of non-residents? And yet, beyond all cavil, our policy is to recognize the latter. The truth is, foreign corporations are not properly to be regarded with suspicion, nor should unnecessary restraints be imposed upon their doing business in our midst. They carry no black flag, and the policy of all civilized nations is to grant them recognition in their courts. It seems to me that every reason which urges upon us the recognition of foreign corporations organized with power to do business in our state, and composed of citizens of the foreign state, is equally potent when the foreign corporation is composed of our own citizens. It has always been supposed that a state should at least deal as liberally with its own citizens as with those of foreign states. If, therefore, we permit foreign citizens to come within our limits in the form of a foreign corporation organized

with power to do business here, and recognized by us, why should we not permit our own citizens to avail themselves of the like privilege? If we impose terms and conditions upon foreign corporations, as such, doing business here, those same terms and conditions still and equally apply to a foreign corporation when composed of our own citizens. Why should they not be placed at least upon an equality with the foreign citizen?

The case of *Railway, etc., Co. v. Board*, 6 Kan. 245, simply holds that the courts of that state will not recognize a corporation formed under the laws of Pennsylvania, where the corporation is not itself permitted to do business in the state which grants its charter. It was also stated in the above case that the charter, if enacted by the Kansas legislature, would have been void as contravening two constitutional provisions. In such a case it would scarcely be expected that a foreign state would grant greater recognition and privileges than were accorded by the state under which the corporation was formed. It might readily be supposed that no rule of comity compelled the recognition of a foreign corporation formed to do acts which are prohibited by the laws of the state to its own citizens or corporations. It is upon this principle that *Empire Mills v. Alston Grocery Co.* was decided by the court of appeals of Texas, and reported in 15 S. W. Rep. 200, 505, and to which our attention has been called. The legislature of Texas prohibited the incorporation of corporations in that state of the character of the Iowa corporation, and the court held that comity did not extend to the recognition of such a corporation by the courts of Texas.

After a careful examination of the case, we have come to the conclusion that the defendant sufficiently proved the existence of a valid corporation under the laws of West Virginia, and that there was nothing in the other facts proved which should cause us to refuse recognition of that corporation. The result is that the complaint was properly dismissed, and the judgment to that effect should be affirmed, with costs. All concur.

THE CASE OF SUTTON'S HOSPITAL.

(10 Coke, 23a.)

(Extract from the Report.)

"* * * And it is to be known, that every corporation or incorporation, or body politic or incorporate, which are all one, either stands upon one sole person, as the king, bishop, parson, &c., or aggregate of many, as mayor, commonalty, dean and chapter, &c., and these are in the civil law called universitas sive collegium. Now it is to be seen what things are of the essence of a corporation. 1. Lawful authority of incorporation; and that may be by four means, sc. by the common law, as the king himself, &c. by authority of parliament; by the king's charter (as in this case); and by prescription. The 2d, which is of the essence of the incorporation, are persons to be incorporated, and that in two manners, sc. persons natural, or bodies incorporate and political. 3. A name by which they are incorporated, as in this case governors of the lands, &c. 4. Of a place, for without a place no incorporation can be made; here the place is the charter-house in the county of Middlesex. Vide 3 Hen. VI. 'Detinue,' 20; 17 Edw. III. 59b; and 45 Edw. III., 17. 5. By words sufficient in law, but not restrained to any certain, legal and prescript form of words. And forasmuch as good pleading is lapis lydius, the touch-stone of the true sense and knowledge of the common law, the form of pleading of a corporation by prescription is to be observed, for in such case he ought to prescribe in every thing which is of the essence of the incorporation. In the Book of Entries (title 'Quare impedit' 1) the pleading is, quoddam hospitalis Sanctae Mariae de Bristow de uno magistro, & Conventu a toto tempore, &c. incorporat' fuerunt per nomen Magistri & Conventus Hospitalis Sanct' Mariae de Bristow; and there it appears that there they purchased lands and tenements, and were impleaded, without any prescription for the one or the other, because when they are incorporated by prescription by a certain name, then to implead and to be impleaded, to grant and purchase, &c. are incidents to a body incorporate. M. 15 H. 7. Rot. 522. in Com' Banco, there the prescription is custos & vicarii collegii vicariorum in Choro Hereford 'sunt & a toto tempore, &c. fuerunt incorporat' per nomen Custodis et Vicar' Collegii Vicariorum in Choro Hereford'; and there also they purchased and were impleaded as incidents to incorporation. Lib. Intr. tit. 'Assizes' fol. 63. Magister, fratres, et sorores fraternitatis sive guildae novem ordinum sanctorum Angelorum juxta Brainford brought an assise; the tenant pleads, quod in villâ de Brainford est quaedam fraternitas incorporata infra tempus memoriae de magistro, fratribus et sororibus novem ordinum Angelorum juxta Brainford Bridge, absque hoc quod habetur aliqua talis fraternitas; which case is report-

ed in 22 Edw. IV., 34a, where the tenant at first pleaded, no such corporation, and if it be, not found; and naught because two bars, and then he pleaded the said plea, quod est quaedam fraternitas incorporata &c., and yet there they were infeoffed by Bocking upon condition, and capable thereof as incident to incorporation. And therewith agrees, Bishop of Exeter's Case, in the Book of Entries, 455; Corporation of Godmanchester 2 Hen. VII., 17b; in the case of Hospital of Wicambe, 34 Hen. VI. 27a, b. (Vide 26 Hen. VIII., 1b.) In 9 Edw. IV. 20a. The master of the hospital of Burton St. Lazarus prescribed, quod ipse et omnes praedecessores sui magistri hospitalis praedict' a toto tempore, &c. nominati et cogniti fuerunt, &c. tam per nomen Magistri hospitalis Sancti Lazari de Burton, de ordine Sancti Lazari de Jerusalem in Angliâ, quam per nomen Magistri de Burton Sancti Lazari de Jerusalem in Angliâ: by which it appears that this 'incorporo,' or any derivative thereof, is not in law requisite to create an incorporation; but other equivalent words are sufficient, as here nominati & cogniti; and therewith agree 44 Assizes p. 9. In Prior of Plimpton's Case, and Edw. IV.; 7b. in the case of Abbot of Glastenbury, and in none of these books or records was any mention made of these words, fundo, erigo, &c. or any other like words; for as it hath been said, they are only declaratory words, and the effect of them may be done by the owner of the land without any grant. And it was well observed, that in old time the inhabitants or burgesses of a town or borough were incorporated when the King granted to them to have gildam mercatoriam: In the Register, 219b, where the writ recites, quod cum inter caeteras libertates civibus civitatis Winton' per chartas progenitorum nostrorum quondam Regum Angliae quas per chartam nostram confirmavimus, concessum sit eisdem, quod nullus eorum qui fuerunt infra gildam mercatoriam placet extra murum, &c. where gilda signifies contubernium seu fraternitas incorporata; and upon that the place of their meeting and assemblies was called the guild-hall. And I have seen the charter made by King Henry I. (Textoribus Lond'), by which he grants to them that they shall have gildam mercatoriam, and a confirmation of it made by King Henry II., by which charters they were incorporated. And where the opinion of Fineux in 13 Hen. VIII. 3b, and of Prisot in 39 Hen. VI. 13b, was cited at the bar, that a corporation aggregate of many cannot be a body only without a head, that was utterly denied: for at first the greater part of corporations were bodies without any head by force of these words gilda mercatoria. And that a corporation may be aggregate of many without a head. Vide 18 Edw. II. Annuity 48; 5 Edw. III. 11b; 22 Assizes 67; 29 Assizes, 17; 2 Hen. VI. 9; 18 Hen. VI. 16a, b; 19 Hen. VI. 80; 21 Edw. IV., 55b, 56a, b; 7 Edw. IV. 14a, b;

2 *Mariae Dyer*, 100. And it appears by record that Paulinus, the first archbishop of York, after he had baptized the inhabitants of Nottinghamshire in the river of Trent, founded a collegiate church in Southwell of prebendaries consecrated to the Virgin Mary, which continues a body without a head even to this day. Vide for this word guild or fraternity in the Book of Entries, 68; 37 Edw. III. c. 5; 15 Rich. II. c. 5; the statute of 1 Edw. VI. of Chancies. In which three things were observed. 1. How prudens antiquitas did always comprehend much matter in a narrow room. 2. That to the creation of an incorporation the law had not restrained itself to any prescript and incompatible words. 3. That when a corporation is duly created, all other incidents are tacite annexed. And for direct authority in this point in 22 Edw. IV. Grants, 30, it is held by Brian, Chief Justice, and Choke, that corporation is sufficient without the words to implead and to be impleaded, &c., and therefore divers clauses subsequent in the charters are not of necessity, but only declaratory, and might well have been left out. As 1. By the same to have authority, ability, and capacity to purchase, but no clause is added that they may alien, &c., and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, &c.; that is also declaratory, for when they are incorporated, they may make or use what seal they will. 4. To restrain them from aliening or demising but in certain form; that is an ordinance testifying the king's desire, but it is but a precept, and doth not bind in law. 5. That the survivors shall be the corporation, that is a good clause to oust doubts and questions which might arise, the number being certain. 6. If the revenues increase, that they shall be employed to increase the number of

poor, &c. that is but explanatory, as appears in the Case of Thetford School, in the eighth part of my Reports (131a.). 7. To be visited by the governors, &c. that is also explanatory; for in this case the poor which shall be resident in the house of the charter-house shall not be incorporated, but certain persons in whom the possessions are vested, who shall not be resident there, but only to have the general government and ordering of the poor therein; so that this case is out of the statutes of 2 Hen. 5, c. 1, and 14 Eliz. c. 5, for if no visitor had been appointed by the charter, the governors should visit; and the books in 8 Edw. III. 28, and 8 Assizes, 29, do not gainsay it, where it is held, that if the hospital be lay, the patron shall visit, and if spiritual the bishop shall visit, so that every hospital is visitable; it is true, but in the case at the bar the poor of the hospital are not incorporated, and so no legal hospital. 8. To make ordinances; that is requisite for the good order and government of the poor, &c., but not to the essence of the incorporation. 9. The exemption from the ordinary is but declaratory, for being a lay incorporation he neither can nor ought to visit. 10. The license to purchase in mortmain is necessary for the maintenance and support of the poor, &c., for without revenues they cannot live, and without a license in mortmain they cannot lawfully purchase revenues, and yet that is not of the essence of the corporation, for the corporation is perfect without it, so that by what has been said, it appears what things in genere are requisite to a complete body incorporate, and which are verba operativa in this case (which are necessary to be known in every case), in the resolution whereof it appears how necessary it is that the law and experience should join with their hands together. * * *

POWERS OF CORPORATIONS AT COMMON LAW.

(*Extract from Sir William Blackstone's Commentaries.*)

"* * * After a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider. Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed, of course.¹ As, 1. To have perpetual succession. This is the very end of its incorporation; for there cannot be a succession forever without an incorporation;² and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as go off.³ 2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors; which two are consequential to the former. 4. To have a common seal. For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any acts, by words, or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole.⁴ 5. To make by-laws or private statutes for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land, and then they are void. This is also included by law in the very act of incorporation:⁵ for as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic. And this right of making by-laws for their own government, not contrary to the law of the land, was allowed by the law of the twelve tables of Rome. But no trading company is with us allowed to make by-laws which may affect the king's prerogative, or the common profit of the people, under penalty of 40l., unless they be approved by the chancellor, treasurer, and chief justices, or the judges of assize in their circuits; and even though they be so approved, still, if contrary to law, they are void.⁶ These five powers are inseparably incident to every corporation, at least to every corporation aggregate; for two of them, though they may be practised, yet are very unnecessary to a corporation

sole, viz., to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

"There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole; the reason of them ceasing, and of course the law. It must always appear by attorney, for it cannot appear in person, being, as Sir Edward Coke says,⁷ invisible, and existing only in intendment and consideration of law. It can neither maintain, nor be made defendant to, an action of battery or such like personal injuries; for a corporation can neither beat, nor be beaten, in its body politic.⁸ A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities.

"Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be seized of lands to the use of another;⁹ for such kind of confidence is foreign to the end of its institution. Neither can it be committed to prison; for, its existence being ideal, no man can apprehend or arrest it. And therefore, also, it cannot be outlawed; for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do; for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods.¹⁰ Neither can a corporation be excommunicated: for it has no soul, as is gravely observed by Sir Edward Coke;¹¹ and therefore also it is not liable to be summoned into the ecclesiastical courts upon any account; for those courts act only pro salute animae, and their sentences can only be enforced by spiritual censures: a consideration which, carried to its full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.

"There are also other incidents and powers which belong to some sort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot:¹² for such movable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor, which the law is careful to avoid. In ecclesiastical and eleemosynary foundations, the king or the

¹ 10 Coke, 32.

² Brooke, Abr. tit. "Corporation," 63.

³ Brooke, Abr. tit. "Feoffm. al Uses," 40, Bac. St. Uses, 347.

⁴ Brooke, Abr. tit. "Corporation," 11, "Outlawry," 72.

⁵ 10 Coke, 32.

⁶ Co. Litt. 46.

¹ 10 Coke 30; Hob. 211.

² 10 Coke, 26.

³ 1 Rolle, Abr. 514.

⁴ Dav. 44, 48.

⁵ Hob. 211.

⁶ St. 19 Hen. VII. c. 7; 11 Coke, 54.

founder may give them rules, laws, statutes, and ordinances, which they are bound to observe: but corporations merely lay, constituted for civil purposes, are subject to no particular statutes; but to the common law, and to their own by-laws, not contrary to the laws of the realm.¹³ Aggregate corporations, also, that have by their constitutions a head, as a dean, warden, master, or the like, cannot do any acts during the vacancy of the headship, except only appointing another: neither are they then capable of receiving a grant: for such corporation is incomplete without a head.¹⁴ But there may be a corporation aggregate, constituted without a head:¹⁵ as the collegiate church of Southwell, in Nottinghamshire, which consists only of prebendaries; and the governors of the Charter-house, London, who have no president or superior, but are all of equal authority. In aggregate corporations, also, the act of the major part is esteemed the act of the whole.¹⁶ By the civil law this major part must have consisted of two-thirds of the whole, else no act could be performed: which perhaps may be one reason why they required three at least to make a corporation. But with us any majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act (which King Henry VIII. found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations) it was therefore enacted by statute 33 Hen. VIII. c. 27, that all private statutes shall be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority: but this statute extends not to any negative or necessary voice, given by the founder to the head of any such society.

"We before observed, that it was incident to every corporation to have a capacity to purchase lands for themselves and successors: and this is regularly true at the common law.¹⁷ But they are excepted out of the statute of wills:¹⁸ so that no devise of lands to a corporation by will is good, except for charitable uses, by statute 43 Eliz. c. 4,¹⁹ which exception is again greatly narrowed by the statute 9 Geo. II. c. 36. And also by a great variety of statutes,²⁰ their privilege even of purchasing from any living grantor, is much abridged: so that now a corpora-

tion, either ecclesiastical or lay, must have a license from the king to purchase, before they can exert that capacity which is vested in them by the common law: nor is even this in all cases sufficient. These statutes are generally called the statutes of mortmain; all purchases made by corporate bodies being said to be purchases in mortmain, in mortua manu: for the reason of which appellation Sir Edward Coke²¹ offers many conjectures; but there is one which seems more probable than any that he has given us, viz., that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law, and therefore holden by them might with great propriety be said to be held in mortua manu.

"I shall defer the more particular exposition of these statutes of mortmain till the next book of these Commentaries, when we shall consider the nature and tenures of estates; and also the exposition of those disabling statutes of Queen Elizabeth, which restrain spiritual and eleemosynary corporations from aliening such lands as they are at present in legal possession of: only mentioning them in this place, for the sake of regularity, as statutable incapacities incident and relative to corporations.

"The general duties of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one, that of acting up to the end or design, whatever it be, for which they were created by their founder. * * *

—1 Bl. Comm. book 1, c. 18, pp. 475, 480.

(Extracts from *Kyd on Corporations*.)

"When a corporation is duly created, many powers, capacities, and incapacities, are tacitly annexed to it without any express provision,¹ and of these, five are said to be necessarily and inseparably incident to every corporation. 1. To have perpetual succession, and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as are removed by death or otherwise.² 2. To sue and be sued, implead and be impleaded, grant and receive by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them for the benefit of themselves and their successors. 4. To have a common seal, and 5. To make by-laws, or private statutes for the better government of the corporation. The two last, however, it is admitted, are very unnecessary to a corporation sole, though they may be practised;³ and the last is not so inseparably incident to a corporation aggregate, that it cannot subsist without it;

²¹ 1 Co. Inst. 2.

¹ 10 Coke, 30b.

² 1 Rolle, Abr. 514.

³ Vid. 1 Bl. Comm. 475, 6.

¹³ Ld. Raym. 8.

¹⁴ Co. Litt. 263, 264.

¹⁵ 10 Coke, 30.

¹⁶ Brooke, Abr. tit. "Corporation," 31, 34.

¹⁷ 10 Coke, 30.

¹⁸ 34 Hen. VIII. c. 5.

¹⁹ Hob. 136.

²⁰ From Magna Charta, 9 Hen. III. c. 36, to 9 Geo. II. c. 36.

for there are some aggregate corporations to which rules and ordinances may be prescribed, and which they are bound to obey,⁴ as will be more fully shewn in another place. Neither are these all the incidents, which without any express provision are necessarily annexed by legal implication to an aggregate corporation; and, it is material to observe, that though many things be incident to a corporation, yet to form the complete idea of a corporation aggregate, it is sufficient to suppose it vested with the three following capacities. 1. To have perpetual succession under a special denomination and under an artificial form. 2. To take and grant property, to contract obligations, and to sue and be sued by its corporate name, in the same manner as an individual. 3. To receive grants of privileges and immunities, and to enjoy them in common. These alone are sufficient to the essence of a corporation; neither the actual possession of property nor the actual enjoyment of franchises, is necessary.⁵

"There are two general points of view in which corporations may be considered. 1. In their relation to the public; and 2. In respect to their internal constitution. Considering them in their relation to the public, these will be the objects of our enquiry: 1. Their several capacities and incapacities. 2. The mode prescribed by the law, in which they must act, and which must be observed by others in acting against them. 3. By what acts they are bound; and 4. To what burthens they are subject. A corporation being merely a political institution, it can have no other capacities than such as are necessary to carry into effect the purposes for which it was established; it cannot therefore be considered as a moral agent subject to moral obligation, nor as a single person subject to personal suffering, or capable of personal action; and on this principle we may account, in a satisfactory manner, for many of the incapacities attributed to a corporation aggregate, without having recourse to the quaint observations frequent in the old books, 'that it exists merely in idea, and that it has neither soul nor body.'⁶ On this principle a corporation aggregate cannot be guilty of a crime, as of treason or felony;⁷ and consequently cannot be subject to the punishment of a criminal: nor can it take an oath, which is one reason why it could not do fealty,⁸ and why it can-

not be executor or administrator;⁹ and for the same reason it cannot wage its law;¹⁰ neither can it be subject to ecclesiastical censure, and consequently cannot be excommunicated, nor summoned into the ecclesiastical courts;¹¹ neither can it do or receive a personal injury, and therefore can neither sue nor be sued in an action of trespass for battery or false imprisonment.¹² It is incapable of a personal appearance, and therefore could not have done homage, because that could not be done by attorney;¹³ which is another reason why it could not do fealty; but it might have purchased lands held by homage and fealty, and then it would have been considering as holding them by that tenure.¹⁴ For the same reason it cannot levy a fine;¹⁵ neither can it be apprehended or arrested, and therefore cannot be outlawed,¹⁶ for outlawry always supposes a precedent right of arrest. * * * The capacity of aggregate corporations to take property for the benefit of themselves and successors, extends equally to personal and to real property; but it is a general rule that no chattel shall go in succession in the case of a corporation sole,¹⁷ and therefore if a lease for years be granted to a bishop, dean, parson, vicar, &c. and to his successors, it shall go to the executor and not to the successor; so, if a man be bound in a recognizance or obligation, to any such sole corporation, the executor and not the successor shall have it; for though they have a natural and a corporate capacity, yet the latter is confined to real property. * * * It has been observed, that, by the rule of the common law, a corporation has an equal capacity of taking property with a private person,¹⁸ but their capacity to take landed property is subject to some restraints imposed by statute, of which it is necessary now to give an account. These restraints were at first introduced to prevent the effects of too great an accumulation of land by religious houses, and other ecclesiastics; and the statutes by which they were imposed, have been called statutes of mortmain. * * * Though bodies politic and corporate are expressly excepted from the statute of wills, and are therefore incapable of taking directly by will, yet it has been held that they were not, by means of that exception, rendered totally incapable of taking the benefit of a devise made in their favour, for that if a man devised that his executors should, by the advice of learned counsel, convey his lands

⁴ Vid. eund. 477.

⁵ Per Holt, Skin. 311; 10 Coke, 31a; Case of The Dean and Chapter of Norwich, 3 Coke, 75b.

⁶ Vid. 10 Coke, 32b. Manwood, C. B., is said by Lord Coke to have said of corporations, that they had no soul, which he proved by this curious syllogism, "None can create souls but God; but a corporation is created by the king: therefore a corporation can have no soul." 2 Bulst. 233.

⁷ 10 Coke, 32b.

⁸ Plow. 213, 245; 10 Coke, 32b.

⁹ Com. Dig. "Administration," B, 2.

¹⁰ 9 Coke, 32a.

¹¹ 10 Coke, 32a.

¹² Br. Corp. 63.

¹³ Co. Litt. 66b.

¹⁴ 33 Hen. VIII. Br. Fealty, 15.

¹⁵ Com. Dig. tit. "Fine," B.

¹⁶ 10 Coke, 32a, cites 39 Edw. III. 13a; Br. Utlagary, 72. Corpor. 11;

¹⁷ Co. Litt. 46b; 4 Coke, 65; 1 Rolle, Abr. 515; Dyer, 48, pl. 15; Cro. Eliz. 464.

¹⁸ Dyer, 48, in Mag. Char. 16.

to any corporation, spiritual or temporal, this was not against the statutes, because it might be lawfully done by license to alienate in mortmain and writ of ad quod damnum."

* * * It is likewise to be observed that the statutes of mortmain make no mention of personal property, and therefore the power of corporations aggregate, in general, to take such property, remains unlimited: but many particular corporations, established by act of parliament for some particular purpose, are limited in this respect as well as in their power to purchase lands. * * *

Having considered the capacity of corporations with respect to their property and

privileges, it follows naturally that we should say something with respect to their capacity of suing and being sued. This part of the subject resolves itself into two questions. 1. What actions can they bring? and, 2. What actions may be brought against them? To both which one general answer may be given, that they may maintain all such actions as are necessary to assert their rights when invaded, or to give them a recompense for any injury that can be done to them; and that all such actions may be maintained against them, as are necessary to enforce the claims of others in opposition to them.

—Stewart Kyd, *Treatise on Corporations*, 1793.

* Porter's Case, 1 Coke, 25a.

AYERS et al. v. SOUTH AUSTRALIAN
BANKING CO.

(L. R. 3 P. C. 548. 1871.)

On appeal from the supreme court of South Australia.

This was an appeal from an order making a rule absolute of the supreme court of South Australia, discharging, with costs, a rule nisi calling upon the respondents to show cause why the verdict obtained by them should not be set aside, and instead thereof a nonsuit entered, or that amount of damages and interest be reduced, pursuant to leave reserved at the trial in an action of trover to recover the value of a quantity of wool, in which the respondents were plaintiffs, and the appellants, defendants. The action was brought by the respondents against the appellants for the wrongful conversion of wool on which the respondents claimed a preferable lien under an agreement dated the 23d of August, 1866, and which wool the appellants, who were trustees or assignees of the creditors of the firm of Philip Levi & Co., had appropriated as part of the assets of that firm. The appellants pleaded, first, not guilty; and, secondly, that the wool was not the respondents', as alleged. Issue was joined on those pleas.

The action was tried before the chief justice of the supreme court. * * * The first two documents put in by the appellants consisted of two indentures of assignment, one dated the 17th of September, 1866, executed by Philip Levi, Edmund Levi, and Alfred Watts, three of the partners in Adelaide of the firm of Philip Levi & Co.; and the other, dated the 23d of February, 1867, executed in the name of Frederick Levi, the London partner of that firm, under a power of attorney. These deeds purported to be made under the provisions in the sixth division of the insolvent act (No. 16, 1860), entitled "An act to amend and consolidate the laws relating to insolvent debtors." The latter indenture also confirmed an indenture, dated the 31st of January, 1868, which was also put in by the appellants. Under the indentures of the 17th of September, 1866, and the 23d of February, 1867, or one of them, the appellants, as trustees for the creditors of the insolvent firm of Philip Levi & Co., obtained possession of the wool in question, and insisted upon their right to convert the same to their own use, notwithstanding the respondents' preferable lien.

It also appeared that the appellants, after the commencement of the action, obtained an order of the provincial court of insolvency, dated the 24th of September, 1868, for the sale of the wool in question, upon the alleged footing of the same being in the order and disposition of Philip Levi at the time when he executed the indenture of the 17th of September, 1866. The appellants also put in evidence another preferable lien, dated the 19th of July, 1866, given by Mr. Philip

Levi to the respondents and to John Coleman Dixon, as the inspector of the bank, upon the wool in question, with a view to raise an objection as to the right of the respondents to recover in the action, as the right of action was vested in Dixon, and not in the respondents. The appellants also put in the respondents' bank charters of the 3d of September, 1847, and the 5th of July, 1866. The object of the appellants in putting in the bank charters was to question the preferable lien, on the ground that by the charter of 1847 it was not lawful for the bank to lend or advance money on the security of lands, houses, or other real property, or of ships or merchandise. The last document put in on the part of the appellants was an agreement, dated the 26th of May, 1866; the appellants to set up this document as a first charge on the wool in question in favour of the firm of Willans, Overbury & Co.

On the trial the appellants submitted, that the judge ought to nonsuit the respondents, or direct a verdict for less than the net value of the wool, but the judge directed a verdict for the respondents for £16,280. 14s. 9d., and interest at 10 per cent. from the 1st of July, 1867, reserving leave to the appellants to move to enter a nonsuit or to reduce the amount of damages and interest. * * * In pursuance of the leave thus given the appellants moved to set aside the verdict, and to enter a nonsuit, on the following grounds: * * * Eleventh,¹ that the transaction was prohibited by the bank charter. * * * A rule to show cause was granted. The case was argued before the supreme court. * * * The rule nisi was discharged, and the present appeal was brought from an order of the supreme court, dated the 7th of January, 1869, discharging the rule nisi.

LORD JUSTICE MELLISH. This is an action of trover, brought for the conversion of a large quantity of wool. The defendants are the trustees of the firm of Philip Levi & Co., in South Australia, who became insolvent according to the laws of that country; and the action was brought by the South Australian Banking Company to enforce what is called a preferential lien, which they had obtained, as they alleged, on the wool of a large number of sheep, by an instrument made in accordance with the South Australian Act No. 4 of 1855-6, on the 23d of August, 1866. Several objections were argued; but it is probably better first to allude to an objection which was taken in the court below, though it was not seriously argued here, namely, that an action of trover would not lie for this wool, even if there was a good preferential lien given in accordance with the South Australian act. One of the learned judges in the court below was of opinion that an action of trover could not be

¹ The statement of the other grounds is omitted.

maintained. Now, as regards that, their lordships are clearly of opinion that an action of trover may be maintained by a person to whom a valid preferential lien has been given under this act.

The real effect of the act appears to be this, that it enables a proprietor of sheep to make a valid pledge of the wool of his next clip, although no possession is given. Ordinarily by the common law, although of course a mortgage may be given of chattels as well as of land without delivering possession, yet a mere pledge cannot be given without the delivery of the possession of the goods. The effect of this act simply appears to be this, that it enables a pledge of wool to be given without a delivery of possession; and it enacts that "the possession of such wool by the said proprietor shall be, to all intents and purposes in the law, the possession of the person or persons making such purchase or advance." Therefore, the person who has made the advance is to be deemed to be in possession. That being so, there appears no reason whatever why he should not be able to maintain an action of trover, because there is no doubt at all, that if goods are delivered by way of pawn or pledge to a person who makes advances on them, and then somebody else takes the goods out of his possession and converts them, he can maintain an action of trover. And the true effect of this act appears to be, that the lender is for the purposes of the act to be deemed to be in possession, and to have the same rights in point of law as if he was in possession, and amongst those rights, is the right of maintaining an action of trover if anybody wrongfully converts the wool.

Now, the next question, and the more material question, which was argued on behalf of the appellants, is that Philip Levi, the person who signed his name to the instrument of the 23d. of August, 1866, was not the proprietor of the whole of these sheep, and that, therefore, all that could pass under this instrument was the interest, whatever it might be, that Philip Levi happened to have in the sheep.* * *

Another objection was taken by Mr. Manisty on the terms of the charter—the clause in the charter which says, it shall not be lawful for the bank to make advances on merchandise. Now, unquestionably, a great many questions might be raised on the effect of that clause in the charter which may be of very great importance, but which also

being of great difficulty, their lordships do not think it necessary to give any opinion upon. There may be a question as to what are the transactions which come really within the clause, and whether this particular case does come within it. There may be also question whether, under any circumstances, the effect of violating such a provision is more than this, that the crown may take advantage of it as a forfeiture of the charter; but the only point which it appears to their lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not prevent property passing, either in goods or in lands, under a conveyance or instrument which, under the ordinary circumstances of law, would pass it. The only defence which can be set up here (there is no plea of illegality) is under the plea of not possessed, that the right of property and the right of possession never passed to the plaintiffs. Their lordships are of opinion, that whatever other effect it has, it cannot have the effect of preventing the property passing. If that were otherwise, the consequences might be most lamentable, because if the property never passed to them, they could not themselves convey any property to third persons. Transactions of the most honest description might be set aside. They might do what is a very common thing, make advances and take bills of exchange with the bills of lading attached. If it is to be said that the property in the goods mentioned in the bill of lading does not pass to them, then any purchaser to whom they might sell the goods under the bill of lading would get no title, and the original owner who had received the full proceeds of the goods, or a large advance upon them, might say, "Oh, the property never passed to the South Australian Bank, and, therefore, it never passed to you." Mr. Manisty admitted that he could find no authority for the proposition, that any violation of such a condition of a charter would prevent the property in goods passing to the person to whom an instrument otherwise valid professed to pass it, and their lordships are of opinion, that whatever other effect the violation of such a condition may have, it has not the effect of preventing the property in the goods passing, or of preventing an action of trover being maintained if there is a wrongful conversion.

On the whole, therefore, their lordships are of opinion, that the judgment of the court below was right, and they will humbly advise her majesty that this appeal should be dismissed, with costs.

* Part of the opinion relating to this question is omitted.

In re MCGRAW'S ESTATE.

In re FISKE'S ESTATE.

(19 N. E. 233, 111 N. Y. 66. 1888.)

Appeal from judgment of the general term of the supreme court in the fourth judicial department, entered upon an order made August 20, 1887, which reversed a decree of the surrogate of Tompkins county on settlement of the accounts of Douglass Boardman as surviving executor of the will of John McGraw, deceased, and as executor of the will of Jennie McGraw Fiske, deceased. Reported below, 45 Hun, 334.

John McGraw, a resident of Ithaca, died May 4, 1877, leaving his only child and heir, Jennie McGraw, who, on the 14th day of July, 1880, intermarried with Willard Fiske, and died September 30, 1881, without issue, leaving her husband surviving her.

John McGraw left a last will and testament, which has been duly admitted to probate by the surrogate of Tompkins county, and of which his daughter and Douglass Boardman, and the survivor of them, were made sole executors. His daughter, Jennie McGraw Fiske, also left her last will and testament, by which she made Douglass Boardman her sole executor, and which has been duly proven and admitted to probate by the surrogate of Tompkins county. Excepting property from about \$130,000 to \$150,000 in value, which came to her by devise and bequest of her grandfather, John Southworth, the title to the estate and property, which formed the subject of disposition by her will, came through the will of her father, John McGraw.

The will of John McGraw gave \$500,000 in trust for his said daughter, and made her residuary legatee, with full power to dispose by will of all the property left by him.

The will of Mrs. Fiske directed that her estate "be converted into money, or available securities, as soon as can be done, having in view its best interests and results." After numerous bequests, among them a bequest to Cornell University of \$50,000 in trust, to be expended, so far as necessary, in completing and perfecting the McGraw building of said university; also, to said university \$200,000 in trust, to be known as the "McGraw Library Fund,"—the will contained the following residuary clause: "I give, devise, and bequeath all the rest, residue, and remainder of my property (if any there shall be) to Cornell University, aforesaid, to be added to the 'McGraw Library Fund' aforesaid, and subject to the trusts, purposes, uses, and conditions hereinbefore prescribed for said fund." The amount of Jennie McGraw Fiske's estate at the time of her death, as found by the surrogate, including the trust fund created under the will of John McGraw, which the surrogate held was part of the estate of John McGraw, but which Mrs. Fiske had a right to dispose of by will, was

\$2,275,933.46; legacies to other than Cornell University, \$1,121,570; bequests to said university, \$1,154,363.46. The further material facts are stated in the opinion.

PECKHAM, J. The question to be decided in this case is whether Cornell University, or some other parties, being the residuary legatees, or else the heirs at law or next of kin of John McGraw, deceased, or of Jennie McGraw Fiske, deceased, or her husband, shall have the property, or any portion of it, bequeathed to the university by the will of Mrs. Fiske. In case the university should be held not to be a competent legatee, the question as to where the property shall go is, as we understand, a matter in which the various parties to the litigation have agreed, and hence the only question we need consider is: First, in regard to the capacity of the corporation to take the legacy. If that should be decided in the affirmative, it would be necessary to discuss no other question. If, however, it should be held that the corporation had no power to take and hold more than \$3,000,000, the second question would be as to whether it was the owner and holder of such an amount at the time of the decease of Mrs. Fiske. Both of these questions are important, and worthy of the most careful and deliberate consideration. The case involves a very large amount of property, and involves, also, the decision of a question as to the effect of the general statutes relating to the acquisition and holding of property by corporations of the class of this university, as the same have been affected by the terms of the special charter granted to it.

The case has been most elaborately and ably argued by counsel on both sides, and the written briefs submitted to the court by them bear conclusive evidence of the thoroughness and extent of their researches into the English law on the subject of mortmain and its results, as well as that of our own and of the other states of the Union.

To examine and comment upon each argument advanced, and to go through the long list of cases cited in this and other states, and in England, would render this opinion of immoderate length, and would not probably be of any great service. We must be content to give the conclusion at which we have arrived, together with the reasons which seem to us controlling, in as short a space as it reasonably may be done.

First. Coming to a discussion of the first question, it may be assumed that a corporation, by the common law, had power to take property by devise. *Sherwood v. Society*, 4 Abb. Dec. 227, 231; 1 Kyd. Corp. 74-78; *Grant, Corp.* 98.

Our Revised Statutes provided that every corporation, as such, has power, among other things (section 1, subd. 4), to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require,

not exceeding the amount limited in its charter. By section 2 of the same title of the statutes the powers enumerated in section 1 "shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter, or in the act under which it shall be incorporated."

Section 3 provides that, in addition to the powers enumerated in the first section, and to those expressly given in its charter or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given. 1 Rev. St. pp. 599, 600, §§ 1-3.

Under this power to hold, purchase, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in its charter, the corporation could take property by devise, for the word "purchase" includes all means of acquiring property not coming to one by descent or the mere act or operation of the law. The same Revised Statutes, however, in providing for the transmission of real property by will, stated that "every estate and interest in real property descendible to heirs" might be devised. "Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." 2 Rev. St. p. 57, §§ 1-3.

There are other provisions in the Revised Statutes relating to corporations incorporated for purposes of education. It is enacted therein that "the trustees of every college to which a charter shall be granted by the state shall be a corporation." Section 31. "Sec. 36. The trustees of every such college, besides the general powers and privileges of a corporation, shall have power * * * 4. To take and hold, by gift, grant or devise, any real or personal property, the yearly income or revenue of which shall not exceed the value of twenty-five thousand dollars." 1 Rev. St. p. 460, §§ 31-37.

At the adoption of the Revised Statutes, therefore, the law in this state was that a corporation could hold, purchase, and convey such real and personal estate as the purposes of the corporation should require, not exceeding the amount limited in its charter, but it could not take any real property by devise unless it was expressly authorized by its charter or by statute to take by devise. And there was power in the trustees of a college to which a charter was granted by the state, to take and hold real or personal property by gift or devise, provided the income did not exceed \$25,000 annually. Some time subsequent to the adoption of these statutes, and in the years 1840 and 1841 (chapter 318 of 1840, and chapter 261 of 1841), the legislature passed acts (the latter being an amendment of the earlier one) by

which trusts were authorized to be created by grants, devises, and bequests of property to incorporated colleges or other literary incorporated institutions in the state, to be held in trust for specific purposes comprehended in the general objects authorized by their charters. The acts contained no limitation as to the amount or value of property which could be thus taken in trust by the corporation.

It was held, however, by this court in *Chamberlain v. Chamberlain*, 43 N. Y. 424, that these acts did not repeal or affect the general law of the state limiting and restricting the amount and value of property which could be taken and held by literary and educational corporations, and it was therein said that the general laws of the state are in harmony with its policy, which has been uniform and consistent, so far as such policy is indicated by legislation in relation to gifts in mortmain, and the powers of corporations to take and hold property. It was further said that these statutes (those of 1840, 1841) authorized the creation of special trusts in furtherance of the objects of the corporations named, but that such trusts could be created, and full effect given to the acts within the limits imposed by the general laws upon the power of the corporations to acquire and hold property. There being no express repeal of the general provisions of law or repudiation of the uniform policy of the state, the intent of the legislature to do either, it was said, could not be implied.

Thus the several provisions of law relating to the property of corporations stood at the time of the granting of its charter to Cornell University by the state in 1865. By chapter 585 of the Laws of that year the legislature incorporated and established the Cornell University. In the first section of the act the following language is to be found: "The corporation hereby created shall have the rights and privileges necessary to the object of its creation as declared in this act, and in the performance of its duties shall be subject to the provisions and may exercise the powers enumerated and set forth in the second article of the fifteenth chapter, title 1, of the Revised Statutes of the state of New York."

The second article above alluded to is entitled "Of the Powers and Duties of the Trustees of Colleges," and is to be found already referred to (supra) as 1 Rev. St. p. 460, §§ 31-37. It is subdivision 4 of section 36 which authorizes the trustees to take and hold real or personal property by gift or devise not exceeding the value therein stated.

Section 5 of the charter reads as follows: "Sec. 5. The corporation hereby created may hold real and personal property not exceeding three millions of dollars in the aggregate."

These provisions in the charter, together with the statutes above alluded to, must be examined for the purpose of discovering, if

possible, what was the legislative intent towards this corporation regarding property.

The learned counsel for the appellant claims at the threshold that the provisions of the Revised Statutes as to the incorporation of colleges (*supra*), with a single exception, were merely intended to apply to institutions of learning incorporated by the regents of the university of the state under the general laws of the state. He argues that the regents had power to incorporate a college by virtue of the provisions of the act (chapter 82) of 1787, the provisions of which were re-enacted in 1813, and incorporated subsequently into the Revised Statutes; and at that time, and for many years thereafter, there was no other way of incorporating a college unless by a special act of the legislature. Hence, he says, these provisions of law, general in their nature, applied to corporations which were incorporated by the regents, and were never supposed to apply to corporations incorporated by special act, unless expressly made applicable in the special act.

The counsel is right in his statement as to the fact when the act was passed. At that time there was no general law for the incorporation of colleges or other institutions of learning other than by the regents, and when they granted a charter there can be no doubt that its provisions were affected by the act as contained in the Revised Statutes. But the language therein used (section 31), that the trustees of every college to which a charter shall be granted by the state shall be a corporation, is general in its nature, and it would seem to include all cases embraced within its language. That it is superfluous to apply it to the case of a corporation which becomes such by virtue of the very act which incorporates it is not a conclusive answer. It is an argument from the point of view that it was unnecessary, but because it was unnecessary is not always, perhaps even generally, an argument against the applicability of a statute to a certain condition of things. It is alike unnecessary with regard to colleges or academies which were incorporated by the regents under the power granted them in the Acts of 1787 and 1813, both of which acts expressly granted them power to incorporate colleges and academies by giving them a charter. When they did so the college or academy became a corporation by virtue of those acts which empowered the regents to incorporate it. The section (31) was therefore unnecessary in both cases, and yet it was adopted, and in its language it embraces all colleges to which a charter is granted by the state.

The thirty-sixth section provides that the trustees of every such college shall have power, among other things (subdivision 4), "to take and hold * * * any real and personal * * * property, the yearly income," etc.

I think it plain, therefore, that the pro-

visions contained in that title would be applicable to the Cornell University, although specially chartered by the state, unless inconsistent provisions were to be found therein. The charter, however, in so many words makes this title applicable to the university. See section 1 of the charter, part of the language of which is quoted *supra*.

It is true that it states the corporation, in the performance of its duties, shall be subject to the provisions, and may exercise the powers, enumerated in the title mentioned, among which is the right to take and hold real and personal property. But the title itself is headed, "Of the Powers and Duties of the Trustees of Colleges," and among those powers and duties is the right above mentioned. I do not think that the use of the words, "in the performance of its duties," would in any wise exclude the application of this fourth subdivision of section 36, and we must look elsewhere for such exclusion if it is to be excluded. That it is to be excluded all admit, but the exclusion is founded upon a special provision in the charter itself which is wholly inconsistent with its continued applicability. The subdivision confines the taking and holding by gift, etc., of real or personal property, to a yearly income not exceeding in value \$25,000, while the charter permits it to hold real and personal property to an amount not exceeding \$3,000,000 in the aggregate.

Both sides admit that this subdivision in question is not applicable; the respondents, because an inconsistent provision in the charter expunges it, while the appellant claims that, even if there were no inconsistent provision in the charter, it would still be inapplicable, because the statute only applies to corporations incorporated by the regents. The provisions of the charter are inconsistent, and still we must look at all the other statutes above cited for the purpose of discovering what the legislative intent is. Looking at the General Statutes, we find corporations have power to purchase and hold property necessary for the purposes of their incorporation, not exceeding the amount limited in their charter; but they cannot take by devise unless expressly authorized by their charter or by statute so to take. Then the Revised Statutes prohibit corporations from possessing or exercising any corporate powers, except such as are enumerated or are expressly given to them by their charters, or such as shall be necessary to the exercise of the powers so enumerated and given. The statutes also allow the trustees of a college to take property by gift or devise, not exceeding a certain annual income; and then come the Acts of 1840, 1841, and then the charter of this university. The argument of the learned counsel for the appellant is, as I have said, based upon the theory of the utter inapplicability of the act of the Revised Statutes as to colleges, and then he claims that the Acts of 1840 and 1841 bestow a capacity

to take property by will, not exceeding the amount limited in the charter of the corporation; and he claims also that in this case there is no limitation of the power in the charter of the university to take real or personal property to any amount, and the only limitation there is consists of a limitation upon the power of holding more than \$3,000,000, in the aggregate. He thus obtains the power to take an unlimited amount of property by virtue of one act, and a limitation is only placed upon its power to hold by another act, and that is the organic act of incorporation itself.

I do not think such an interpretation of the statutes can be sustained. I think the fifth section of the charter gives the measure of the power of the university to take as well as to hold property. The language is an authority as well as a limitation. It is an authority to hold more than the Revised Statutes permitted, but it shall not be permitted to hold more than a certain specified amount. And, if there were nothing said on the subject of property in the charter, I think the Revised Statutes, as to the limitation for colleges, would apply. Reading the language in the charter, it is difficult to imagine a holding without a previous taking of property, and the counsel for the appellant admits that, if there were no other statute providing for a taking of property, the language of the fifth section of the charter would necessarily imply a right to take in order to hold. I do not think that his claim to derive an unlimited capacity to take by virtue of the Laws of 1840 and 1841, when construed with the other statutes and with the provisions in the charter, can be upheld as a fair exposition of the legislative intent upon the subject. The statutes of 1840 and 1841 were passed for the purpose of authorizing the creation of certain special trusts in connection with these educational institutions, which could not have been legally created prior to their passage, and their object did not in the least infringe upon the general laws of the state or its policy. As has been said, their passage did not repeal those general laws limiting the amount or value of property which corporations might take and hold. Because a special statute contained provisions upon the subject of the property of the corporation thereby incorporated which were inconsistent with the general provisions contained in the Revised Statutes relating to the same subject, I do not think the effect was not only to render the general law inapplicable, but also to twist the provisions of the law of 1841 in relation to the special trusts spoken of into a permission outside of and beyond the language of the charter to take property without any limitation as to amount or value. That might have been the effect if the charter had repealed those general provisions as to this corporation, and had made no other provision regarding it. Under such circumstances, the act of 1841 could have been referred to as

permitting the corporation to take property by devise and in trust to an extent unlimited, but when the same language which renders the general law inapplicable also gives a power to hold property to a certain limited extent, it seems to me that such a power includes the power to take up to that sum, and limits it accordingly.

It is said that if the power to take an unlimited amount of property, and to hold but a certain sum, were contained in the same law, there could be no doubt upon the question of the power to take. That may be so, for in that case the legislative will would have been announced in terms which could not be misunderstood. But there is a great difference between the two cases. The question is always one of legislative intent, and the inquiry is whether the statute of 1841, providing for the creation of trusts, really applies in this instance to this university, so far as an unlimited capacity to take property is concerned. For the reasons already stated, I think it does not.

Looking for a moment outside of and beyond the statute laws of the state, and in order to strengthen his position regarding the true construction to be given that law as to the material distinction, in the case at least of a corporation, between the power to take and the power to hold property, the counsel for the appellant has made a most able and learned argument. Its outlines are, in substance, as follows: A corporation, at common law, could take and hold property by devise. At an early stage in the history of the law of England, relating to the power of corporations to hold real property, and while the feudal system still prevailed, it was enacted that no man should alien his feud to a corporation under penalty of a forfeiture thereof to his next superior, of whom he held the land, and, in default of such superior insisting upon the forfeiture, then his superior might do so, and thus on until the king, as the general superior and lord of all, was reached. But, in case the forfeiture was not insisted upon, the corporation, which had taken a defeasible title to the land, could hold it as against all the world.

He therefore insists that this distinction between taking and holding strengthens his claim that the use of the word "hold" in the charter was intentional and for the specific purpose of permitting the corporation to "take" an unlimited amount of property and to hold only the amount specified. No sound reason for giving such unlimited power to take, while limiting the power to hold, can, as it seems to me, be stated; and, if such were the intent, I think it would have been plainly stated in the charter, instead of trusting to such a conjectural application to be given to another statute.

The counsel cites about all the writers upon the subject of corporations, and they have all adverted to this distinction as existing in relation to the English corporations subject:

to the mortmain statutes, and they state that licenses to hold in mortmain were granted to such bodies, but without such licenses they took the title to the real property aliened, subject only to the right of the superior lord to enter and take the land under the power of forfeiture. The only penalty, therefore, which a corporation risked when it took lands without a license in mortmain was that of a forfeiture of the land to the next superior of the grantor, and so on up to the king; and the counsel claims that in this state, in the case of a corporation with unlimited power to take, but not to hold more than a certain amount, the penalty for holding more is that the state, representing the whole people, and standing in this respect in lieu of the king (there being no mesne lords), can forfeit the charter of the corporation, and thus prevent the further holding. And, assuming this to be the fact, he uses it as strengthening his argument as to the existence of this clear and material distinction between taking and holding property.

The further claim is then made that, as title to the property has vested in the corporation, which, in holding it, has become subject to the forfeiture of its charter, the heirs or next of kin of the testator have no more right to raise the question than any other third parties who have no interest therein. It is said that it is a matter for the state alone to take cognizance of, and until it does the corporation holds the property, however much it may transcend the limitation prescribed in its charter.

The counsel states accurately the law of mortmain in England, and its consequences of possible forfeiture of the estate granted, and, until forfeiture, the vesting of the title in the corporation indefeasible, except by the re-entry of the person entitled to take it by reason of the forfeiture. But the circumstances under which lands are held by citizens of New York, where their tenure is so wholly different from that which prevailed in England when the early mortmain acts were enacted, render any argument in regard to those acts and their effect totally inapplicable to the case of a corporation of this state. Taking the law as it exists in our statutes, including the special provision upon the subject in the charter of the university, it seems to me that the provision therein limiting the holding of property is, as I have said, a restriction also upon the power to take in excess of the specified amount. As, at common law, a corporation could take real property in the same way as an individual, the consequence was that, in England, large landed possessions were held by religious corporations, and, by reason of alienations of real estate to them, the services due by the vassal to the lord were partially, if not totally, paralyzed, and the chief lords lost their escheats. This was a constantly growing and alarming evil. To remedy the difficulty, the first mortmain act was

placed in Magna Charta, which declared all such alienations to corporations entirely void, and that the lands should revert to the lord of the fee. It was held, however, that the reversion must be accomplished by an entry, and then and from that time there was a forfeiture, the corporation having taken the title and held the property until such forfeiture by re-entry. Shelf. Mortm. 8, 34; 1 Kyd. Corp. 81; Grant, Corp. 106.

Other statutes upon the subject were subsequently enacted, all for the purpose of preventing the great accumulation of real property in the hands of corporations, and they all provided substantially for a re-entry on the part of the next superior lord whenever lands had been aliened in mortmain; and, until such entry enforcing the forfeiture, the corporation held the lands. There was one law, directed against superstitious uses (23 Henry VIII. c. 10), which provided that the grant to such uses for more than 20 years was absolutely void, and the estates thus aliened would have gone to the grantor of his heirs, excepting for a provision, subsequently made, giving such estates to the king. Wilm. Notes, 9, 10, in Attorney General v. Downing, variously reported: Amb. 550, 571; 1 Dick. 414; 3 Ves. 714; 5 Ves. 300; 8 Ves. 256. The mortmain statute (9 Geo. II. c. 36) renders all devises to charitable uses void (Shelf. Mortm. 118-120).

The nature of the tenure of real property at the time of the passage of the early mortmain acts in England bears no resemblance to the tenure by which a citizen of this state holds lands. Here there is no vassal and superior, but the title is absolute in the owner, and subject only to the liability to escheat. Const. N. Y. art. 1, § 13. The escheat takes place when the title to lands fails through defect of heirs. Id. § 11.

A devise to a corporation which is forbidden to take (or forbidden to hold, if the word, under the circumstances of the case, is construed to include a taking also) does not, therefore, give a title subject to the right of some superior to claim a forfeiture of the land; but, if it be in violation of a statute, I think the devise is void, and the land descends to the heir or residuary devisee.

We have not, in this state, re-enacted the statutes of mortmain, or generally assumed them to be in force, and the only legal check to the acquisition of lands by corporations consists in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects. 2 Kent, Comm. 282. Of course, the restrictions contained in any general law, if applicable, must also be referred to.

There is, by reference to our laws, no such necessary and universal distinction between taking and holding property by corporations as is seen in the laws of England relating to alienations in mortmain. Whether the legis-

lature, when using language providing for a limitation upon holding property, meant to permit an unlimited taking, is a question of legislative intent; and I think the general inference would be, in the absence of some plain and controlling circumstance to the contrary, that the legislative body meant to limit a taking as well as a holding beyond the specified amount. As is said in the *Chamberlain Case*, this is in accordance with the policy of the state, a policy which has been recognized as existing for many years, and which the courts have concurred in approving and carrying out. I do not think the statute (Laws 1779, c. 25, § 13) touches this case. It provided that the absolute property of all lands, etc., and all rents, franchises, debts, dues, duties, and services, escheats, and forfeitures, which, before the 9th of July, 1776, vested in or belonged or were due to the crown of Great Britain, were, and forever after the 9th day of July, 1776, shall be, vested in the people of the state, in whom the sovereignty and seigniority thereof are and were united and vested.

The counsel for the appellant does not claim that this property was itself forfeited to the state, if the state should choose to enforce the forfeiture. His claim is, as I understand it, that if the university exceeded its limitation by holding more property than it was allowed by law to hold, a cause of forfeiture of the charter was thereby created, and, that in enforcing such forfeiture after the payment of the debts of the corporation the rest of the property would (as he insists) probably go to the state, because there would be no living claimant to it who would have any right to acquire it. A forfeiture the state may claim and may enforce at pleasure, when the occasion arises, but it is a forfeiture of the charter, and not a forfeiture of the property held by the corporation. It is further claimed that this distinction between the right to take and the power to hold property is one which has been admitted and enforced in the courts of England, of this state, and of the other states of the Union for a long number of years, and that there is no reason why effect to such a distinction should not be given in this case; the result being, as is stated, that the corporation has an unlimited right to take property, and also an unlimited right to hold it as against any one but the state in its capacity of sovereign. There is undoubtedly a distinction between the right to take and the power to hold property under some circumstances, the only question being whether the legislature had such distinction in mind, and meant to provide for it in the case in hand. It is said that an alien has the right to take property by purchase, but he cannot hold it as against the state. That is so. He takes, however, a defeasible title, good as to all but the sovereign power, which must take it up-

on office found or by escheat. *Wright v. Saddler*, 20 N. Y. 320.

In such case it is not exactly an accurate description of the alien's title to simply say that he can take but cannot hold. That is a contradiction in terms. If he take, he must hold, if for but a fractional part of a second of time. The expression is but a short one for the statement that he cannot hold, as against the claim of the state, where properly made and enforced. The same expression is used in the case of a corporation under the mortmain laws, that it can take but not hold; the meaning being that it cannot hold as against the claim for forfeiture when made by the next superior lord of the grantor of the lands. That the words lose all their meaning when wrenched from the circumstances under which they were used, and applied to corporations existing by virtue of the laws of this state, seems to me a plain proposition.

The counsel has, however, with great industry and research, cited a number of cases from our own courts and those in other states, where this distinction, he claims, has been admitted, and in cases, too, where the principles involved were similar to the case at bar (one or two being, he says, precisely like it), and where it has been held that in such cases, although the corporation was violating the law of its being, yet no one but the state could take advantage thereof.

I think that, with the exception of one case, they were all entirely different from this one, and the decisions were based upon totally different, and probably a perfectly unassailable, ground.

The principal case, or a least one of the early ones, is that of *Leazure v. Hillegas*, 7 Serg. & R. 313, which arose in Pennsylvania, and was decided in 1821. The restriction in the charter of the Bank of North America was that the bank should not purchase and hold property excepting under circumstances therein stated. The directors of the bank accepted from their grantor, William Henry, a conveyance of his land (not within their specified powers) at a fair price, in payment of a debt bona fide due. The question was whether the corporation could hold and convey a title. *Tilghman, C. J.*, said: "The restriction is that the bank shall not purchase and hold. Purchasing and holding are very different things, and the consequences of each are very different. To purchase and hold might have been thought dangerous, but to purchase subject to the statutes of mortmain, which authorized the state to appropriate the land to its own use, could be attended with no danger."

The court there held that some portions of the mortmain laws of England were in force in Pennsylvania, to the extent of permitting the state, as the sovereign lord, there being no mesne lords, to enter and claim the forfeiture; and that, until the state did so, the title of the corporation was good, and it

could convey such a title to its grantee. No such laws have been in force in this state.

Under the modern acceptance of the law regarding corporations, this case could probably be supported on an entirely different ground, viz. that it was an executed contract or conveyance, upon a good consideration, and that the grantor could not be heard to dispute his own grant under the circumstances; and that no one could take advantage of this violation of its charter by the corporation, excepting the state, which could proceed to forfeit the charter because thereof. The case is no authority in this state for the proposition that none but the state can interfere, nor is it of any importance upon the question as to how material it is to note the absence of an express limitation in words upon the power to take property under the charter of the university. *Baird v. Bank*, 11 Serg. & R. 411, is a somewhat similar case, and decided also upon the authority of *Leazure v. Hillegas*, supra. *Gouldie v. Water Co.*, 7 Pa. St. 233, decided in 1847, refers to the *Leazure Case*. It was also a case where the contract was on a good consideration, and the company had the right to contract for the land and pay for it, and a deed for value would vest in it a good title, subject to the right of the state to interfere, etc. The case of *Runyan v. Coster*, 14 Pet. 122, decided in 1840, upon appeal from the circuit court in Pennsylvania, was decided with express reference to the statute of that state, passed April 6, 1833, relative to escheats, which permitted the corporation to retain the title, subject to be divested at any time by the commonwealth. The decision was put upon the ground of the act of 1833, and the doctrine of the supreme court of Pennsylvania in the *Leazure Case*. These are the cases cited from the Pennsylvania courts, and it is plain they furnish no support for the contention in this case, in the absence of those laws of mortmain upon which they were founded.

There is one case, however, which has been decided by the supreme court of the United States upon the question of who may take advantage of a violation of the charter in a relation to the power to hold property, which comes very near the case at bar. The decision of that court goes quite a distance towards sustaining the contention of the appellant's counsel, although there was another ground upon which the decision could rest. The very great respect which we all feel for any decision of the federal court of last resort, and for any opinion given by its learned and able judges, even in cases where it is not binding upon us, renders it necessary to examine the case with some care. The case is *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336. The headnote is: "Restrictions imposed by the charter of a corporation upon the amount of property it may hold cannot be taken advantage of

collaterally by private persons, but only in a direct proceeding by the state."

The testatrix, a resident of the state of Georgia at the time of her death, devised and bequeathed to the Georgia Historical Society certain land for the purposes of maintaining a historical society, etc. The corporation was incorporated in 1839, and had power to purchase, take, hold, etc., lands and tenements, provided the clear annual income of such real and personal estate should not exceed the sum of \$5,000. It was admitted that the net income of the corporation from property held by it at the time of the death of the testatrix was between \$3,000 and \$4,000, and that the income of the property bequeathed to it by her will would add \$7,000 to that income. The appellants, who were the heirs at law and next of kin of the testatrix, claimed that the gift was void in toto, as it gave more than the corporation was allowed to take or hold. The court, per Gray, J., stated the answer to such proposition in the language of the headnote above quoted, and, without argument, referred in support of such doctrine to five cases, viz.: *Runyan v. Coster*, 14 Pet. 122, 131; *Smith v. Shelley*, 12 Wall. 358, 361; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633, 758; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Davis v. Railroad Co.*, 131 Mass. 258, 273.

Upon looking at those cases I have been unable to find that they decide the principle they are cited to sustain. It seems to me that the question was not really and fully presented, discussed, or decided in any of them. The first case, *Runyan v. Coster*, 14 Pet., supra, has already been cited and sufficiently discussed. It was decided upon the express statute of Pennsylvania, and can be no authority for the general doctrine stated by Mr. Justice Gray in his opinion. The next case is *Smith v. Shelley*, 12 Wall. 358-361. The bank in that case had been incorporated by an act of a territorial legislature, where a law of congress was in force providing that no act of such a legislature incorporating a bank should have any force until approved by congress. The bank had power under the territorial act "to buy and possess property of every kind." Land was sold to it for a money consideration paid by it.

Mr. Justice Davis, in his opinion, said: "It is insisted, however, as an additional ground of objection to this deed, that the bank was not a competent grantee to receive title. * * * It could not legally exercise its powers until the approval of congress was obtained, but this defect in its constitution cannot be taken advantage of collaterally. * * * Conceding the bank to be guilty of usurpation, it was still a body corporate de facto exercising at least one of the functions which the legislature attempted to confer upon it, and in such a case the party who makes a sale of real estate to it is not in a

position to question its capacity to take the title after it has paid the consideration for the purchase." This, as it seems to me, is also very far from authority for the proposition for which it is cited. The grantor dealt with it as a corporation, received its money, and should not be heard to deny or question its existence.

The next case cited by the learned judge is *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633 (vice chancellor's opinion, 720-758, as to point in question). It was provided that the church could not hold more than an income of £500. The fact was that when the grant in question was made it did not hold, with the grant, nearly as much as it was allowed. Then the vice chancellor said, if it did, it was a question between the corporation and the sovereign power, in which individuals have no concern, and of which they cannot avail themselves in any mode against the corporation. This was mere obiter. The question was not involved nor decided. It was not a case of a devise to a corporation holding at the time of the devise more property than the law permitted, and where the question was whether such devise was good, and, if bad, whether the property (not devised by a valid devise) passed to the heirs.

The defense of the defendant was, among others, adverse possession, and that defense prevailed. The case referred to by the vice-chancellor (*Humbert v. Trinity Church*, 24 Wend. 587, 604, 629) did not decide the question either. The ground of the decision was that the plaintiff's claim was barred by the statute of limitations. Cowen, J., says (page 605): "Admit that the law will cast no title on the corporation, the answer, in the words of the statute, is equally fatal. You have been out of possession for more than twenty years, and are thus disqualified to maintain an action to recover your land against us or any other." It was a decision upon a question of adverse possession.

Senator Furman (page 629), in his opinion, assumes from the evidence that the real estate, when received, counting all defendant ever had, did not amount to the limitation of £500. He adds, in giving another view of the case, that the "restriction is a mere question of governmental policy, and individuals, as such, have nothing to do with it, and no control over it. That it is only voidable at the instance of the supreme power." He cited no authorities, and the question was not before him.

The case is only authority for the proposition that a corporation can insist upon a title to property by adverse possession, which when proved is as potent to close the mouth of a claimant to the property in the case of a corporation as in that of an individual. To same effect, *Harpending v. Dutch Church*, 16 Pet. 455; *Bogardus v. Trinity Church*, 4 Paige, 178.

Then comes the case of *De Camp v. Dobbins*, 29 N. J. Eq. 36, which was a devise to

a charitable corporation claimed to have been restricted to a holding of property to the amount of \$2,000 annual value. The chancellor found that by a later statute the restriction did not exist. He then gave a dictum that if a corporation takes land by grant or devise, in trust or otherwise, which by its charter it cannot hold, its title is good as against third persons and strangers; the state alone can interfere.

This dictum is opposed by another distinguished judge of New Jersey (Chief Justice Beasley), who, on appeal to the court of errors and appeals in the same case, took occasion, in delivering the unanimous opinion of the court, while affirming the judgment below, to dissent from any such view of the law. I shall have occasion to refer to the case again. *De Camp v. Dobbins*, on appeal, 31 N. J. Eq. 671, 690. The New Jersey case cannot, therefore, be regarded as the least authority for the main proposition under discussion.

The last case cited by the learned justice is that of *Davis v. Railroad Co.*, 131 Mass. 258-273. The case decides that a railroad company had no power to guaranty the payment of the expenses of a musical festival, although it was expected that profits would result to the railroad company therefrom.

Incidentally, and as part of the general argument, the court, in the opinion at page 273, mentions the doctrine contained in the *Leazure Case*, supra, and in *Railroad Corp. v. Evans*, 6 Gray, 25. Neither case decides the question, and it was not involved in either. This completes the examination of the cases cited in the opinion in *Jones v. Habersham*, and I think that it cannot be said that they really furnish any very secure foundation for the doctrine contained in that case, and I think the doctrine is opposed to the principle of the *Chamberlain Case*, supra, decided by this court. The other cases cited in the printed argument of the counsel for the appellant are mostly cases where a corporation has contracted with parties on a valid consideration, and where a conveyance has been made and then it is sought to raise the question as to the power of the corporation to take or convey a title, and it has been held that in such cases of an executed contract, if the corporation has violated the statute, the parties seeking to set up such violation would not be heard, and in such case none but the state would be. That one who contracts with a corporation shall not, under such circumstances, be heard to raise the question, is, in substance, the principle decided.

Such are the cases, in substance and principle, of *Cowell v. Springs Co.*, 100 U. S. 55; *Hough v. Land Co.*, 73 Ill. 23; *Alexander v. Tolleston Club*, 110 Ill. 65; *Barnes v. Sudard*, 117 Ill. 237, 7 N. E. 477; *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398; *Water Co. v. Clarkin*, 14 Cal. 544; *Hayward v. Davidson*, 41 Ind. 212; *Baker v. Neff*, 73

Ind. 68; *Railroad Co. v. Lewis*, 53 Iowa, 101, 4 N. W. 842; *Land v. Coffmaz*, 50 Mo. 243; *Chambers v. City of St. Louis*, 29 Mo. 576; *Barrow v. Nashville & C. Turnpike Co.*, 9 Humph. 304; *Baker v. Loan Co.*, 36 Minn. 185, 30 N. W. 464; *Land Co. v. Bushnell*, 11 Neb. 192, 8 N. W. 389. I have examined all of these cases, and while the facts are, of course, not precisely similar, yet in not one of them does the fact exist of a devise of property to a corporation which it cannot hold, because the limitation has been reached provided for by statute, and, of course, no doctrine that in such a case the heirs cannot claim the property is advanced.

In most of them the court looks upon the question as one of a forfeiture of the charter on account of a violation of some limitation therein contained, and in such case it is said, none but the sovereign can raise such question.

The case of *Hayward v. Davidson*, 41 Ind. 212, was that of a devise of real estate to county commissioners for the use of the county. The court held that the county was authorized to acquire and hold title to real property for some purposes, and it could not be made a question by any one, except the state, whether or not real estate acquired by such county has been thus acquired for authorized purposes or not; that the title passed under the power of the county to take real estate for some purposes. But the court also said if the charter or the law has forbidden a corporation to take, then a deed or devise passes no title.

In the case at bar, where the statute authorizes the corporation to hold not exceeding a limited amount, is it not the same thing, in substance, as a prohibition against holding and, therefore, a prohibition against taking any more? And when the limit is reached, is it not the same as an original prohibition against taking any? In *Chambers v. City of St. Louis*, supra, the court held, also, that there was a right in the city to take and hold lands, and if there were a capacity in the vendor to convey, so soon as there was a conveyance there was a complete sale, and if the corporation, in purchasing, violates or abuses the power to do so, that is no concern of the vendor or his heirs. It is a matter between the state and the city. This case rests upon the same principle above alluded to.

In the case of *Vidal v. Girard's Ex'rs*, 2 How. 127, the trusts created by the will of Stephen Girard were held valid, and the court said that in such a case, if the corporation were incompetent to execute them, the heirs could not take advantage of such fact, as that could only be done by the state by quo warranto or other judicial proceeding. This is upon the ground that the trust was a valid trust, and if so, and the corporation, as such, had no power to execute it, the trust did not, for that reason, fail, but upon the failure of the corporation, for lack of power,

to execute it, a court of equity would appoint a new trustee. Of course, the heirs had no interest in the question when once the trust was declared valid, whether the corporation was exceeding its power in taking upon itself the execution of the trust or not. They had no title to or any further interest in the property. They stood, therefore, in respect to the corporation, as any other strangers. The case does not aid the appellant upon the matter under review.

I have not yet referred to all the cases cited by the indefatigable counsel for the appellant, but I have read them all and in not one is the question fairly up and decided in the way he asks the court to decide this case.

The cases decided by the supreme court of the United States, known as the "National Bank Mortgaging Cases," are cited to sustain the view of counsel. *Bank v. Whitney*, 103 U. S. 99; *Fortier v. Bank*, 112 U. S. 439, 5 Sup. Ct. 234. They were cases where the bank took a mortgage from a party to secure future advances (against the act of congress), which advances it subsequently made, and for the non-payment of which it attempted to foreclose the mortgage, when the mortgagor set up the violation of the act. The court held that the act did not make the security void, and that the government meant that the only penalty should be the right of the government to proceed against the bank for a judgment of ouster and dissolution. Certainly the party who had contracted with the bank, and had obtained its money on the faith of the security, had no equity in his claim. It is not, however, in the least analogous to the subject under discussion. Yet, even in that case, this court held that the mortgage was void because taken in violation of the national banking act (*Crocker v. Whitney*, 71 N. Y. 161), and it was stated, as the undoubted law of this state, that a contract made in violation of a statute is void, and it is immaterial that it is not so declared in the statute itself, and that a security taken in violation of a statute is void.

As the case involved the construction of an act of congress an appeal was taken to the federal supreme court, where the judgment was reversed and the penalty for a violation of the act was held to consist in the right of the government to proceed against the bank for a forfeiture of its charter, and the security was held valid.

The counsel refers to the general doctrine of ultra vires in respect to corporations, and shows that, as matter of fact, corporations have power to violate the law of their existence, or, in other words, to do wrong; and he cites *Bissell v. Railroad Co.*, 22 N. Y. 259; *Arms Co. v. Barlow*, 63 N. Y. 63; *Bank v. Savery*, 82 N. Y. 292; *Rider Life-Raft Co. v. Roach*, 97 N. Y. 378.

The theory upon which the plea of ultra vires is examined is that it will not, as a general rule, prevail whether interposed for or against a corporation, when it will not ad-

vance justice, but will accomplish a legal wrong. See above cases.

I do not perceive that any assistance accrues to the appellant from a presentation of this doctrine. There is no question between these parties of a contract nature, nor any fact which ought to preclude the respondents from setting up any legal bar to the right of the corporation to take title to property which they claim either as heirs-at-law or as legatees or devisees.

The cases of the Elevated Railroad Co., 70 N. Y. 327, 338, and More v. Railroad Co., 108 N. Y. 98, 104, 15 N. E. 191, are cited to show that none but the sovereign can take advantage of a forfeiture of the charter, and that must be in a direct proceeding against the corporation. The principle is undenied. But in a case like this it is no forfeiture that is being insisted upon. It is simply a question of title to the property, and, provided it has not been legally devised or bequeathed, it necessarily vests in the heir or next of kin.

But it is said that where property is given to a corporation which has power to take or hold under some circumstances, the title vests in the corporation, for otherwise the state would never obtain the right to forfeit even the charter for a violation thereof. The argument is, the corporation would answer a claim to forfeit the charter by the fact that the charter precluded it from taking such property, and, therefore, as it could not, it had not done so. I do not see the force of the argument. The charter may preclude the rightful taking of the property by the corporation, and may prevent the legal title from vesting in it, but that has nothing to do with the fact that, nevertheless, the corporation has, as a physical act, taken the property and may be insisting upon its right to keep it as matter of law. In such case can there be any doubt that the corporation has taken and is holding the property as its own and in defiance of the charter, and that it may be punished by having its charter forfeited, although the rightful owner of the property may thereafter obtain his own? The fact that he does obtain it is no answer to the other fact that the corporation had taken it, nor is it any legal answer to the claim of forfeiture of the charter, on the part of the state, that it was unsuccessful in continuing to hold the property against the charter provisions.

Although we never adopted or enacted the English statutes of mortmain, yet in this, as in other states, we have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise.

"It is a statute of mortmain, resting on a mortmain policy as distinctly as any act of the British parliament. * * * The necessity is recognized of forbidding the acquisition by will, unless the legislature, in granting the charter, and in full view of the reasons

for so doing, think proper to confer the power in express terms. * * * Nor is this necessity by any means a fanciful one. It is eminently praiseworthy to give in the interest of charity and religion. But in the last hours of life exaggerated impressions of charitable or religious duty often obscure the judgment of men and subject them to undue influence and persuasion. Against these the statute is intended to guard, because it is in behalf of associations incorporated for pious and benevolent purposes that the sentiments of men in such situations are most generally appealed to. The enactment is, therefore, prohibitory, and it ought to be expounded and applied in that sense." Per Comstock, C. J., in *Downing v. Marshall*, 23 N. Y. 366, 387.

"Judges have given the widest possible scope to statutes in restraint of the disposal of property in mortmain, and have been astute in their arguments for the application of such statutes to cases as they arose." Per Gibson, C. J., *Hillyard v. Miller*, 10 Pa. St. 326. The courts ought not to impute an "intent to the legislature not clearly expressed in direct hostility to the traditions and policy of the past. * * * Claiming property and seeking the aid of the court to reach it, the corporation can rely only on the warrant and authority conferred by law, and cannot claim in transgression or excess of that authority.

* * * Doubtless, the restriction upon corporations is a governmental regulation, and one of policy, and to be enforced by the government, but an individual whose interests will be affected by a transgression of the rule, may assert and insist upon the limitation as a restriction upon the power of the corporation to take." Per Allen, J., in *Chamberlain v. Chamberlain*, 43 N. Y. 424-439.

Under our general statutes upon the subject of the right to take or hold property by corporations, and reading them in connection with the provisions of the charter of the university, we should be astute in our arguments against the application of the mortmain statutes instead of in favor of them, if we should decide that the language of the charter did not apply as well to a taking as of a holding of the property beyond the express limit.

There can be no doubt that it is the law, in this state at least, that if there be a prohibition against the taking of property beyond a certain amount or value, a devise or bequest to a corporation of property which will exceed the amount or value which the corporation is permitted to take, will be void, for the excess. This is expressly decided in the *Chamberlain Case*, and we think it was rightly decided. Nor is there any doubt that in such a case the heirs or next of kin can raise the question. This was also decided in the same case. See, also, *White v. Howard*, 46 N. Y. 144. When we come to the conclusion, therefore, that this university is by law precluded (or was precluded at the time of the death of Mrs. Fiske) from taking more

than the amount of property limited in its charter, we bring the case precisely within the rules laid down in the cases just cited.

The language of Chief Justice Beasley, in the case of *De Camp v. Dobbins*, 31 N. J. Eq. 690, is very appropriate here. He says: "Nor can I assent to the other proposition that if, as the contention assumes, this bequest is violative of the law if carried into effect, that none but the state can intervene. I find no warrant for such a doctrine, either in the legal principles belonging to the subject or in the adjudications. There can be no doubt that there are cases in which, where a corporation has acquired rights of property to an extent or in a manner unwarranted by its charter, no one but the public can have the right to complain. A grantor making title to a corporation might be estopped from questioning the effect of his own conveyance. So a mere stranger could not question such a corporate title. But I have not observed any decision that asserts, where a title is created by devise which vests in a corporation for its own use a larger quantity of property than the laws authorize, that the heir-at-law has no right to make objection. The authorities referred to do not lend countenance to such a doctrine." The learned judge refers to the cases of *Bogardus v. Trinity Church* and *Leazure v. Hillegas* (both cited *supra*), and continues: "These cases rest on the obvious principle that the capacity of the corporate body to become the grantee in the given case cannot be challenged by a party who does not stand in a position to raise the question. In such a position it would be true that the state alone could object to such corporate act. But such instances are to be discriminated from that other class, where the corporation claims to take and hold by devise, in contravention of law, and the heir of the deviser is the party complaining. In this latter situation the doctrine enforced in the cases does not apply. * * * I have no doubt that the heir-at-law has a standing in court to raise such a contention, and that in a court of equity he would be entitled to prevail if he could succeed in establishing the proposition on which such defense rests." The court affirmed the judgment below on the ground that the corporation was not prohibited from taking the property.

The counsel claims, however, that a devise to a corporation vests the title in it, so far as the question of capacity is concerned, whenever it would in the case of a sale for a valuable consideration. Hence he says that the cases of sales above cited are decisive of this, if they be admitted as well decided. In the case of an executed sale, however, the question of *ultra vires*, as set forth in the modern cases, comes in play, and the question of a want of title in the corporation in such case would not be permitted to be raised by the grantor or his heirs, because it would be against justice and would

accomplish a legal wrong. *Arms Co. v. Barlow*, 63 N. Y. 62.

The question of an executed gift without consideration by a donor, by an absolute delivery to a corporation without power to take, is also instanced, and the question is asked whether the title vests in such a case in the corporation so that the donor or his heirs could not recover it back, and if it do, the counsel asks where is the difference in the two cases. It is time enough to decide such a case when it arises. But it seems to me there is a decided difference. In the one case the gift is made *inter vivos* by the absolute owner, and it is made effectual as to him by a delivery. In such case it would seem that he stands in no position to ask the aid of the court to get him out of a situation into which he voluntarily entered with his eyes open, and the court might well say to him that he stood in no position to attack the right of his donee to property which he freely and absolutely gave it. As to his heirs it could be said that their ancestor had made a disposition of property which was absolutely his own in his lifetime, and in such a way that he could not question its validity, and that as he could not, they succeeding only to his rights, were alike disabled.

In the case of a devise, however, the case is essentially different. The will does not take effect until the testator's death, and then, if his property is not legally devised or bequeathed, no title vests for a single moment in the devisee or legatee, but it vests instantly in the heir or next of kin; and the corporation claiming under the will asks the aid of the law to give the property to it, and in so doing it must show the authority it has to take. And if there were only a prohibition in words against holding the property, would the law not be doing a vain thing in handing it over to a corporation which by the very fact of holding would render itself liable to have its charter forfeited on that account? Would not the prohibition against holding be properly and necessarily construed as a prohibition against taking also?

Is not this an argument against the right of the corporation to take, if by holding it is thus rendered liable to such a penalty? And is it not an argument in favor of the construction of the language in the charter that the limitation upon the power to hold property is, under all the circumstances, a limitation upon the power to take any more than it can legally and properly hold?

One more statement must be noticed. It is said that as the legislature, subsequently to the death of Mrs. Fiske, passed an act which took away any limitation on the power of the university to hold property, this action of the legislative department of the government throws a strong light upon what is the policy of the state regarding institutions of learning, and in view of appellant's counsel, waives the right which might have

existed on the part of the state to claim a forfeiture of the charter of the corporation. But the policy of the state in relation to what may be called its mortmain laws is to be gathered from its statutes of general application on that subject, and cannot be said to be altered by the passage of special acts regarding particular corporations.

Nor do I think the counsel for appellant shows any change in the general policy of the state by referring to the acts of 1840 and 1841, already cited, as indicating a purpose to open the door to an unlimited accumulation of property by educational institutions in general. Those acts, as has been said, did not enlarge the capacity of corporations to take property more than they could take under the general laws. The act of 1864, as to union and high schools, by which the board of education has power to take and hold property for educational purposes, and where permission was given to bequeath property to the state or to the superintendent of public instruction for the support or benefit of common schools, or to any county or district school commissioner, for such support, does not betray any change in the policy of the state upon this subject. The bequests spoken of are to the political subdivisions of the state or to the state itself as a corporation, but in its political capacity, and the property remains to be administered by the state officials or the officers of such political subdivisions, for the purposes of education in the common or high schools which the people are taxed to support. This is an entirely different thing from gifts to what may be termed a private educational establishment. Our courts have been quite unanimous in their opinions as to what the policy of the state was and is on this matter; and the extracts I have made regarding it, from the opinions of two very eminent former judges of this court, could be added to very largely by citing opinions of other judges in our own state, but it is not necessary.

However perfect may be the waiver in the act alluded to, of the right of the state to forfeit the charter of this university on account of any alleged violation thereof, such act can, of course, have no possible effect upon rights of property which vested at the death of Mrs. Fiske and before the passage of the act in question. *White v. Howard*, 46 N. Y. 144.

The counsel asks what is to be done in regard to the real property in other states, if we hold this corporation has no power to take any more property? It is said the surrogate has found, as a fact, that the university

had legal capacity to take and did take by devise all the real property the title to which was in Mrs. Fiske at the time of her death, in those states. He says the title to real estate is governed by the laws of the states where the real property is situated. And that in the states in question it is held that a corporation can take under such circumstances as this case. This will devise no real estate to Cornell University.

It gives to the university \$40,000 in trust for the erection and furnishing and support and maintenance of a hospital; \$50,000, in trust, for completing and perfecting the McGraw building; \$200,000, in trust, for the McGraw library fund, and it gives and devises the residue of the property of the testatrix, if any, to be added to the last mentioned fund. It then directs that the estate of the testatrix shall be converted into money or available securities by her executor as soon as it can be done, having in view the best interests of the estate. This direction to convert operated as an equitable conversion of the state of the testatrix into money or available securities, and hence no real estate in other states has been devised by her to the university. It is needless to inquire what would have been the rule in case real estate in other states had been specifically devised to the university, while this court should at the same time decide that it held property up to its charter limit, and that it had no capacity to take or hold any more real or personal property than the amount specified in its charter.

Upon a review of the whole question as to the proper construction of the legislation, general and special, affecting this university, I am of the opinion that it had no power to take or hold any more real and personal property than \$3,000,000, in the aggregate.

Second. Coming to the conclusion I have, on the first branch of the case, it becomes necessary to examine the second and only remaining question, viz.: Does this property, if taken and held by the university, exceed the amount which by law it can hold?¹

* * * This brings the property of the university, above set forth, up to more than its permitted aggregate at the time of the decease of Mrs. Fiske, and no debts to be deducted therefrom. Under such circumstances, the university could not take the various legacies bequeathed to it by her will.

The judgment of the general term should, therefore, be affirmed, with costs. All concur, except FINCH, J., taking no part. Judgment affirmed.

¹ Part of the opinion relating to this question is omitted.

RICHE v. ASHBURY RAILWAY CARRIAGE & IRON CO., Limited.

(L. R. 9 Exch. 224. 1874.)

In the Exchequer Chamber.¹

June 20, 1874. The following judgments were delivered:

BLACKBURN, J. The Ashbury Company are a company incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89). The memorandum of association states (as was required by the 8th section of the act), the object for which the company is established. The articles of association which it is material to notice are those numbered 3, 4, and 5.

Up to a certain extent I believe there is no doubt as to the effect of the incorporation of a company under the companies act of 1862. The company is a corporation, and it is a partnership for trading purposes, for the objects for which the company is established. And by the articles in this case, as in almost all others, the management of the company's business is confided exclusively to a board of directors. And I apprehend that it is clear that this board have the same authority to bind the company in the managing the company's business that a partner or manager in an ordinary partnership, established at common law for the same objects, would have to bind the firm; an authority which to be valid must be exercised in cases within the scope of the ordinary business and transactions of the firm: see Story, Partn. §§ 110-113. If the board in a joint stock company, or a partner in a common law partnership, make a contract beyond their authority, it does not bind the company in the one case, or the firm in the other. This is only applying the general law as to principal and agent to the particular case of a board acting as agents for an incorporated company. So far I believe there is no difference of opinion.

But if a partner, in a firm established under the common law, professes to bind his firm to an extent beyond his authority, the other members of the firm, though not bound by his unauthorized contract, may adopt and ratify it, and if they do the firm is bound.

It is obvious that in many cases it may be judicious to adopt an unauthorized contract and make the best of it. In many others it may be injudicious so to do. On that each individual partner must form his own opinion. And as the partners do not confer on each other authority to ratify contracts which they did not give each other authority to make, the ratification, to bind the firm, must be shewn to be made by the authority of each individual partner. No majority of partners, however great, can

bind the minority. If even one partner does not ratify, then, though all the rest agree, the firm is not bound. This again, is only applying the general law of agency to the particular case of a partner acting as agent for the firm.

The question on which there is doubt and difficulty is, whether in the case of a company incorporated under the Companies Act, 1862, the unanimous shareholders can ratify a contract made in the name of the company, but beyond the authority of those who made it. That question must ultimately depend on the true construction of the act of parliament. Had the legislature thought fit to enact in clear language either that all contracts, made by or on behalf of a company incorporated under the act beyond the scope of the objects for which it was established, should be absolutely void, or expressly to enact that contracts though beyond the scope of those objects should be valid if either previously authorized, or subsequently ratified by all the shareholders, our task would simply be to carry out that expressed intention of the legislature. But there is no express enactment either one way or the other in the act of parliament, and we must therefore interpret the act for ourselves.

I will endeavour to do so later, but I now proceed to shew how, in fact, the question arises in the present case. The board entered into contracts called in the case contracts A, B, C, and D, and in October, 1865, entered into further contracts, called in the case X, Y, and Z, modifying those. If those seven contracts had been such that the board of directors had authority to make them on behalf of the company, the plaintiff would clearly be entitled to recover. But I think that, looking at those contracts as a whole, they are not within the scope of the objects for which the company was established, as disclosed in the memorandum of association. I do not enter on this part of the subject, as it is fully, and, to my mind, satisfactorily disposed of by Bramwell and Channell, BB., in their judgments below, and by my Brother Archibald in his judgment in this case, which I have perused, and I believe there is not any difference of opinion on that part of the case amongst the judges in the court of error.

I think, and start with the assumption, that the company was not in October, 1865, bound by those contracts, though entered into by the board in its name, on the ground that the board had exceeded its authority. But it is contended that the whole of the shareholders in the company have ratified the contracts. And whether or no that ratification is made out is a question of fact, which we have to decide on the statements in the case, with power to draw inferences.

I think we have much reason to complain of the way in which the case is stated on this point; and I have had some doubt whether we ought not to send down the

¹ For a statement of the facts, see the report of this case on appeal to the house of lords, in volume 1 of these "Cases," p. 152.

case to be restated. But on the whole I think enough appears to lead me to find this fact in favour of the plaintiff.

It appears that the board of directors had advanced on the contracts, and on some Spanish contracts of a similar kind, a large sum of money. In their balance sheet, dated the 30th of September, 1865, they take credit amongst other items for

Advances on Contracts.

	£	s	d
Madrid, Placentia, and Malpartida Railway.....	41,338	11	6
Anvers, Douai, and Tournai....	27,191	14	8

—And this balance sheet was circulated amongst the shareholders. At the annual meeting, held on the 5th of December, 1865, a dividend of 14 per cent. was declared, and was, no doubt, accepted by every shareholder. Now, if I could see that the entry in the balance sheet, above quoted, should have conveyed to the mind of an ordinary shareholder that the board had entered into contracts ultra vires with the Belgian Railway, and that the large dividend declared was earned in part out of these unauthorized contracts, I should have no hesitation in drawing the conclusion that the acceptance of that dividend did amount to a ratification of those unauthorized contracts, whatever they might be.

But though the large item thus vaguely described might lead a good man of business to ask for explanation, I do not think it would convey to the mind of an ordinary shareholder any such information as to justify me in drawing the inference that each such shareholder adopted the transactions with the Belgian Railway, knowing them to be beyond the authority of the board.

Before the next annual meeting of the company times had changed. Instead of a flourishing report, and a dividend of 14 per cent., a circular was sent, informing the shareholders that the meeting would be held pro forma, and adjourned to a day of which notice would be given. It was, in fact, ultimately held on the 14th of May, 1867. This circular was sent in consequence of a resolution passed at a special general meeting, held on the 20th of December, 1866, at which a committee was appointed to inquire, and report at an early meeting of the shareholders.

I draw the inference of fact that the circular was duly sent; and I further think that every shareholder who received such a circular must now have been aware that something was wrong, and has himself only to blame if after this he failed to learn what was the report of the committee of inquiry?

That report was presented at an extraordinary meeting of the company, held on the 1st of May, 1867.

This report incidentally refers to negotiations between the board and some individuals, directors and shareholders, and to the circulation among the shareholders of a

prospectus and circular letter. These are matters which might or might not be material if we knew what they were, which the case as drawn does not tell us. But this much is obvious to any one who reads the report, that the board had entered into contracts in Belgium which the committee were advised were beyond the authority of the board. That under those contracts a large sum belonging to the company had been advanced in Belgium which, as the committee were advised, could not be recovered back from the Belgians. That the committee thought the directors might be made personally liable in chancery, and that proposals had been made for a compromise between the directors and the company on the basis of a transfer of the liability and advantage of these contracts. And the committee wind up their report by saying that "looking at the important interests involved, and the extent to which they would be jeopardised by proceedings in chancery extending over a considerable period, they would recommend the shareholders to endeavour to effect an amicable settlement with the directors without having recourse to legal proceedings."

At the meeting on the 1st of May, 1867, a committee was accordingly appointed "to confer with the directors with the view to an agreement being arrived at on the matters in dispute."

On the 14th of May, 1867, the general meeting adjourned pro forma in December, 1866, was convened by a circular letter mentioning among the agenda: "To receive, consider, and, if so determined, to adopt any report or recommendation which may be made by the committee appointed at the extraordinary meeting held on the 1st of May instant to confer with the directors with a view to an agreement being arrived at on matters in dispute."

The balance sheet which accompanied this circular shewed a loss, and the directors' report also accompanying it declared that there was no dividend. These are matters intelligible to, and likely to rouse attention in, the dullest and most careless of shareholders. I certainly, therefore, feel justified in saying that there is a prima facie case that every shareholder knew what it was proposed to do. I do not say that it is conclusive. A shareholder might have been dangerously ill during the whole of these six months, so as to be incapable of attending to business, and other exceptional cases might exist. But the defendants have a strong interest in proving that there was even one shareholder who did not know what was going to be considered, or who afterwards disapproved of what was actually done, and they have made no attempt to prove it.

At the meeting held on the 14th of May, 1867, a resolution was come to. (See L. R. 9 Exch. pp. 280-282.)²

² This resolution is omitted.

The sale to the purchasers of the company's interest in the contracts does of necessity involve in it a ratification of those contracts, and, if the purchasers were solvent persons, which, at all events, they were believed to be, it was very much for the interest of the company that such a sale should be made. I am, therefore, not surprised at finding that those who defend the action have been unable to find a single shareholder to give evidence that he did not assent to or, even now, disapproves of that sale, and I draw the inference of fact that each individual did assent to it.

In the circular letter convening the next general annual meeting, held on the 24th of December, 1867, among the agenda was "to consider and, if so determined, to sanction a contract which has been entered into by the company with the directors thereof in pursuance of a resolution passed at the last annual meeting, held on the 14th May, 1867."

At this meeting a formal indenture was produced. (See this indenture, L. R. 9 Exch. p. 282, note 1.)³ By the first clause, the Ashbury Company assigns to the purchasers all benefit which the company has, or is supposed to have, in the Belgian railways, and all contracts, and the benefits of all sub-contracts that have been made, or expressed to be made, in connection therewith. And by the sixth clause the company are to allow their name to be used by the purchasers either as plaintiff or defendant.

By the last clause it is agreed that nothing shall preclude the company from maintaining that such contracts are ultra vires. This last clause may be effectual as between the company and the purchasers, and may, therefore, avail the company in any future proceedings against the directors for breach of trust; but it cannot, in my opinion, prevent the operation of the deed as a ratification of the contracts.

I think that it is not competent for a person, in whose name a contract has been made without authority, to sell the benefit and advantage of that contract, and to authorize the purchasers to sue in his name in order to obtain that benefit, if the contracts should prove advantageous, and at the same time to reserve power to repudiate the contract if it prove a losing contract.

I think that the act of selling the contract is an unequivocal act of election to ratify and adopt it, and that election being once made it is determined for ever.

At the meeting a formal resolution was passed that the seal of the company should be affixed to this indenture, which was accordingly done.

It was argued before us that all this came too late, because, as is stated in the case, early in May, 1866, the directors of the company repudiated all further performance of the above contracts, on the grounds that

they were ultra vires, and my Brother Bramwell, in his judgment below, seems to adopt this view, as he says (L. R. 9 Exch. p. 235), "If it was ratified it was between the 5th of December, 1865, and May, 1866."

I however, do not agree in this. I think that when the plaintiff thus had notice from the directors that they had exceeded their authority and that the company were not bound, the plaintiff might, if he pleased, have declared himself no longer bound, and I think that if he had done so, a ratification would have come too late to bind him.

But he did not do so; and as long as he continued insisting on the contract as a binding one, the company might adopt the contract if for their benefit. This, I think, is clear on principle, and the case of *Soames v. Spencer*, 1 Dowl. & R. 32, cited in the argument, is an authority in support of it.

It seems to me, therefore, that in this case there has, in fact, been a complete and deliberate ratification of this contract, under the seal of the company, affixed to the ratification in pursuance of the resolutions of two successive meetings of the company convened for the express purpose; and that as a fact there is no shareholder in a position to object to that ratification, every one either having previously assented to that ratification or subsequently approved of it.

I do not think it is sufficiently made out that there was any ratification before 1867, but then there was a complete one. I have only further to observe that there is a technical difficulty as to binding a body corporate at law otherwise than by its seal. I should require further consideration before I decided that a ratification by each individual of the whole shareholders, even at law, must be inoperative unless declared by it under its seal; and I should also require further consideration before I decided whether, at law, it was competent for the corporation to set up as a defense that the seal was affixed without the assent of every one of the shareholders; but on the view I take of the facts neither question arises in this case. I therefore come to the conclusion that if, in any case, a company formed under the Companies Act, 1862, can ratify a contract made beyond the scope of the objects for which it is formed, this company has done so.

If this view of the facts is correct it becomes necessary to decide the question of law, viz. whether a corporation constituted under the Companies Act, 1862, can, even under seal, bind itself in its corporate capacity, by a contract for objects beyond the scope of those specified in its memorandum of association as the objects for which it is established. My late Brother Channell, in his judgment in the case below, says: "In some of the earlier cases quoted in the argument in which questions were discussed relating to contracts ultra vires of the companies making them, the question was treat-

³ The indenture is omitted.

ed as one of illegality. Whatever may be the case with regard to companies which have been specially incorporated by parliament for a special purpose, and which use the powers so obtained for other purposes, it seems clearly settled by the more recent authorities that in the case of companies such as that in the present case, the persons constituting the company, that is to say, the shareholders, may bind themselves in their corporate capacity, by their individual assent to contracts not authorized by the memorandum of association or other like instrument by which the constitution of the company is defined. The objection to such a contract is not that it is illegal and therefore unenforceable, but simply that it is unauthorized by the body whom it purports to bind."

The more recent authorities referred to are, I presume, the three cases of *Spackman v. Evans*, L. R. 3 H. L. 171; *Evans v. Smallcombe*, Id. 249, and *Houldsworth v. Evans*, Id. 263, decided in the house of lords in 1868, and *Lime Co. v. Green*, L. R. 7 C. P. 43, decided in the court of common pleas in 1871.

In the cases in the houses of lords the company had been incorporated under the Act of 7 & 8 Vict. c. 110. In the case in the court of common pleas the company was incorporated under the present Act of 1862.

It is, I think, too much to say that these cases clearly settle the point. Instead of saying that these cases clearly settle that the law is as my Brother Channell says, I only say that I think them authorities to that effect, and that I think such is the law.

With this slight alteration I agree entirely with what is above quoted.

I do not entertain any doubt that if, on the true construction of a statute creating a corporation, it appears to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void; and to hold that a contract wholly void cannot be ratified.

But it is of great importance, when we come to construe a statute creating a corporation, to consider what would be the incidents at common law conferred on a corporation created by charter.

The leading authority on this subject is the case of *Sutton's Hospital*, 10 Coke, 1. There were many points raised in that case. Those which I think material to the present point arose on a part of the charter set out in the special verdict (10 Coke, 10b), by which the king incorporated the first governors of the Charterhouse, and expressly provided, 1. That they should have power to purchase &c., as well goods, chattels, &c., as lands. 2. To sue and be sued. 3. To have a common seal, "whereby the same corporation

shall or may seal any manner of instrument touching the said corporation and the manor, lands, &c., thereto belonging, or in any wise touching or concerning the same. Nevertheless it is our true intent and meaning that the said governors for the time being and their successors, nor any of them, shall do, or suffer to be done, at any time hereafter, any act or thing whereby or by means whereof any of the manors, &c., of the said incorporation or any estate, &c., shall be conveyed, &c., to any other whatsoever contrary to the true meaning hereof, other than by such leases as are hereafter mentioned, and that in such manner and form as is hereafter expressed, and not otherwise." The king, therefore, by this charter not only did not in express terms give a power of alienation, but by express negative words forbade any alienation except by lease. But the resolution of the court, as reported by Coke (page 30b), was that "when a corporation is duly created all other incidents are tacite annexed; * * * and, therefore, divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out. As, 1. By the same to have authority, ability, and capacity to purchase; but no clause is added that they may alien, &c., and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, &c.; that is also declaratory, for when they are incorporated they may make or use what seal they will. 4. To restrain them from aliening or demising, but in a certain form; that is an ordinance testifying the king's desire, but it is but a precept and doth not bind in law."

This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further, that an attempt to forbid this on the part of the king, even by express negative words, does not bind at law. Nor am I aware of any authority in conflict with this case.

If there are conditions contained in the charter that the corporation shall not do particular things, and these things are nevertheless done, it gives ground for a proceeding by *sci. fa.* in the name of the crown to repeal the letters patent creating the corporation: see *Archipelago Co. v. Reg.*, 2 El. & Bl. 837, 22 Law J. Q. B. 196. But if the crown take no such steps, it does not as I conceive, lie in the mouth either of the corporation, or of the person who has contracted with it, to say that the contract into which they have entered was void as beyond the capacity of the corporation.

I am aware of no decision by which a corporation at common law has been permitted to do so. I take it that the true rule of law is, that a corporation at common law has, as

an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, Does the statute creating the corporation by express provision, or by necessary implication, shew an intention in the legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, as incident to it, a general capacity to contract, the question is, Does the statute creating the corporation by express provision, or necessary implication, shew an intention in the legislature to prohibit, and so avoid the making of a contract of this particular kind?

I think this is the real question, and for that I refer to the judgment of Parke, B., in *South Yorkshire Ry. Co. v. Great Northern Ry. Co.*, 9 Exch. 55, 84; 22 Law J. 305, 313, and the various other cases cited by my late Brother Willes and by myself in *Taylor v. Railway Co.*, L. R. 2 Exch., at pages 375, 389.

And when we are construing a statute and regulating a corporation, it is right to bear in mind that, as Lord Coke says: "It is a maxim in the common law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law." 2 Co. Inst. 200. Affirmative words may no doubt be used so as to imply a negative (see *Plow. Comm.* 113); but I take it the general principle is that thus laid down by Cresswell, J., in *Archipelago Co. v. Reg.*, 2 El. & Bl. 888, 23 Law J. Q. B. 82: "That to make the words giving an express liberty or right have the effect of controlling or limiting that which would otherwise exist, they must be very plain."

I now come to consider the construction of the act of 1862, under which the present company is formed. The sections of the act of 1862 bearing on the present case seem to me to be only sections 6, 8, 9, 10, and 12.

By the 6th section of the act of 1862, any seven persons may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act, in respect of registration, form an incorporated company with or without limited liability.

The 8th, 9th, and 10th sections provide that the memorandum of association shall contain the objects for which the proposed company is to be established.

The 12th section provides that the company may make certain specified alterations in the memorandum of association, not including a change in the objects for which the company is to be established, and then, in express negative words, provides that, "save as aforesaid, no alteration shall be made in

the conditions contained in the memorandum of association."

The objects of the proposed company must, therefore, always remain the same; and that has, I think, two important effects. First. I think that if the company, as a body, propose to do anything beyond these objects, any one dissentient shareholder (who has not precluded himself from doing so) may prevent it from doing so. Secondly. No person can be entitled to fix the company with a contract made by the board for any purpose beyond those objects, on the ground that the board had an ostensible or apparent authority to make contracts of that kind, but must, in order to fix the company, at least prove an actual authority given to the board to make the particular contract he seeks to enforce.

Now, if I thought that it was at common law an incident to a corporation that its capacity should be limited to the extent conferred on it by the instrument creating it, I should agree that the capacity of a company incorporated under the act of 1862 was limited to the objects in the memorandum of association. But if I am right in the opinion which I have already expressed, that the general power of contracting is an incident to a corporation which it requires an indication of intention in the legislature to take away, I see no such indication here. There are not even affirmative words, those used in section 25 of 7 & 8 Vict. c. 110, to which I shall now refer, having been (I presume advisedly) not repeated.

The 7 & 8 Vict. c. 110, § 25, enacts that from the date of the certificate the shareholders shall be incorporated "by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this act and of such deed as aforesaid." And then express powers are given to the company to enter into contracts for any "necessary purpose of the company."

I think if the question was whether the legislature had conferred on a corporation created under this act capacity to enter into contracts beyond the provisions of the deed, there could be only one answer. The legislature did not confer such capacity.

But if the question be, as I apprehend it is, whether the legislature have indicated an intention to take away the power of contracting which at common law would be incident to a body corporate and not merely to limit the authority of the managing body and the majority of the shareholders to bind the minority, but also to prohibit and make illegal contracts made by the body corporate in such a manner that they would be binding on the body if incorporated at common law, I think the answer should be the other way. There certainly is ground for suspecting that the person who framed the Act 7 & 8 Vict. c. 110, thought that the

corporation would have no other powers than those thus expressly given to it, and perhaps meant to restrict its powers accordingly, but when we remember the canon of construction that affirmative words do not take away the common law right, I think he has not used words sufficient to effect such a purpose. It would be different if negative words had been used, and it had been said that the company should not do any other acts than those necessary for the purpose for which it is formed.

The two acts, 7 & 8 Vict. c. 110, and the act of 1862, are so much in *pari materia*, that if it had been settled by judicial construction that a company under 7 & 8 Vict. c. 110, was forbidden to make any contract for objects beyond those specified in the deed, I should endeavour to put the same construction on the act of 1862, unless the change in the language shewed an intention in the legislature to alter the law.

There are many dicta in courts of equity, worthy of great respect, which indicate an opinion not only that such acts are beyond the authority of the board, or even of a majority of the shareholders, but also that they are beyond the capacity of the company though unanimous.

These are worthy of great attention, but I can find no case in which it has been decided that a contract so made or ratified by the whole company that it would have bound the company in its corporate capacity (but for the provisions of the statute), has either at law or in equity, been held void on account of the provisions of that act. And I think that the three cases, already referred to, of *Spackman v. Evans*, L. R. 3 H. L. 171; *Evans v. Smallcombe*, Id. 249; and *Houldsworth v. Evans*, Id. 263,—all decided in the house of lords, are at least authorities for the contrary doctrine.

The question in all three cases was, whether a person, who had many years ago *de facto* retired from the company under an arrangement made with the directors, was still a shareholder in point of law, and therefore ought to be put on the list of contributories.

In all three cases it was agreed that it was beyond the competence of the board of directors, or even of a majority of the shareholders, to allow such a retirement. In *Spackman's Case*, L. R. 3 H. L. 171, the majority of the lords—Lords Cranworth, Chelmsford, and Colonsay—thought it not proved that the whole body of shareholders had ratified the arrangement under which *Spackman* went out, and consequently he was retained on the list of contributories, Lord St. Leonards and Lord Romilly, dissenting.

In *Smallcombe's Case*, L. R. 3 H. L. 249, the majority of the lords—Lord Cairns and Lord Cranworth—thought it was sufficiently proved that all the shareholders had ratified the arrangement under which Mr. Small-

combe went out, and consequently he was removed from the list of contributories, Lord Chelmsford dissenting.

In *Houldsworth v. Evans*, L. R. 3 H. L. 263, the majority of the lords—Lord Cairns and Lord Chelmsford—thought it not sufficiently proved that the arrangement under which he retired was brought to the notice of all the shareholders, and consequently he was retained on the list of contributories, Lord Cranworth dissenting.

The differences of opinion, though chiefly on the questions of fact, were sufficient to secure that the cases should be very carefully considered, and consequently all that is said in them is of high authority.

In the first of the cases—*Spackman v. Evans*, L. R. 3 H. L. 171—all the lords who formed the majority based their decisions on the absence of satisfactory proof that the arrangement was ratified by all the shareholders. Lord Cranworth says, page 190: "The act of the directors in cancelling the shares of the appellant, though not warranted by the deed of settlement, would be valid if it was either previously authorized or subsequently ratified by all the shareholders." And at page 194 he says: "Looking at all which was thus done, I should certainly hold that the conduct of the continuing shareholders amounted to a ratification of the illegal or irregular acts of the directors, provided it be clear that the shareholders knew that they were illegal or irregular, that is, knew that they were acts not authorized by the deed, and not done in pursuance of the notice given to every shareholder by the circular of the 4th of November, 1848."

It certainly seems to me, that, when using this language, Lord Cranworth had in his mind the words of the 25th section of 7 & 8 Vict. c. 110, previously quoted, and meant to express an opinion that the acts of the directors not authorized by the provisions of the deed were illegal in them, but were capable of ratification by the corporation. Lord Chelmsford also says, page 234: "It is quite clear that to render valid an act of the directors of the company which is *ultra vires*, the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, viz. the acquiescence of each and every member of the company."

Lord Colonsay also dwells on the absence of proof of knowledge on the part of the shareholders, though I do not think his language indicates so strongly that he thought that this, if proved, would have been decisive in *Spackman's* favour.

In the subsequent case of *Evans v. Smallcombe*, L. R. 3 H. L. 249, at page 253, Lord Cairns says, speaking of *Spackman v. Evans*, L. R. 3 H. L. 171: "I apprehend I am correct in stating that it was the opinion of the majority of your lordships in that case, indeed, I think it was the opinion of all your lordships who were present, that, looking to

that arrangement, which has been called throughout in this case the Chippenham arrangement, it would have been competent for any shareholder in the company to object within a reasonable time to that arrangement, that the arrangement was one which was ultra vires of the directors, and which, if supported at all, could only be supported by reason of the consent or acquiescence of all the shareholders in the company, or by the proof of such a state of facts as would lead to the reasonable inference that there had been that consent or that acquiescence."

These cases decided in the House of Lords are binding on us as far as they go. I agree that they do not precisely decide the very question before us. In the first place they were decisions as to a company incorporated under 7 & 8 Vict. c. 110, which differs in its language from the act of 1862. It seems to me that the difference in the wording of the two acts is such that it is more plausible to say that 7 & 8 Vict. c. 110, is prohibitive, than to say that the act of 1862 is so. In the next place, the question raised was whether a particular person was to be inserted on the list of contributories, which, as pointed out by Lord St. Leonards, is an equitable question, and in a court of equity the distinction between the body corporate and the whole of the individuals who, in the aggregate, form that body corporate, is not so important as in a court of law. The present question is a purely legal one, viz., whether the body corporate is bound by this contract. But I take it that the question whether the statute 7 & 8 Vict. c. 110, rendered a proceeding beyond the provisions of the deed illegal, that is, *malum prohibitum*, is the same in equity as at law. The act, illegal in that sense, could no more be adopted and set up in equity than at law; and I therefore apprehend these cases do decide conclusively that an arrangement such as that come to in *Evans v. Smallcombe*, L. R. 3 H. L. 249, was not forbidden by the statute 7 & 8 Vict. c. 110.

It was argued by the counsel for the defendants before us that the object there was to enable one of the partners to retire, which might have been done consistently with the provisions of the deed in some other way; and perhaps that it fell within the general power given to companies in the twelfth subsection of s. 25, viz. "to perform all other acts necessary for carrying into effect the purposes of such company, and in all respects as other partnerships are entitled to do." Lord Romilly, who was one of the dissentient minority in *Spackman v. Evans*, L. R. 3 H. L. 171, at page 244, says: "Of course, if this company had bought mines, or entered into a contract to set up a steam-packet business, this would have been simply void, and would not have bound the company or any one, because they could do nothing that was beyond the objects of the company;" which may be construed as indicating that he had some such distinction in his mind. I think,

however, when looked at with the context, he must be understood as merely saying that the arrangement was voidable, not void, standing good till some one entitled to do so took steps to avoid it, whilst such an act as he supposed would be void till affirmatively ratified. With this exception I have looked through the opinions delivered in the house of lords without finding anything to indicate that such a distinction was in the mind of any of the noble and learned lords; and I think that we should hardly be following out the ratio decidendi of the majority of the house of lords if we acted on such a distinction.

I do not think we can properly enter on the consideration of what it would have been politic in the legislature to enact. If we could do so, I think much might be said on both sides.

I am impressed with the hardship on incoming shareholders, who it is said have a right to believe that the company is carrying on the business for which it is formed and no other. And though of course, if the property of the company has been already squandered on unauthorized transactions or embezzled, the incoming shareholder must bear that loss; yet it is hard on him to be made liable to a contract beyond the objects of the company, even though that contract must by supposition have been ratified by the outgoing shareholders through whom he derives title.

On the other hand, it may often happen that when the shareholders first learn that the unauthorized contract has been made, their capital may be already so inextricably engaged in it that to stop the contract would be certain ruin, and to go on would give a very fair prospect of extricating themselves without much loss, perhaps with profit.

And the recent cases in the house of lords shew that very great hardships may fall on third persons if a transaction is always to be held void, though ratified by the whole shareholders.

And I do not see any risk of a company practically carrying on business for other objects than those named in the memorandum. The difficulty of obtaining the assent of all shareholders, and of proving that it had been obtained, is so great that no sensible man would trust to that and deal with the company on those terms.

But I do not think that we can ask what ought to have been enacted by the legislature. Our duty is to declare what has been actually enacted.

And I think, for the reasons I have above given, that in this case the unanimous shareholders have in fact assented to the ratification under the seal of the company of this contract; and that such a ratification, at all events, makes the contract binding on the company in its corporate capacity.

I think, therefore, that the judgment of the court below should be affirmed.

My Brothers BRETT and GROVE agree in this judgment.*

As this court is equally divided, the judgment appealed against must be affirmed.

ARCHIBALD, J. * * * Is there authority, then, that in such a case as the present the assent of all the shareholders can render the contracts valid as contracts of the corporation? The case of *Spackman v. Evans*, L. R. 3 H. L. 171, and the other cases following it in the house of lords are relied on as authorities to that effect; but there are differences between the provisions of the Companies Act, 1862, and those of 7 & 8 Vict. c. 110, which may well justify the distinction contended for by the defendants between the case of companies constituted under that act and of companies under the act of 1862, which account for the view taken by the house of lords as to the power of all the shareholders to ratify a contract ultra vires of the directors, and apparently beyond the scope of the incorporation; but, at all events, I think the fact that there are no such prohibitory words in 7 & 8 Vict. c. 110, as are to be found in section 12 of the Companies Act, 1862, and that the effect of such prohibitory words therefore was never considered by the house of lords, is of itself sufficient to show that the view taken in those cases is not necessarily binding in the present one.

The 7th section of 7 & 8 Vict. c. 110, requires that companies constituted under it should be formed by a deed setting forth among other things the business or purpose of the company, and by section 25, on obtaining a certificate of complete registration, the shareholders are to be incorporated for the purposes of the trade or business for which the company was formed, according to the provisions of the Act and of the deed; but section 7 also gives the power of registering a further or supplemental deed if not repugnant to the act, for the purpose of supplying any omission or defect as regards the matters required to be set forth in the deed of settlement, and under such a supplementary deed such alterations in the mode of dealing with the forfeiture of shares, might have been adopted as were the subject of the contracts made in the case of the *Agriculturists' Cattle Insurance Company*, out of which *Spackman v. Evans*, L. R. 3 H. L. 171, and the other cases which followed it arose. Upon this view, therefore, 7 & 8 Vict. c. 110, provided means for formally giving effect to the contracts which were asserted to have been ratified in those cases.

It is true that this distinction was not adverted to in those cases, but there was no occasion to institute any comparison between the two acts, or to put any construction on the act of 1862. But in *Dent's Case* (In re Anglo-Mo-

ravian Hungarian Junction Ry. Co.), L. R. 8 Ch. App. 771, decided by Lord Chancellor Selborne since the argument in this case, it was held that, under the Companies Act, 1862, articles of association professing to confer authority to modify the memorandum beyond the limited extent allowed by the act are void, and the necessity of a rigid adherence to the directions of the act is insisted on. The lord chancellor says in giving judgment: "We must not forget the important change made by the act which introduced limited liability. Before that act, partners in a trading partnership could not prescribe a limit to their liability. In favour of the shareholders the legislature permitted a limit to be placed on the liability, but it prescribed the means by which alone this could be done, and those means must be exactly adhered to; and the act expressly says that it must be done by the memorandum of association. Then the 23d section of the act provides that any subscriber of the memorandum shall be deemed to have agreed to become a member of the company, and shall be entered as a member of the register; and the 38th section provides, that the members of the company shall be liable for no more than the unpaid portion of their shares. All these provisions have reference to the memorandum by which the shares are to be limited. In the present case, the memorandum mentions the limit of the shares; and the effect of a person subscribing the memorandum was to make him liable for 20l. on each share, and in some way or other he must pay it. That was laid down expressly in the case decided by Lord Justice Giffard,—In re Baglan Hall Colliery Co., L. R. 5 Ch. App. 346,—who said that if there were in that respect a contradiction between the articles and the memorandum, the articles must give way.

* * * Then the 12th section of the act provides, that the conditions contained in the memorandum of association may be modified to a limited extent if the articles authorize it. But that could only be done (I am speaking of the law as it stood at the time when the question in this case arose) by the increase of capital or the consolidation or division of stock; and then the clause goes on, 'but save as aforesaid, and save as hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association.' It is quite certain that under that clause, if there be found anything in the articles limiting the liability of the shareholders in a way inconsistent with the memorandum—anything tending to reduce the liability of the shareholders thereby prescribed—it is simply void."

The privilege of contracting as a corporation and with a limited liability is conferred, only subject to the express directions and limitations of the act, of which it seems to me to be the policy as well as the true construction, to ignore (so to speak) the exist-

* KEATING and QUAIN, JJ., concurred in the opinion of ARCHIBALD, J.

ence of the corporation and the power of the shareholders, even when unanimous, to contract or act in its name for any purpose substantially beyond or in excess of its objects as defined by the memorandum of association; but if the business of a company as thus defined could be extended or altered by the consent of all the shareholders, notwithstanding the express prohibition of section 12, there would be an easy means of acquiring exceptional privileges whilst completely evading the act.

A company registered for one purpose would practically obtain powers to carry out in its corporate name and character, and with a limited liability on the part of the shareholders, objects entirely different, and might undertake business or contracts altogether at variance with its object as set forth in the registered memorandum, without any notice whatever to the public. The shareholders in such a company might of course change from day to day, and persons buying shares, or even entering into contracts on the faith of the registered memorandum, might find all the funds of the company already pledged for totally different objects. Of course the individual shareholders assenting would have no just ground of complaint, but the fact that their acts might thus operate to the prejudice of strangers subsequently acquiring shares, or contracting with them on the faith of the registered documents of the company, goes far to prove to me though all join in a contract beyond the competency of the company, the contract cannot be regarded as a contract by the corporation, but must be dealt with as one binding the shareholders, if at all, merely as individuals and not in their corporate capacity.

I admit that at common law (as was resolved in the case of *Sutton's Hospital*, 10 Coke, 30b,) when a corporation is duly created all other incidents are tacite annexed, such as liability to purchase and alien, to sue and be sued, and to use what seal they will; and that even a clause in their charter restraining them from aliening or demising but in a certain form, though an ordinance testifying the desire of the crown, is to be deemed but a precept and not binding in law, so that a corporation thus constituted acquires rights of contracting as extensive as those of a natural person; but the question under consideration has reference to the creation of corporations by statute with a limited scope and objects, and to the true construction of the statute law in regard to such bodies, a question which depends necessarily to a great extent, where the legislative provisions are not unmistakeably clear and express the other way, on the general policy of such legislation.

No doubt, as observed by Lord Cranworth (*Shrewsbury & B. Ry. Co. v. Northwestern Ry. Co.*, 6 H. L. Cas., at page 135, 26 L. J. Ch., at page 493), when the legislature con-

stitutes a corporation it gives to that body *prima facie* an absolute right of contracting. But he goes on to say, "that this *prima facie* right does not exist in any case where the contract is one which, from the nature and objects of the incorporation, the corporate body is expressly or impliedly prohibited from making."

Adopting this view, what can rebut more strongly the presumption of a *prima facie* general authority to contract than an express provision that the scope and objects of the company, as originally declared by its memorandum of association, shall be unchangeable, and in effect, therefore, that its corporate capacity shall exist only within the limits and for the purposes thus defined?

This argument is rendered more cogent by the consideration that the registered memorandum is notice to the public of the purposes for which alone the corporation exists, and of the scope of its powers; and that, in the case of a registered company, those who contract with it must be taken to have read its registered documents, and to be aware of any restrictions imposed by them on its capacity to contract. *Bank v. Turquand*, 6 El. & Bl. 327.

As to contracts substantially beyond its scope and objects, I prefer to regard the case as one of incapacity to contract, rather than of illegality, and the corporation as if it were non-existent for the purpose of such contracts. If, then, I am correct in this view, how can the individual assents of all the shareholders be sufficient to affirm or give validity to a contract which is beyond the scope and objects of the memorandum, so as to render it a contract of the ideal legal body, which exists only as a corporation, and with powers and capacity which are thus admittedly exceeded?

I am unable to agree with my late Brother Channell, that it is settled by the more recent authorities that shareholders in a company registered under the act of 1862 may bind themselves in their corporate capacity by their individual assents to contracts not authorized by the memorandum of association. I cannot regard the cases of *Spackman v. Evans*, L. R. 3 H. L. 171; *Evans v. Smallcombe*, Id. 249; and *Houldsworth v. Evans*, Id. 263, as authorities to that effect; and I know of none others which can be so regarded. They may well do so with respect to any matter as to which they would have power under the act (if it were done formally) to make an alteration in the memorandum or in the articles of association, but not otherwise; and I think that the distinction suggested on this ground by the counsel for the defendants between this case and that of *Lime Co. v. Green*, L. R. 7 C. P. 43, is a sound one. In that case an alteration, which it was competent to them to have made, in the articles of association would have enabled the company to have done in a formal manner what was done informally by the assent of all the

shareholders. But as the contracts in question here are to my mind clearly and entirely beyond the scope of the memorandum or of any alteration that could be made in it, and therefore beyond the scope of the incorporation, I have arrived at the conclusion that they are incapable of ratification so as to bind the body corporate.

But even if capable of ratification, have they been in fact ratified by the assent, express or implied, of all the shareholders?

* * *

If, therefore, it had been competent to the

shareholders to have ratified, and all had assented to the arrangement made on the 14th of May, 1867, the plaintiff would, in my opinion, have been entitled to recover. But as I think there is no proof of such assent by all the shareholders, and still more on the ground that the contracts under the circumstances were wholly incapable of ratification, I am of opinion that the question submitted in the case must be answered in the negative, and that the judgment of the court of exchequer should be reversed. Judgment affirmed.

CENTRAL TRANSP. CO. v. PULLMAN'S PALACE CAR CO.

(11 Sup. Ct. 478, 139 U. S. 24. March 2, 1891.)

In error to the circuit court of the United States for the eastern district of Pennsylvania.

This was an action of covenant, brought September 21, 1886, by the Central Transportation Company, a corporation of Pennsylvania, against Pullman's Palace Car Company, a corporation of Illinois, to recover the sum of \$198,000, due for the last three-quarters of the year ending July 1, 1886, according to the terms of an indenture of lease from the plaintiff of all its personal property to the defendant, dated February 17, 1870, and set forth in full in the declaration. The defendant filed several pleas, one of which was "that said indenture of lease was void in law as between the parties thereto, for the want of authority and corporate power on the part of the parties thereto to make and enter into said indenture of lease; and for that the same was in excess and in violation of the charters conferring the corporate powers on said plaintiff, and of the purpose of their incorporation." The plaintiff filed a replication, traversing the averments of this plea. The plaintiff was originally incorporated December 26, 1862, by a certificate or charter, made, acknowledged, recorded, and filed in the office of the secretary of the commonwealth, as required by the general laws of Pennsylvania, which authorized companies to incorporate themselves, by voluntary act of the associates, "for the purpose of carrying on the manufacture of woollen, cotton, flax, or silk goods, or of iron, paper, lumber, or salt," or "for the manufacture of articles from iron and other metals, or out of wood, iron, and other metals," within the state, for a term not exceeding 20 years; and provided that every corporation so formed might by its corporate name purchase, hold, and convey real or personal property, "necessary or convenient to enable the said company to carry on the business or operations named in such certificate;" and that its stock, property, and affairs should be managed by a board of directors, a majority of whom in all cases should be stockholders therein and citizens of the state; and authorized the directors, subject to the revision and approval of the stockholders, to make such by-laws for the management and disposition of its stock and affairs, "and for carrying on all kinds of business within the objects and purposes of such company;" and forbade the company to use any part of its capital stock or other funds in the purchase of stock in any other corporation. St. Pa. April 7, 1849, No. 368, §§ 1, 3, 4, 8; Id. April 1, 1853, No. 186, § 2. In accordance with the requirements of those statutes, the plaintiff's certificate of incorporation or charter stated the object for which it was formed, "the transportation of passengers in railroad cars constructed and to be owned by the said company in accordance with the several letters patent," four in all, described by numbers and dates; the place where its chief operations

were to be carried on, Philadelphia; the amount of its capital stock, \$200,000; and its term of continuance, 20 years, the extreme limit allowed by the statutes. By a special act of the legislature of Pennsylvania of February 9, 1870, No. 94, entitled "An act to extend the charter of the Central Transportation Company, to empower them to lease their property and increase their capital stock," the plaintiff's charter was extended for 99 years from its expiration; and "said company are hereby empowered to enter into contracts with corporations of this or any other state for the leasing or hiring and transfer to them, or any of them, of their railway cars and other personal property," as well as "to increase their present capital stock two hundred thousand dollars." On February 17, 1870, eight days after the passage of that act, the indenture sued on was made by and between the plaintiff and the defendant, which had been incorporated three years before, with a capital stock of \$100,000, by a special act of the legislature of Illinois of February 22, 1867, (declared to be a public act,) "to manufacture, construct, and purchase railway cars, with all convenient appendages and supplies for persons traveling therein, and the same" to "sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper."

The indenture, after the statement of the names of the parties, began with the following recitals: "Whereas, the parties hereto are engaged in the business of manufacturing railway cars, generally known as sleeping-cars, under certain patents belonging to them, respectively, and of hiring the same to railroad companies under written contracts, to be used and employed on and over the lines of the roads of said railroad companies, and receiving therefor income and revenue by the sale to passengers of the berths and accommodations therein; and whereas, the demands of the public for increased means of personal comfort and convenience in traveling, of avoiding repeated changes of cars over long routes of railroad, the necessity for affording, at fair and reasonable rates, these advantages, which cannot be extended by railroad companies themselves, require that every possible means should be adopted to meet such demands by avoiding the inconvenience and curtailing the expenses incidental to the maintenance of the business management and organization of two separate corporations." It further recited that the parties (professing to act under the powers conferred upon them, respectively, by the special acts of the legislatures of Pennsylvania and of Illinois, above mentioned) had agreed that the plaintiff should demise, transfer, and set over to the defendant, and the defendant should take, all the plaintiff's railway cars, contracts, patent-rights, and personal property. By that indenture, accordingly, the plaintiff "granted, demised, transferred, and set over" 119 railway sleeping-cars, with their equipment, its contracts with 16 railroad companies, (copies of which were annexed to and made parts of the indenture,) all its pat-

ent-rights, (an assignment of which, including the four specified in its charter and 13 others, was also annexed to the indenture and made part thereof,) and all its "personal property, rights, credits, moneys, and effects, rights of action, money due and to become due from licenses heretofore granted," to the defendant, its successors and assigns, "to have and to hold the above demised property, and all income, revenue, and profit to be derived therefrom," for the term of 99 years from January 1, 1870, except so far as the contracts, patents, and licenses should expire sooner; and the plaintiff expressly covenanted that it would use its influence to obtain renewals or new contracts in the defendant's name from the railroad companies; and that it "shall and will not engage in the business of manufacturing, using, or hiring sleeping-cars" while this contract remains in full force and effect. The defendant, on its part, covenanted to pay to the plaintiff annually the sum of \$264,000, in equal quarterly installments, "during the entire term of ninety-nine years," unless, upon a diminution of the revenue received from the railroad companies, the indenture should be declared void by the defendant, or the annual sums payable by the defendant be reduced, as therein provided; also to pay all the plaintiff's debts up to January 1, 1870, according to a schedule annexed, by which they were not to exceed the sum of \$63,998.69, that being the amount of cash transferred by the plaintiff to the defendant; to continue and carry on the business as authorized by its charter, during the existence of the assigned contracts or other like contracts with the same railroad companies; to keep in repair the cars and their equipment, and to renew and reconstruct them when needful; not to assign the indenture without the plaintiff's assent, nor to create any lien or mortgage upon the property that should impair the plaintiff's rights under the indenture; that, upon the defendant's failure to make any quarterly payment for 30 days after due, the plaintiff might avoid the indenture, and thereupon the defendant should surrender the cars and equipment, assign to the plaintiff the contracts with the railroad companies and any unexpired patent-rights, and cease to run or employ cars on the same lines of railroad; and, at the end of the 99 years, to deliver to the plaintiff the cars and equipment in good order, and assign to the plaintiff any unexpired contracts with those railroad companies.

At the trial, in May, 1888, the plaintiff offered in evidence its original charter, the statute of Pennsylvania of February 9, 1870, and the indenture of February 17, 1870, as well as evidence tending to show that the defendant, under that indenture, entered into possession of the plaintiff's property, and continued in possession during the period covered by the declaration. To the admission of all this evidence the defendant objected, "on the ground that it was beyond the power of either corporation to make the contract; and also because it was null and void by reason of its being in restraint of trade, and against public policy as preventing competition."

The court sustained the objection, and excluded the evidence, and the plaintiff excepted. The plaintiff then offered to prove, in addition to the above evidence, that in pursuance of the indenture of February 17, 1870, the plaintiff's cars, contracts, and patent-rights were delivered to the defendant, and continued in its possession under the indenture, and the defendant insisted on retaining them until July 1, 1886, and the defendant then for the first time tendered them to the plaintiff, and declared the indenture void, in accordance with its provisions. The defendant objected to this evidence; the court sustained the objection, and excluded the evidence; and the plaintiff excepted. The defendant thereupon moved for a nonsuit, and the court granted the motion, and ordered a nonsuit, and refused a motion of the plaintiff to take it off; and the plaintiff again excepted. A judgment of nonsuit was entered accordingly, and the plaintiff tendered a bill of exceptions, which was allowed by the court, and sued out this writ of error.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The principal defense in this case, duly made by the defendant, by formal plea, as well as by objection to the plaintiff's evidence, and sustained by the circuit court, was that the indenture of lease sued on was void in law, because beyond the powers of each of the corporations by and between whom it was made. There is a preliminary question of practice, arising out of the manner in which the case was disposed of below, which is deserving of notice, although not mentioned by counsel in argument. The circuit court, in ordering a nonsuit because in its opinion the evidence offered by the plaintiff was insufficient in law to maintain the action, acted in accordance with the statute of Pennsylvania, which provides that "it shall be lawful for the judge presiding at the trial to order a judgment of nonsuit to be entered, if in his opinion the plaintiff shall have given no such evidence as in law is sufficient to maintain the action, with leave, nevertheless, to move the court *in banc* to set aside such judgment of nonsuit; and, in case the said court *in banc* shall refuse to set aside the nonsuit, the plaintiff may remove the record by writ of error into the supreme court for revision and review, in like manner and with like effect as he might remove a judgment rendered against him upon a demurrer to evidence." St. Pa. March 11, 1836, § 7; Id. March 11, 1875, § 1; 2 Purd. Dig. (11th Ed.) pp. 1362, 1363. Under that statute, as expounded by Chief Justice GIBSON, the judge can order a nonsuit, only when all the evidence introduced, with every inference of fact that a jury might draw from it in favor of the plaintiff, appears to be insufficient in matter of law to sustain a verdict; and the defendant's motion for a nonsuit is equivalent to a demurrer to evidence, differing only in the judgment thereon not being a final determination of the rights of the parties, for if it is in favor of the plaintiff the case must be submitted to the

jury, and if in favor of the defendant it is no bar to a new action. *Smyth v. Craig*, 3 Watts & S. 14; *Fleming v. Insurance Co.*, Brightly, N. P. 102; *Bournonville v. Goodall*, 10 Pa. St. 133. It is true that a plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error. *U. S. v. Evans*, 5 Cranch, 280; *Evans v. Phillips*, 4 Wheat. 73; *Cossar v. Reed*, 17 Q. B. 540. But in the case of a compulsory nonsuit it is otherwise; and a plaintiff, against whom a judgment of nonsuit has been rendered without his consent and against his objection, is entitled to relief by writ of error. *Elmore v. Grymes*, 1 Pet. 469; *Strother v. Hutchinson*, 4 Bing. N. C. 83, 5 Scott, 346, 6 Dow. 238; *Voorhees v. Coombs*, 33 N. J. Law, 482. There are many cases in the books in which this court has held that a court of the United States had no power to order a nonsuit without the plaintiff's acquiescence. *Elmore v. Grymes*, above cited; *Crane v. Morris*, 6 Pet. 598, 609; *Silsby v. Foote*, 14 How. 218; *Castle v. Bullard*, 23 How. 172, 183. Yet, instead of overruling, upon that ground alone, exceptions to a refusal to order a nonsuit, this court, more than once, has considered and determined questions of law upon the decision of which the nonsuit was refused in the court below. *Crane v. Morris* and *Castle v. Bullard*, above cited. The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is, as observed by Mr. Justice FIELD, delivering a recent opinion of this court, "rather a matter of form than of substance, except [that] in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon appeal." *Oscanyan v. Arms Co.*, 103 U. S. 261, 264. Whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, the defense that the plaintiff, upon his own case, shows no cause of action, is a question of "practice, pleadings, and forms and modes of proceeding," as to which the courts of the United States are now required by the act of congress of June 1, 1872, c. 255, § 5, (17 St. 197,) re-enacted in section 914 of the Revised Statutes, to conform, as near as may be, to those existing in the courts of the state within which the trial is had. *Sawin v. Kenny*, 93 U. S. 289; *Ex parte Boyd*, 105 U. S. 647; *Chateaugay Ore. etc., Co.*, Petitioner, 128 U. S. 544, 9 Sup. Ct. Rep. 150; *Glenn v. Sumner*, 132 U. S. 152, 156, 10 Sup. Ct. Rep. 41.

It is doubtless within the authority of the presiding judge, and is often more convenient, in order to prevent the case from being brought up in such a form that the judgment of the court of last resort will not finally determine the rights of the parties, to adopt the course of directing a verdict for the defendant and entering judgment thereon. But the judgment of nonsuit, being a final judgment disposing of the particular case, and rendered upon a ruling in matter of law duly excepted to by the plaintiff, is subject to be reviewed in this court by writ of error. It was

therefore rightly assumed by the counsel of both parties at the argument that the only question to be determined is of the correctness of the ruling sustaining the defense of *ultra vires*, independently of the form in which that question was presented and disposed of. Upon the authority and the duty of a corporation to exercise the powers granted to it by the legislature, and those only, and upon the invalidity of any contract, made beyond those powers, or providing for their disuse or alienation, there is no occasion to refer to decisions of other courts, because the judgments of this court, especially those delivered within the last 12 years by the late Mr. Justice MILLER, afford satisfactory guides and ample illustrations.

The earliest case in this court which touches the subject is *Railroad Co. v. Winans*, decided at December term, 1854, in which a railroad corporation unsuccessfully tried to escape liability for an unlicensed use of the plaintiff's patent in cars run over its road, upon the ground that the cars were constructed, owned, and used by another corporation under a contract with the defendant. Mr. Justice CAMPBELL, delivering judgment, said: "Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature." 17 How. 30, 39.

In *Pearce v. Railroad Co.*, at December term, 1858, it was adjudged that two corporations, chartered by the state of Indiana to construct and manage distinct, though connecting, railroads, had no power to consolidate themselves into one corporation, or to establish a connecting steam-boat line on the Ohio river, and therefore were not liable to be sued upon a promissory note which they had given in payment for a steam-boat. The same justice, in delivering the opinion of the court, stated the reasons for the decision as follows: "The rights, duties, and obligations of the defendants are defined in the acts of the legislature of Indiana under which they were organized, and reference must be had to these, to ascertain the validity of their contracts. They empower the defendants, respectively, to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But, in addition to that act of illegality, the managers of these corporations established a steam-boat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded

no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporations shall transcend their authority." 21 How. 441-443.

In *Zabriskie v. Railroad Co.*, at December term, 1859, this court, again speaking by the same justice, while affirming and acting on the principle that a corporation may be bound by the conduct and representations of its directors in "those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard," took the precaution to observe: "This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of their organization. This doctrine has been constantly affirmed in this court." 23 How. 381, 398.

In *Thomas v. Railroad Co.*, 101 U. S. 71, decided at October term, 1879, it was adjudged that a lease for 20 years by a railroad corporation of its railroad, rolling stock and franchises, in consideration of being paid one-half of the gross sums collected from the operation of the road by the lessees during the term, and reserving to the lessor a right to terminate the lease and retake possession of the road at any time, paying to the lessees the value of the unexpired term, was void; and that the corporation, upon terminating the lease and resuming possession when the lessees had been in possession five years, and the accounts of the parties for those years having been adjusted and paid, was not liable to an action by the lessees to recover the value of the unexpired term; and Mr. Justice MILLER, in the course of delivering judgment, said: "The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter: 'That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfillment of such contracts.' This is no more than saying: 'You may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals.' No doubt a contract by which the goods, received from railroad or other carrying companies, should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within

this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease, or transfer to others the entire road, and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers, and of performing the duties which it implies." Id. 80. "The authority to build a railroad, and to contract for carrying passengers and goods over it and other roads, is no authority to lease it, and with the lease to part with all its powers to another company or to individuals." Id. 81. "The powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." Id. 82. "There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract. That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void, as against public policy." Id. 83. It was also held in that case that the lease was not made valid by a subsequent act of the legislature, regulating the rates of fares and freights to be charged by "the directors, lessees, or agents of said railroad;" the court saying: "It is not by such an incidental use of the word 'lessees,' in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid, and ratified by the state." Id. 85.

In *Branch v. Jesup*, Mr. Justice BRADLEY, delivering judgment, said: "Generally, the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company; and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable; and they are so, not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfillment of those

purposes; and it would be a dereliction of the duty owed by the corporation to the state and to the public to part with them." And a lease from one railroad corporation to another was upheld in that case, only because the lessor had by its charter express authority, not only to purchase, hold, and convey property, real and personal, and to connect its road with any other road, but also to incorporate its stock with that of any other company, which, it was observed, "contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself, and its absorption into a different organization. The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road, and the franchises incident thereto, and necessary to its operation. Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply." 106 U. S. 468, 478, 479, 1 Sup. Ct. Rep. 495.

In *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, these same principles were reaffirmed; and the court, again speaking by Mr. Justice MILLER, after referring to some of the previous decisions on the subject in this and other courts, stated, "as the just result of these cases and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company, without similar authority, make a contract to receive and operate such road, franchises, and property of the first corporation; and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter." In that case it was held that a lease for 99 years of a railroad in Illinois and Indiana from a railroad corporation of Illinois to a railroad corporation of Indiana, whose road connected with the road leased, was within the authority conferred on the lessor by the statute of Illinois, which empowered all railroad corporations of that state to make "contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof," yet was unlawful and void, because beyond the authority conferred upon the lessee by the statute of Indiana, empowering any railroad corporation of that state, whose road connected with a railroad in an adjoining state, "to make such contracts and agreements with any such road constructed in an adjoining state, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper;" the court saying that it could not "see in this provision any authority to make contracts beyond those which relate to forwarding by one company the passengers and freight of another, on terms to be

agreed on, and possibly for the use of the road of one company in running the cars of the other over it to its destination without breaking bulk." 118 U. S. 290, 309, 312, 630, 6 Sup. Ct. Rep. 1094, 7 Sup. Ct. Rep. 24. In another case, decided about the same time, the same justice, in delivering an opinion by which a corporation was held to be liable for a tort done by its agents in the course of its business and of their employment, although in excess of its powers, observed: "The question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force or restraint or fraud is practiced on him. The powers of these corporations are matters of public law, open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement." *Salt Lake City v. Hollister*, 118 U. S. 256, 263, 6 Sup. Ct. Rep. 1055.

In *Willamette Woolen Manuf'g Co. v. Bank of British Columbia*, 119 U. S. 191, 7 Sup. Ct. Rep. 187, cited for the plaintiff, a corporation chartered "for the purpose of creating and improving water-power and privileges," and authorized to bring water from a river, was also expressly authorized by its charter to "use, rent, or sell" "the exclusive right to the hydraulic power and privileges created by the water" so taken, and for that reason only was held by this court, speaking by the same justice, to have the power to mortgage such right, power, and privileges. In *Green Bay & M. R. Co. v. Union Steam-Boat Co.*, 107 U. S. 98, 2 Sup. Ct. Rep. 221, and in *Pittsburgh, etc., Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 384, 9 Sup. Ct. Rep. 770, the general doctrine of *ultra vires*, as established by earlier decisions, was affirmed; and a railroad corporation was held to have the power, for the purpose of securing a continuous line of transportation of which its road formed part, to make a contract with a steam-boat company, or with a company chartered to construct a railway bridge or viaduct, because the charter of the particular railroad corporation, read in connection with the general laws applicable to it, clearly manifested the intention of the legislature to confer upon it that power.

In *Oregon Ry., etc., Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409, it was held that a general law of Oregon, authorizing companies to organize themselves by written articles of association filed with the secretary of state for "any lawful enterprise, business, pursuit, or occupation" specified in the articles, including "making or constructing any railroad," and "to purchase, possess, and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation," did not authorize a railroad corporation to be incorporated, either for leasing its railroad to another corporation, or for taking leases from other corporations of their roads, although these objects were in-

cluded in its articles of association; and therefore that, without further and express authority from the legislature, a lease for 96 years from one railroad corporation of its whole road and franchises to another such corporation was utterly void, and would not sustain an action by the lessor against the lessee to recover the rent stipulated in the lease. It was also held in that case, in accordance with the decision in *Thomas v. Railroad Co.*, that no authority to make such a lease could be implied from a special act passed by the Oregon legislature before the lease, granting to the plaintiff corporation rights, privileges, and easements, for wharves, stations, and tracks, in certain public grounds and streets; with a proviso that said corporation "or its assigns" should have no power to sell, convey, or assign the rights so granted to any person or corporation, save only with and as part of its railway; and the reasons for so holding appear in the following extracts from the opinion of the court, delivered by Mr. Justice MILLER: "One of the most important powers with which a corporation can be invested is the right to sell out its whole property, together with the franchises under which it is operated, or the authority to lease its property for a long term of years. In the case of a railroad company, these privileges, next to the right to build and operate its railroad, would be the most important which could be given it, and this idea would impress itself upon the legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that, if the legislature saw fit to confer such rights, it would do so in terms which could not be misunderstood. To infer, on the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word 'assigns,' a very loose and indefinite term, is a stretch of the power of the court in making implications which we do not feel to be justified." 130 U. S. 30, 9 Sup. Ct. Rep. 415. "The object of the legislature in making the proviso to that statute was to make sure that the grant given to the Oregonian Company of 'Terminal Facilities,' as they are called, with the right to wharves, depots, and access to the river for the use of the road, should never be separated by sale, assignment, or otherwise from the road itself, and that into whose-soever hands the road went should also go the rights, powers, and privileges conveyed by the grant." 130 U. S. 32, 9 Sup. Ct. Rep. 415, 416. It was further held that a provision of the general laws of Oregon, authorizing any corporation, by a vote of a majority of its stockholders, to dissolve itself, and thereupon to settle its business, dispose of its property, and divide its capital stock, did not confer upon it any authority, while continuing in existence, to dispose of by conveyance or lease its road and its corporate powers and franchises. 130 U. S. 34, 35, 9 Sup. Ct. Rep. 416, 417.

The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general

laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special charter from the legislature, and to those formed by articles of association under general laws.

By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee, and in favor of the public; because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544-548; *Railroad Co. v. Litchfield*, 23 How. 66, 88, 89; *Slidell v. Grandjean*, 111 U. S. 412, 437, 438, 4 Sup. Ct. Rep. 475. This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the legislature or of any public authority. *Oregon Ry., etc., Co. v. Oregonian Ry. Co.*, 130 U. S. 26, 27, 9 Sup. Ct. Rep. 413, 414.

In the case at bar, the plaintiff was originally incorporated for 20 years from December 26, 1862, with a capital stock of \$200,000, by articles of association, called a certificate or charter, under general laws of Pennsylvania. It is not without significance that those laws required its stock, property, and affairs to be managed by a board of directors, a majority of

whom should be stockholders therein, and citizens of the state; and forbade it to use any part of its capital stock in the purchase of stock in any other corporation. Those laws related to manufacturing companies only. But the purpose of its incorporation, as stated in that charter, was "the transportation of passengers in railroad cars constructed and to be owned by the said company" under certain patents. And, as appears by the recitals in the indenture sued on, the plaintiff carried on the business of manufacturing sleeping-cars under its patents and of hiring or letting those cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers.

The validity of the plaintiff's incorporation, as well as its power to make that indenture, however, depends not solely upon the original charter and the general laws under which it came into existence, but mainly upon a special act of the legislature of Pennsylvania of February 9, 1870. By this act, the validity of the charter for the object therein named was clearly recognized; the charter was extended for 99 years, nearly fivefold the period for which the corporation was or could have been formed under the general laws; and the corporation was expressly empowered to double its capital stock, and "to enter into contracts with corporations of this or any other state for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property." The plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership, or an individual engaged in manufactures, sell or lease all its property to another corporation. *Ardesco Oil Co. v. North American Oil, etc., Co.*, 66 Pa. St. 375; *Treadwell v. Manufacturing Co.*, 7 Gray, 393. But the purpose of its incorporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment and was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steam-boat company, as a carrier of passengers, owes to the public, independently of possessing any right of eminent domain. The public nature of that duty was not affected by the fact that it was to be performed by means of cars constructed and of patent-rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a *quasi* public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. *Pickard v. Car Co.*, 117 U. S. 34, 6 Sup. Ct. Rep. 635; *Railroad Co. v. Winans*, 17 How. 30, 39; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. Rep. 469.

The evident purpose of the legislature, in passing the statute of 1870, was to enable

the plaintiff the better to perform its duties to the public, by prolonging its existence, doubling its capital, and confirming, if not enlarging, its powers. An intention that it should immediately abdicate those powers, and cease to perform those duties, is so inconsistent with that purpose that it cannot be implied, without much clearer expressions of the legislative will looking towards that end than are to be found in this statute. The provision of this statute, by which the plaintiff is empowered to contract with other corporations "for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property," is fully satisfied by construing it as confirming the plaintiff's right to do as it had been doing, to "lease" or "hire" (which are equivalent words) to other corporations in the regular course of its business, and to "transfer" under such leasing or hiring its "railway cars," and "other personal property," either connected with the cars, or at least of the same general nature of tangible property. It can hardly be stretched to warrant the plaintiff in making to a single corporation an absolute transfer, or a long lease, of all that might be comprehended in the words "personal property" in their widest sense, including not only goods and chattels, but moneys, credits, and rights of action. In any view, it would be inconsistent alike with the main purpose of the statute, and with the uniform course of decision in this court, to construe these words as authorizing the plaintiff to deprive itself, either absolutely, or for a long period of time, of the right to exercise the franchise granted to it by the legislature for the accommodation of the public.

By the contract between these parties, as expressed in the indenture sued on, are transferred all cars already constructed, all existing contracts with railroad companies for running cars, all existing patent-rights under which other cars might be constructed, and all other personal property, moneys, credits, and rights of action of the plaintiff. But after the cars and the railroad contracts may have ceased to exist, and after all those patent-rights must have expired, the indenture is still to continue in force for the full term of 99 years, unless sooner terminated as therein provided. In addition to all this, the plaintiff covenants, in the most express and positive terms, never to "engage in the business of manufacturing, using, or hiring sleeping-cars" while the indenture remains in force. In short, the plaintiff not only parts with all its means of carrying on the business, and of performing the duty for which it had been chartered, of transporting passengers and making and letting cars to transport them in, but it undertakes to transfer, for 99 years, nearly co-extensive with the duration of its own corporate existence, the whole conduct of its business, and the performance of all its public duties, to another corporation; and to continue in existence, during that period, for no other purpose than that of receiving, from time to time, from the other corporation the stipulated rent or compensation, and of making dividends out of the moneys so received. (Considering

the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts, and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using, or hiring sleeping-cars; and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties. The necessary conclusion from these premises is that the contract sued on was unlawful and void, because it was beyond the powers conferred upon the plaintiff by the legislature, and because it involved an abandonment by the plaintiff of its duty to the public.

There is strong ground, also, for holding that the contract between the parties is void, because in unreasonable restraint of trade, and therefore contrary to public policy. Of the cases cited by the plaintiff upon this point, those which have most resemblance to the present case are quite distinguishable. A covenant by the assignor of letters patent for an invention, that he will not himself make, use, or sell the patented article, is undoubtedly valid, because the act of congress which creates the monopoly expressly authorizes it to be assigned as a whole. Rev. St. §§ 4884, 4898; Gayler v. Wilder, 10 How. 477, 494; Morse Co. v. Morse, 103 Mass. 73. But this plaintiff's transfer and covenant, as we have seen, cover much more than patent-rights, and are to continue in force long after the patent-rights assigned must have expired. Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is used. Fowle v. Park, 131 U. S. 88, 97, 9 Sup. Ct. Rep. 658; Vickery v. Welch, 19 Pick. 523, 527; Peabody v. Norfolk, 98 Mass. 452, 460. A contract of a carrier, whether an individual or a corporation, not to carry passengers or goods over a particular route, may be reasonable and valid. Pierce v. Fuller, 8 Mass. 223; Palmer v. Stebbins, 3 Pick. 188; Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. Rep. 363. But a contract by which a corporation, chartered to perform the duties of a common carrier, or any other duties to the public, agrees that it will not perform those duties at all, anywhere, for 99 years, is clearly unreasonable and void. Navigation Co. v. Winsor, 20 Wall. 64; Gibbs v. Gas Co., 130 U. S. 396, 408-410, 9 Sup. Ct. Rep. 553. This case strikingly illustrates several of the obvious considerations for holding contracts in restraint of trade to be unreasonable and void, as

compactly and forcibly stated by Mr. Justice MORTON in the leading case of *Alger v. Thatcher*: "They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves." "They prevent competition and enhance prices." "They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market." 19 Pick. 51, 54. But this objection, as applied to the facts of this case, so closely connects itself with the objection more distinctly pleaded, and already discussed at length, that it requires no further separate consideration. The contract sued on being clearly beyond the powers of the plaintiff corporation, it is unnecessary to determine whether it is also *ultra vires* of the defendant because, in order to bind either party, it must be within the corporate powers of both. *Thomas v. Railroad Co., Pennsylvania R. Co. v. St. Louis, etc., R. Co., and Oregon Ry., etc., Co. v. Oregonian Ry. Co.*, above cited.

It was argued in behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period. But this argument, though sustained by decisions in some of the states, finds no support in the judgments of this court. The passages cited by the plaintiff from *Railway Co. v. McCarthy*, 96 U. S. 258, 267, and *San Antonio v. Mehaffy*, Id. 312, 315, are no more than a passing remark that "the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice, or work a legal wrong," and a repetition, in substance, of the same remark, adding, "if such a result can be avoided."

In *Thomas v. Railroad Co.*, already cited, Mr. Justice MILLER, while admitting in general terms that "in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the property or the money so transferred," and that "the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it," yet in the same connection, and in the most emphatic words, said that in the case before the court, of a contract forbidden by public policy and beyond the powers of the defendant corporation, it was its legal duty, a duty both to its stockholders and to the public, to rescind and abandon the contract at the earliest moment, and the per-

formance of that duty, though delayed for several years, was a rightful act when done, and could give the other party no right of action; and that to hold otherwise would be "to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law the stronger is the claim to its enforcement by the courts." 101 U. S. 86.

In an earlier part of the same opinion, and again in *Oregon Ry., etc., Co. v. Oregonian Ry. Co.*, he referred with approval to the decision of the house of lords in *Iron Co. v. Riche*, L. R. 7 H. L. 653, by which, as he observed, "the broad doctrine was established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action." 101 U. S. 83; 130 U. S. 22, 9 Sup. Ct. Rep. 412.

In *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809, after one railroad corporation had purchased of two others their connecting railroads and their franchises, a receiver had been appointed of all its property, including the three railroads, and, under the direction of the court, and without objection by any of the parties interested, had for years administered the whole as a unit, and incurred expenses and issued certificates accordingly. It was held that the holders of bonds secured by mortgage of one of the purchased railroads could not, for want of affirmative legislative authority for the sale and purchase of that road, claim a priority of lien upon it as against the holders of certificates issued by the receiver for necessary and proper expenses of the whole line; and this court, as declared in its opinion delivered by Mr. Justice BLATCHFORD, rested this conclusion "on the principle that non-action on the part of the bondholders and their trustee, which allowed the court and the receivers to go on during the entire litigation, contracting debts in respect to the whole line operated as a unit, and administering the property as one, under circumstances where, as shown, it was and is impossible to separate the interests, as to expenditures and benefits, in respect to the matters now questioned, and where important rights have accrued on the faith of the unity of the interests, amounts to such acquiescence as should operate as an estoppel." 117 U. S. 468, 469, 6 Sup. Ct. Rep. 828. The court, in that case, in no way maintained any suit on the contract supposed to be unlawful; but simply refused to set it aside at the demand of parties, by reason of whose silence, and omission to seasonably interpose any objection, it had been acted upon as valid throughout a long course of judicial proceedings.

The distinction is clearly brought out in *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, above cited, in which it was argued, substantially as in the present case, that, although the contract of lease might be void, so that no action could originally have been maintained upon it, yet there had been for years such performance of it, in the use, possession, and control by the

defendants of the plaintiff's road and franchise, that they could not now be permitted to repudiate or abandon it; and that the case came within that class in which it had been held that, where a contract has been so far executed that property has passed and rights have been acquired under it, the courts will not disturb the possession of such property, or compel restitution of money received under such a contract. In answering that objection, Mr. Justice MILLER, speaking for the court, said: "Undoubtedly there are such decisions in courts of high authority, and there is such a principle, very sound in its application to appropriate cases. But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." And whether, in the case then before the court, the lessee might be liable to the lessor, as on a *quantum meruit*, for the use of its road, was not decided, because not presented. 118 U. S. 316-318, 6 Sup. Ct. Rep. 1106, 1107.

In *Salt Lake City v. Hollister*, above cited, it was said that, in cases of contracts upon which corporations could not be sued because they were *ultra vires*, "the courts have gone a long way to enable parties, who had parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to the plaintiff's use." 118 U. S. 263, 6 Sup. Ct. Rep. 1059. The true ground of relief in such cases is clearly shown in a line of opinions, two of which were cited by Mr. Justice MILLER in support of the proposition just quoted, in which municipal corporations, having received money or property, under contracts so far beyond their powers as not to be capable of being enforced or sued on according to their terms, have been held, while not liable to pay according to the contracts, to be bound to account for the money or property which they had received.

Thus, in *Hitchcock v. Galveston*, 96 U. S. 341, 350, where a city was sued for damages for putting an end to a contract with the plaintiffs for the improvement of its sidewalks, the only invalid part of which was its promise to pay in bonds, which it was beyond its powers to issue, it was decided that the invalidity of that promise was no reason why the city should not pay for the benefits which it had received from the plaintiffs' performance of the contract. Mr. Justice STRONG, in behalf of the court, saying: "It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds, because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all."

So in *Louisiana v. Wood*, 102 U. S. 294,

299, a city, which had received money for bonds issued by it without authority and at an illegal rate of interest and purchased by the plaintiff, was held liable, not on any contract of purchase, nor on any express contract whatever, but on a contract implied from its receipt of the money, Chief Justice WAITE saying: "There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to-wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other."

Again, in *Parkersburg v. Brown*, 106 U. S. 487, 503, 1 Sup. Ct. Rep. 442, where individuals, in consideration of bonds issued to them by a city for a purpose beyond its powers, executed to the city a trust-deed, in the nature of a mortgage, to secure the payment of the bonds and interest, it was held that the bonds could not be enforced against the city, but that the mortgagors had a right to reclaim the property and to demand an account of the city; and Mr. Justice BLATCHFORD, in delivering judgment, said: "The enforcement of such right is not in affirmance of the illegal contract, but in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. There was no illegality in the mere putting of the property by the O'Briens [the mortgagors] in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case, the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received." The case of *Chapman v. Douglas Co.*, in which the opinion was delivered by Mr. Justice MATTHEWS, is to the same effect. 107 U. S. 348, 355, 2 Sup. Ct. Rep. 62 et seq. In *Pittsburgh, etc., R. Co. v. Keokuk & H. Bridge Co.* it was stated, as the result of the previous cases in this court, that "a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of." 131 U. S. 371, 389, 9 Sup. Ct. Rep. 776.

The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as

follows: A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities, which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws. The doctrine of the common law, by which a tenant of real estate is estopped to deny his landlord's title, has never been considered by this court as applicable to leases by railroad corporations of their roads and franchises. It certainly has no bearing upon the question whether this defendant may set up that the lease sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other property transferred, the inalienable franchise of the plaintiff, is unlawful and void, for want of legal capacity in the plaintiff to make it. A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract. The ground and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice MILLER in a passage already quoted, where he said that the rule "stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;" and

that, "where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 317, 6 Sup. Ct. Rep. 1106, 1107. Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not

presented by this record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for. Judgment affirmed.

Mr. Justice BROWN, not having been a member of the court when this case was argued, took no part in its decision.

STEAM NAV. CO. v. WEED et al.

(17 Barb. 378. Supreme Court of New York. 1853.)

This was an appeal from a judgment in favor of the defendants rendered on the report of a referee. The plaintiffs were a foreign corporation duly organized under the laws of Connecticut, doing business in that state, and also engaged in the transportation business in the state of New York, on the Hudson river, between Albany and New York. They were authorized by their charter to transport freight and passengers and to tow vessels by the power of steam, and to transact other business incident thereto. And there was a proviso that nothing contained in that act should be construed to authorize or empower such corporation to use its funds for banking transactions. The plaintiffs' line on the Hudson river was called the "Swiftsure Line." The business of the plaintiffs was transacted at Albany, at the office of the Steam Navigation Company, by Van Santvoord & Co. The defendants were partners, residing in the city of Buffalo, and had, previous to the transaction in question, forwarded large amounts of property to Van Santvoord & Co., to be transported to New York, which was forwarded by the plaintiffs' line. Such business was transacted exclusively by the plaintiffs and for their benefit. On the 7th of October, 1851, the defendants sent the following letter to Messrs. Chipman & Savage of Albany:

"Buffalo, October 7, 1851. Messrs. Chipman & Savage—Gents: When your Mr. Savage left here yesterday we promised to remit you \$1,000 today, and we had the promise of it this morning, where we were sure, as we thought, but have been disappointed; but we shall surely have it to-morrow and if you are short, as we suppose you will depend on this, you must go to Van Santvoord & Co. and they must lend you \$1,000 for our acc't. They can and must do it. We have done very large business with them, since we have been in Buffalo, and have not asked a favor before. We are sorry to disappoint you, but our friends Van Santvoord & Co. must help us and you this time. Truly yours, Elias Weed & Co."

Chipman carried this letter to Van Santvoord & Co., who, upon the faith thereof, advanced the \$1,000, by giving him a check therefor, on which he drew the money. The check was in the words and figures following:

"Office of the Swiftsure Line Freight Boats, Albany, Oct. 8, 1851. Commercial Bank of Albany, Pay to the order of Louis L. Scovel one thousand dollars. \$1,000. Van Santvoord & Co., Agents." Endorsed: "Louis L. Scovel."

The check was drawn upon and paid out of the plaintiff's funds, and Chipman advised the defendants that he had got the money up-

on the letter. This action was brought to recover for the money thus loaned.

On the trial the plaintiff's counsel offered to show that the making of advances and temporary loans for the accommodation of customers, was ordinarily incident to the transportation business generally, at Albany. This evidence was objected to as immaterial, and excluded. The referee decided, 1. That the money loaned was, in law, loaned by the plaintiff, and that the action was properly brought in its corporate name. 2. That the plaintiff had no right or power to loan money, or to maintain an action therefor, if loaned, in a matter in no wise incidental to, or arising out of, the purposes for which the corporation was created. And the referee held that the loan in this case, as well as the promise to pay, was a nullity; and that the plaintiff could not recover for money lent and advanced.

PARKER, J. I am inclined to the opinion that the referee erred in not permitting the plaintiff to show that the making of advances and temporary loans, for the accommodation of customers, was incidental to the transportation business generally, at Albany. If it tended to prove that the loan in question was incidental to the purposes for which the corporation was created, it was certainly admissible. But without deciding this question, I think it is better to determine this cause upon the facts which were in evidence, as they presented questions of great importance which will probably be again raised, if a new trial should be awarded.

Those questions are, whether the transaction was an act of banking, and a violation of the restraining act, and whether the defendants were at liberty to set up as a defense that the plaintiff had no right, under its charter, to make the loan.

I suppose the referee was governed in his decision by what was said by Savage, C. J., in *Beach v. Bank*, 3 Wend. 583, which was as follows: "Incorporated companies having no powers but such as are granted, or necessarily incident, a company having no such power, express or implied, has no capacity to lend money, and of course, cannot sue for it." The observations of the judge on this subject were prefaced with the remark "that, perhaps, that point should not now be discussed, as that ground is not relied on in the answer," and the cause was decided on other grounds. What was said on this point, must therefore be regarded as a mere dictum, and not as authority. There are other cases, however, in which it seems to be assumed that the law is as stated by Chief Justice Savage, though I find none in which it has been so adjudged. There was no good reason for supposing that the making of the loan in this case was a violation of the restraining act. 1 Rev. St. (3d Ed.)

593. It was not the discounting of a note. It was a loan of money for a single day, without taking any note or security; and, for aught that appears, without charge or intention to charge for its use. It was a single, isolated casual transaction, not for the purpose of gain, but to oblige a customer. It was not an act of banking. *People v. Brewster*, 4 Wend. 498. The question then was, not whether the loan was a violation of an express statute, but whether the corporation had power, express or implied, to make it. In other words, it was not a question of illegality, but of authority. I think, in such cases, the defendant who has received the money is not at liberty to question the authority of the lender.

In *Bank v. North*, 4 Johns. Ch. 370, where it was alleged that a foreign corporation had exceeded its power in making a loan, Chancellor Kent said: "It would rather belong to the government of Pennsylvania to exact a forfeiture of their charter, than for this court, in this collateral way, to decide a question of misuser, by setting aside a just and bona fide contract." In *State v. Woram*, 6 Hill, 37, the defendant's counsel contended that the Staten Island Whaling Company had no power, by its charter, to purchase or deal in state bonds; and Bronson, J., in delivering the opinion of the court, said: "I agree with the counsel for the defendants, that this company had no authority to purchase or deal in these bonds. But since the decision in *Moss v. Mining Co.*, 5 Hill, 137, I do not see that a corporation can ever avoid its obligation, on the ground that it was given for property which the corporation was not authorized to purchase. And if the company was bound, I see no reason why the defendants should not also be bound by the contract."

The case of *Chester Glass Co. v. Dewey*, 16 Mass. 102, goes much further than that under consideration. The plaintiffs claimed to recover for goods sold and delivered to the defendant. The defendant objected that the plaintiffs were prohibited by law to carry on such trade. Parker, C. J., said: "The defendant cannot refuse payment on this ground; but the legislature may enforce the prohibition by causing the charter to be revoked, when they shall determine that it has been abused."

In *Steamboat Co. v. McCutcheon*, 13 Pa. St. 13, a foreign corporation had taken a lease of real estate without authority in its charter, and, in an action for the rent, the court enforced the contract. Coulter, J., said: "Some things lie too deep in the common sense and common honesty of mankind to require either argument or authority to support them; and this, I think, is one of them."

I think the true rule on this subject is laid down by Duer, J., in *Palmer v. Lawrence*, 3 Sandf. 170, as follows: "A defendant who

has contracted with a corporation *de facto*, is never permitted to allege any defect in its organization, as affecting its capacity to contract or sue; but all such objections, if valid, are only available on behalf of the sovereign power of the state;" and he added, in the same opinion: "It would be in the highest degree inequitable and unjust to permit him to rescind a contract, the fruits of which he retains and can never be compelled to restore."

When it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization, or of powers conferred by the charter, a party who has had the benefit of the contract cannot be permitted to question its validity, in an action founded upon it. Even where there has been a general restriction in the charter, an isolated case of excess beyond the limit prescribed, has been protected and the contract held binding, when the general practice of the corporation had been in strict conformity with its charter. Thus in *Potter v. Bank*, 5 Hill, 490, where the charter of a bank provided that its operations of discount and deposit should not be carried on elsewhere than in the village of Ithaca, and the cashier discounted a note at the city of New York, for the purpose of securing a demand due the bank, it was held to be a valid note, and that the restriction in the charter related only to the customary and permanent business operations of the bank; not to an isolated transaction, like the one in question.

The same doctrine was held in *Suydam v. Banking Co.*, 5 Hill, 491, note, where the loan was made in the city of New York, and the charter of the defendants provided that their banking operations should be carried on in the city of Jersey. In that case the loan was not made for the purpose of receiving a debt due to the banking company, and the decision was affirmed by the late court for the correction of errors. *Suydam v. Banking Co.*, 6 Hill, 217.

In *the Sacket's Harbor Bank v. Lewis County Bank*, 11 Barb. 213, there was a provision in the charter of each bank that it should not, directly or indirectly, deal or trade in buying or selling any goods, wares and merchandise or commodities whatsoever, unless in selling the same when truly pledged by way of security for debts due the corporation. It appeared that the plaintiff, in order to secure a debt, had taken a quantity of butter, to the amount of \$10,000, which it subsequently sold to the defendant. The defendant, for the purpose of raising money, agreed to take the butter at its market price, and also money of the plaintiff, and repay it, at a future day, the amount of the money loaned and the price of the butter. In an action to recover on such contract the defendant set up its incapacity to purchase the butter from the plaintiff. But, it appear-

ing to be an isolated transaction, it was held valid, and a nonsuit, which had been granted, was set aside.

I am happy to come to the conclusion that the law will not sustain this most unconscionable defense. It ill becomes the defendants to borrow from the plaintiff \$1,000 for a single day, to relieve their immediate necessities, and then to turn around and say, "I will not return you this money, because you had no power, by your charter, to lend it." Let them first restore the money,

and then it will be time enough for them to discuss with the sovereign power of the state of Connecticut the extent of the plaintiff's chartered privileges. We shall lose our respect for the law, when it so far loses its character for justice as to sanction the defense here attempted.

"Lex plus laudatur, quando ratione probatur."

The judgment rendered on the report of the referee must be reversed, and a new trial awarded.

PARISH v. WHEELER.

(22 N. Y. 494. 1860.)

Appeal from the supreme court. Action to recover the value of fourteen canal barges, of which the plaintiff claimed to be the owner, and which, he alleged, the defendant had converted to his own use. Upon the trial before a referee, these facts appeared: In 1845, the Northern Railroad Company was incorporated, to construct, maintain and operate a railroad from Ogdensburgh to Lake Champlain. Laws 1845, p. 351, c. 324. The terminus on the lake is at Rouse's Point. By the fourth section of its act of incorporation, the company was subjected to all the conditions and restrictions imposed upon the Attica and Buffalo Railroad Company, a corporation created by chapter 242, Laws 1836, p. 319. The fifteenth section of the latter act declares that the said corporation shall possess the general powers and be subject to the general liabilities and restrictions prescribed by such parts of the eighteenth chapter of the first part of the Revised Statutes as were not then repealed. In 1852, and prior to April, 1853, one James F. Church became the purchaser in his own name of the fourteen barges in question, and had them registered in his name, and used and employed them up to August 30, 1854, in a transportation line from Rouse's Point to the city of New York, known as "Church's Ogdensburgh Railroad Line." The money for the payment of these boats was furnished to Church by the railroad company, with directions to purchase the barges in his own name; and at the time of such purchase, and during all the time Church ran and used the barges, he was the station agent of the railroad company and in its employ, and it received the profits and defrayed the losses of the transportation line. Prior to March, 1852, one Edwin C. French, who was the station agent of the railroad company at Ogdensburgh, and a British subject, purchased the British steamer Boston, at Quebec, and gave a mortgage upon her, to secure his drafts for the amount of the purchase money, payable at different times, and drawn by him on the corporation, accepted by it, and indorsed by Hiram Horton, one of its directors. The conveyance of the steamer was made to French. She was registered and enrolled in his name as owner in the Canada offices, and French made and delivered to the corporation a declaration that he held the property in trust for it. The corporation was to have all the profits from running the steamboat, and was to sustain all the losses incident thereto. On the 15th December, 1851, the corporation executed a mortgage to secure its bonds, issued and about to be issued, to the defendant and two other persons, as trustees, which were known as the second issue of bonds. The mortgage granted and conveyed all the real and personal property then owned or there-

after to be acquired. The corporation, on the 7th of April, 1854, made another mortgage to the trustees mentioned in the mortgage of December 15, 1851, reciting that, since the execution thereof, the company had acquired other lands and personal estate than such as was held and owned by it at the time of such conveyance, and the said company, in order that all the real and personal estate in the first mentioned mortgage and in the present indenture mentioned might be more fully vested in the trustees, thereby granted and conveyed to them "all and singular the railway, rails, bridges, fences, privileges, rights and real estate, buildings and fixtures, of every kind and description, now owned by said company, or which shall hereafter be owned by them, and all the tolls, incomes, issues and profits to be had from the same, and all the land used and occupied for railway depots or stations, with all the buildings standing or hereafter to be erected thereon, and all real estate now owned or hereafter to be acquired by the said company, together with all the locomotives, engines and tenders, passenger cars and freight cars and all other cars, and shops, tools and machinery and all other personal property whatsoever of every name and nature now owned or hereafter to be acquired by the said company, and in any way belonging or appertaining to the said railroad of said company, now constructed or hereafter to be constructed." In August, 1854, the company, wishing to obtain a loan of money to retire the last draft drawn by French in payment of the steamboat Boston, applied to the plaintiff for a loan of money for that purpose, amounting to near the sum of \$6,000. The plaintiff had just recovered a judgment against the company for near the sum of \$9,000, and had an unsettled claim against it amounting to over \$3,000 which had been submitted to a Mr. Parrott for arbitrament and adjustment. An agreement was entered into between the plaintiff and the company, dated August 4, 1854; which recited the recovery of said judgment, and that the parties had agreed to compromise and settle the same for the sum of \$8,736.61, with interest from May 24, 1854, and that the sum was to be paid on or before the 1st of June then next; reciting also, that the plaintiff had lent to the company the sum of \$5,396.86 for the purpose of retiring said draft, and for the purpose of making the final payment on the purchase of said steamboat by French, reciting, also, the claims of the plaintiff against the company then in the process of adjustment by Parrott, and that, for the purpose of securing the payment of said sums, with interest, the company agreed to procure and induce French to convey to one Dickinson the said steamboat Boston, and also to procure from Church a conveyance of the fourteen canal boats. It was further provided that said sums were to be paid on the 1st of June then next, and that

if, in the meantime, any debt should become due by the plaintiff to the company, it might, at his election, be deducted from the sums due to him. The plaintiff agreed, after the conveyance of said steamer should have been made and perfected to Dickinson, to procure from him a charter party to Lee, the president of the company, until the 1st of June then next, for the sum of \$1,500, to be paid on the 15th of May then next; the charterer was to insure the steamer in the sum of \$10,000, in the name and for the use of Dickinson. The plaintiff further agreed that, after the canal boats should have been conveyed to him, he would give a charter party to said Lee for the same until the 1st of June then next, for the sum of \$1,000, payable on or before the 15th of May then next—the charterer to pay on demand the premium for insuring the same in the sum of \$5,000. And the company covenanted and agreed with the plaintiff that the said steamer and canal boats were, and should be, at the time of the conveyance thereof as aforesaid, free, clear and discharged of and from all incumbrances, liens, penalties and forfeitures, and should so remain and continue until the execution of the said charter. If the sums due to the plaintiff were paid on or before the 1st of June then next, he agreed to procure a conveyance from Dickinson of the steamer, and would himself convey the canal boats to such persons as the company should appoint. And it was further agreed that, if the moneys due to the plaintiff were not paid in full by the 1st day of June then next, it might be lawful for said Dickinson to sell said steamer, and for the plaintiff to sell said canal boats, or so much or so many of them as might be necessary to pay him all moneys due to him thereon; and any surplus of money remaining, or any of said property not sold, should be returned to said company or its appointee. On the 30th of August, 1854, French conveyed the steamer to Dickinson, and Church conveyed the canal boats to the plaintiff. The company having failed to pay the interest due upon its bonds on the 1st day of October, 1854, on the 6th of that month made and executed to the then trustees, Eldridge, Wheeler and Howe, a surrender, transfer and conveyance "of all the property, estate, rights and privileges, lands, tenements and franchises conveyed in mortgage to them, as trustees, by said two indentures of mortgage." This surrender was accepted by the trustees, Eldridge and Howe, on the same day. When it was accepted by the defendant Wheeler did not appear.

The referee, in addition to those stated, found the following facts: Before such acceptance, and before the trustees took possession of the boats or assumed to control them, but after they had taken possession of the railroad, Mr. Lee, the president of the company, informed Eldridge, who was then the managing trustee, of the charter party

executed by Parish to him, and told him that he had no objections to the trustees running the boats, provided they would assume all the liabilities and responsibilities imposed upon Lee by the charter party; that, otherwise, he should surrender the boats to the plaintiff. This was agreed to by Eldridge, and the boats were subsequently run by Church under the direction of the trustees.

Mr. Hoyle, formerly a superintendent of the railroad, was the agent of the trustees. He and Eldridge were both directors of the railroad company, and both were aware of the agreement with the plaintiff of the 4th of August, and the conveyance of the boats to him; but it did not appear that they knew of the charter party executed to Mr. Lee, individually, until apprised thereof by him. Hoyle, when informed of the arrangement with Eldridge above mentioned, made no objection. There was no claim made by the trustees, at the time of the surrender or previously, to the property in question. Some six months after the surrender, the defendant informed Mr. Lee, the president of the railroad company, that the language of the mortgage of the 7th April was dictated by him, or interlined by him, so as to embrace the property. After the deed of surrender, the trustees claimed the boats under the mortgage and deed aforesaid; they were run by Church under their direction; and, through Hoyle their agent, they forbid their delivery by Church to the plaintiff. On the 23d of October, 1855, a demand was made by the plaintiff of the defendant for the boats, which was refused, upon the alleged ground that the boats were in possession of the trustees, and that the defendant, as one of them, had no authority to make the delivery. The cash value of the boats, on the day of this demand, was \$600 each.

The steamboat Boston was conveyed to Davenport Dickinson, in September, 1854, in pursuance of the agreement of the 4th of August above mentioned. She was a British bottom. It was necessary that she should be registered as owned by a British subject; and, for this reason, the conveyance was to Dickinson instead of the plaintiff. The steamer was subsequently run, as previously, in connection with the railroad line, under a charter-party to Mr. Lee, as provided in the agreement of August 4th above mentioned.

At the time of the conveyance of the Boston, the plaintiff paid to Horton the amount of the last draft given to the builders as aforesaid, with interest and fees of protest—Horton having paid the same as indorser. The steamboat was then formally delivered by Horton, as the agent of French, to Dickinson, by going on board publicly, and in presence of the captain making such delivery with the keys, &c., of the entire vessel. Parish, the plaintiff, was apprised of the history of the steamboat prior to August, 1854: he was also informed that French, who was a British subject, had purchased the boat and

held the title, and that French and Horton were liable for a part of the purchase money. Shortly after the deed of surrender, the steamer was run in connection with the railroad line, as formerly, under the direction of the trustees. After the charter party expired, in June, 1855, Dickinson, with the assent of the plaintiff, attempted to get possession of the steamer, with a view to a sale in accordance with the agreement of the 4th of August. This was refused by the trustees and those who acted under them. The boat was followed to Canada by the agent of Dickinson, and there replevied by the latter and advertised for sale at Prescott, in Canada, on the 23d October, 1855. An arrangement was then made with the captain of the boat that she should be delivered at Prescott, after the delivery of her cargo. The steamer, however, ran into Ogdensburgh, and the captain and station agent of the trustees refused to surrender possession. She was then sold, on the 23d October, 1855 (while lying at the wharf in Ogdensburgh), at Prescott, one and a half miles distant, but in sight, to one Crane, as the highest bidder, for \$11,500. Afterwards an arrangement was made between the trustees and the plaintiff, through the counsel of the former, that Parish should take possession of the boat on his own responsibility as a trespasser, should the title of the steamer be established in the trustees. The crew refused to leave or surrender the vessel unless their wages were paid, for which they had a claim on the boat, and threatened violence if any attempt should be made to take the steamer away from them without such payment. The agent of Dickinson to procure possession was compelled to pay such wages, amounting, exclusive of the wages of the captain, to \$1,043.35. About \$388.56 was also paid for legal expenses, traveling charges and expenses of removing the boat and guarding the same in the procuring possession and sale thereof, and \$100 was paid to Dickinson to induce him to execute the papers necessary to vest the title in the purchaser at auction as aforesaid—making an aggregate of \$1,522.41. The trustees caused the mortgage of the 7th of April aforesaid to be foreclosed. A decree was obtained, and in pursuance thereof the referee advertised for sale a claim against the plaintiff for taking and converting the steamer, her apparel and furniture, arising out of the proceedings aforesaid.

The referee also found that the account between the plaintiff and the railroad company was only settled up to the 1st of June, 1855, of the matters mentioned in the said agreement of the 4th August; that the balance due from Parish for the use of cars for filling in a certain tract in the said agreement referred to was \$2,611.61, and the amount due from the company to the plaintiff under the said agreement was \$12,642.83, after deducting all payments by means of the drafts and notes above stated and all other payments,

but exclusive of the said sum of \$2,611.61, which was not deducted or applied on the debt due from the company to the plaintiff. One of the items to the credit of the plaintiff, upon that settlement, was the sum of \$5,396.86, advanced to the company to enable the final payment to be made upon the purchase by French of the steamboat Boston, as set forth in the agreement. Another item was for the filling in between Patterson and Elizabeth streets, mentioned in the agreement, and which was embraced in the award of Parrott above mentioned.

The amount allowed on the settlement for the last item exceeded the award some \$600, in consequence of the arbitrator assuming a wrong level in his computation of the quantity of earth filled in; and this error was corrected upon the settlement. The settlement was made in good faith, and the balance above mentioned, found in favor of the respective parties was correct as between them.

The referee found, as conclusions of law, 1st. That the plaintiff was, at the time when, &c., as stated in said complaint, the owner of the boats, or barges, therein mentioned; 2d. That the defendant wrongfully converted said property, as in said complaint is also alleged; 3d. That the plaintiff's damages, by means of the premises, were \$8,400, for which sum, with interest from the 23d of October, 1855, he ordered judgment.

Upon appeal, the judgment was reversed at general term in the fourth district, and a new trial was ordered. The plaintiff appealed to this court, stipulating for judgment absolute against him if the judgment should be affirmed. The cause was submitted on printed arguments.

COMSTOCK, C. J. The mortgage given by the company, dated the 7th of April, 1854, to secure its issue of bonds, was upon its real estate, railroad, bridges, ferries, &c., locomotives, engines, cars, tenders, shops, tools and machinery, and "all other personal property whatsoever in any way belonging or appertaining to the said railroad of the said company." The inclination of my mind is, that the canal boats in question were not included in this description. The boats were used and run in connection with the road, forming that connection at the point where the road terminated. They were, in a general sense, accessory to the business of the road; but I very much doubt, whether they belonged or appertained to it, according to any interpretation which we can place upon those terms.

Assuming this to be so, I think nevertheless, that the trustees to whom the mortgage was given may be looked upon as representing the rights of the railroad company, for any purpose material to this case. In October, 1855, the company was in default in respect to the interest due upon the bonds secured by the mortgage, and they executed

to the trustees a deed of surrender of all the mortgaged property, whether real or personal. This deed certainly conveyed nothing which the mortgage did not embrace; but, under it, the trustees or mortgagees took possession of and controlled these boats, and this was done with the consent of the company, through its president. After this arrangement, the boats were run by the agent, Church, under the direction of the trustees, and they were held and used in this manner, at the time when it is alleged that the defendant refused to deliver them up to the plaintiff. These facts are mentioned, not for the purpose of showing a title in the trustees to this property, under their mortgage, or under the deed of surrender; but to show that the defendant, as a trustee, had a lawful possession under the railroad company, so as to be irresponsible to the plaintiff, provided the corporation itself would be irresponsible, if it had been in possession, at the time of the demand, and had refused to deliver up the property. It is not material, to determine the precise relations between the company and the trustees; it being enough, if the latter had the property in their hands, by the consent and under an authority derived from the company. They may be regarded as bailees, without title, and so accountable for the use of the boats; or we may call them mere agents. In any aspect, so far as mere possession, or the duty of giving up that possession to the plaintiff, are concerned, they stood in the shoes of the company. We must, therefore, inquire into the relations between the plaintiff and the company, for the purpose of ascertaining whether the plaintiff had any title or interest, at the time of the alleged conversion. He must recover upon his title, if he can recover at all, because he never had an actual possession, and because he only complains that the defendant refused to deliver the possession to him.

Proceeding, then, to that inquiry, the plaintiff had a security upon these boats, in the nature of a mortgage; they were conveyed to him on the 30th August, 1854, by Church, on the procurement of the company, and pursuant to a previous agreement between the plaintiff and the company, dated the 4th of August, 1854, by which he agreed to reconvey to them or their appointee, on payment of the sums and liabilities which the agreement specified. It needs no argument, to prove that this arrangement constituted a mere mortgage, and that the interest of the plaintiff would cease, when his claims were satisfied. Much has been said on both sides, about the supposed illegality of the original purchase of these boats by the company, through and in the name of its agent, Church. It has been urged, that the purchase was beyond the powers of the company; that the transaction was consequently illegal, and that the illegality is not cured, by using the name of an individual in the

purchase, or by the intention that he should hold the title; and it is also urged, that as the corporation, for the reason suggested, could not possibly acquire the title, it could not convey or mortgage, or procure it to be conveyed or mortgaged, to the plaintiff.

I take the view most favorable to the plaintiff, on this question, and concede, that the conveyance to him was effectual and is to be maintained according to the exact terms and conditions on which it was given; nor have I the slightest doubt that this is the correct view. Much has been loosely and inconsiderately said, about the incapacity of corporations to acquire property, outside of the precise purposes specified in their charters. To all propositions of this nature, the short answer is, that corporations sometimes do actually purchase and hold property, under that condition. If a railroad company buys and pays for a horse or a boat, and the vendor delivers the chattel, the corporation will own it and can sell or mortgage it, although its charter cannot be pleaded in strict justification of the purchase. This is a conclusion of common sense and common honesty, which no legal subtlety or refinement can refute. It cannot be true, that the vendor of a chattel, who sells and delivers it to a corporation, and receives his pay for it, can allege that he has never sold it, on the mere ground that it was unlawful for the corporation to buy it; nor can it be true, that the title is lapsed or lost, on any such ground. These boats, therefore, belonged either to the railroad company or to Church, their agent, in whose name they were purchased; and it is not material to inquire which was the owner, according to the forms of that transaction, because the transfer to the plaintiff was the act of both of them.

Assuming then, that the plaintiff, in August, 1854, took a valid security upon the boats, in the nature of a mortgage, the material inquiry is, whether his claims, secured by the transfer, were satisfied, at the time of the alleged refusal to give up the property; or, if not satisfied, then, whether the referee erred in awarding to the plaintiff damages in the sum of \$8,400—that being the value of the boats, at the time of the alleged conversion.

In pursuing this inquiry, it becomes necessary to notice the history of the steamboat Boston, which the plaintiff also held as security for the same demand, in the manner presently to be mentioned. It appears, that, in or before March, 1852, one French, a British subject, and the agent of the company at Ogdensburgh purchased the British vessel Boston, for the use of the company; he paid part of the purchase-money, and for the balance, drew his four drafts on the company, payable at different times, which were accepted by the company and indorsed by one Horton. The vessel, upon this purchase, was transferred to French, and was

registered in his name; it was designed, however, for the service of the company, on the River St. Lawrence and Lake Ontario, and it was used accordingly. The said drafts would all mature prior to July, 1854, and the company was bound to pay them according to its acceptances; they had reimbursed to French the money which he paid down on the purchase. The boat was, in fact, bought wholly for the benefit of the company; and French executed a declaration of trust, in its favor accordingly.

In the agreement of August 4th, 1854, between the plaintiff and the company, which has been mentioned in connection with the canal boats, it was further stipulated, that the company would procure from French a conveyance of the steamboat Boston to one Dickinson of Canada, to be held by the latter also as a security for the same liabilities specified in that agreement, and to be reconveyed on the payment thereof. The vessel being a British bottom, the plaintiff could not take the transfer directly to himself. The agreement, therefore, appointed Dickinson to take such transfer, and it was made to him accordingly, in September, 1854. He was, however, a mere trustee of the plaintiff, having no interest in the transaction, which, like that concerning the canal boats, was designed simply to create a security to the plaintiff for the claims and liabilities which the agreement enumerated. That security, it will now be seen, covered both the canal-boats and the steamer Boston.

Looking now at the state of the accounts, for the purpose of ascertaining the extent of the plaintiff's demands, if he had any, at the time of the alleged conversion of the boats, there are only two items which I propose to notice. The defendant denies that the plaintiff should be credited with the sum of \$5,396.86, advanced by him to pay the last of the drafts drawn for the original purchase-money of the Boston, and which the company had accepted. This is one of the items specified in and intended to be secured by the said agreement of August 4th, 1854, and the plaintiff made the advance on the faith of that agreement, and of the transfer of the steamer and canal boats; and he made it at the time of the transfer, in September following. In other words, it was a present advance, secured by the mortgage. This item of indebtedness the defendant proposes to reject, on the ground that the purchase of the steamer by the corporation was ultra vires and illegal; and he insists, that the plaintiff, knowing all the facts, made this advance in pursuance and consummation of that purchase. That the plaintiff knew all the facts is undeniable, and the referee has, in substance, so found. It should be further stated, that Horton, the indorser of the draft in question, had taken it up, and that the plaintiff paid the money to him.

I am clearly of opinion, that the position of the defendant, in respect to this item of the

account, cannot be maintained. Conceding that the company, being simply a railroad corporation, ought not, according to its charter, to purchase and own a steamboat, it nevertheless did purchase one, in the name of another person, and it took the possession and had the use of the property. Save and except such questions as might arise under the navigation laws, the company became the owner of the boat, and its title was never questioned. The vendor never repudiated the sale on any ground; and I think it would be very absurd, to say that the corporation itself, or the defendant, standing in its situation, can repudiate the transaction, the benefit of which was received in the manner stated. In my judgment when a sale of a chattel, made to a corporation, is executed and complete in all things, except the performance of its own promise to pay the price, a plea that it ought not to have made the purchase, is not to be entertained, especially, so long as it retains, and insists upon retaining, all the benefit of the contract.

In this case, the chattel was not only delivered and used by the purchaser, but the vendor received all his pay for it, so that reclamation on his part, upon any ground, was out of his power. The draft now in question represented the unpaid balance of the purchase-money; it was paid by Horton, who had indorsed it for the accommodation of the company. It would be strange, if the company could not lawfully protect and reimburse their own indorser, and equally strange, if, after requesting the plaintiff to make the payment for them, they can be allowed to deny that they are indebted to him on that account. If the purchase of the steamboat involved any breach of the public law, the corporation alone was guilty, because all the restraints of the statute or the common law, affecting the transaction, are imposed upon it alone. There is certainly no moral turpitude, if a railroad corporation buys a steamboat or builds a church; nor is there any legal turpitude. It may be an excess of power, or a private breach of trust in respect to its stockholders; the latter may complain, or the state may interpose; but corporations themselves, like individuals, in dealing with other parties, must live up to the rules of common honesty. My opinion is, that the referee properly allowed the advance which has been here considered, although my reasons for this conclusion are not precisely those which appear to have influenced him.

The other item which I propose to consider belongs on the debtor side of the plaintiff's accounts. The claims and liabilities mentioned in the agreement of August 4th, 1854, were all to be satisfied by the 1st day of June, 1855. The same agreement provided, that, on the transfer of the steamboat to Dickinson and of the canal-boats to the plaintiff, charter-parties should be executed

back to Lee, the president of the railroad company, to last until the said day of payment should arrive; and that, if the demands were paid according to the agreement, the steamboat was to be reconveyed by Dickinson, and the canal-boats, by the plaintiff, to such person or persons as the company should direct. In default of payment on the day specified, the property was authorized to be sold at public auction. The company made default, and the steamboat was sold at auction, pursuant to the power thus given, on the 23d of October, 1855, for the sum of \$11,500. This sum, the plaintiff insists, is not to be allowed in payment or reduction of his claims under the security in question, assigning the alleged illegality of the agreement of August 4th, 1854, as the only reason for this pretension. The learned referee appears to have sustained this position, in his opinion, which is before us, he assumes that the agreement was illegal; that the parties thereto, being the corporation and the plaintiff, were in *pari delicto*; and he then observes, that the law will aid neither party. In this branch of the case, he considered that the defendant was the actor, in seeking to enforce the application of the moneys raised at the sale, and that the plaintiff being in possession of the fund, the maxim, "*potior est conditio defendentis*," applied. I incline to think, with the supreme court, that this reasoning, if it has any just foundation, is fatal to the plaintiff's entire case. The supposed illegal agreement of August 4th, 1854, and the transfers of the steamer and canal-boats, made in pursuance thereof, are parts of one transaction, and, together, they constituted the mortgage which is the plaintiff's only title to the property in controversy. If the contract, therefore, was illegal, in such a sense, that the plaintiff, having sold a part of the mortgaged property, is not accountable for the proceeds, the same illegality, I apprehend, will prevent the enforcement of the contract in his favor, as to another part of the same property.

But I am constrained to reject all the arguments on both sides of this case, founded on the alleged illegality of any of the transactions involved. Contracts with corporations, made in excess of their powers, which are purely executory on both sides, and where no wrong will be done, if the parties are left in their previous situation, I am willing to agree, should not be enforced, because such contracts contemplate an unauthorized diversion of corporate funds, and, therefore, a breach of private trust. But the executed dealings of corporations must be allowed to stand, for and against both the parties, when the plainest rules of good faith so require.

On another occasion, I have said all that I desire to say on this general subject. *Bissell v. Railroad Co.*, 22 N. Y. 262.

The most unfavorable statement of the particular matter now in question is, that the

railroad corporation, in excess of the powers conferred by its charter, purchased and paid for a steamboat and several canal boats, that, being in the possession and use of the property in connection with its regular business, it mortgaged the same property to its creditor, the plaintiff, taking back charter-parties for a limited period, and also a stipulation for a reconveyance, if the debt should be paid at the time agreed on; that the plaintiff, taking the usual course in such cases, caused a part of the property to be sold, after a default had occurred, and received the proceeds of that sale, which nearly or quite satisfied the debt. In all this I can see nothing unlawful, except the want of legal power or right to buy the property. But it was actually bought, paid for and delivered, and, therefore, became a part of the estate and assets of the company; the company could sell or pledge it to a creditor, and could redeem the pledge by paying the debt.

In acquiring the ownership of such property, the corporation may have usurped a right not granted by its charter; but the acquisition was, nevertheless, a fact, which no legal refinement can deny. It was a fact, too, having all the legal relations and incidents of any other fact of ownership. I think, it will not be questioned, that an execution-creditor of the company could levy on this property and sell it for the satisfaction of his debt, and having thus obtained a satisfaction, I do not think that he could deny that he was paid, upon any theory of excess of corporate power, and levy again on other property. So, if the creditor, instead of proceeding to judgment and execution for his debt, takes a pledge or mortgage, and, by the exercise of the power of sale, obtains the cash for his demand, I do not see how he can raise the inquiry, whether the corporation-debtor violated the trust or duty which it owed to its shareholders, in the purchase of the chattels pledged or mortgaged. So long as no one else questions the title thus acquired, and the property is made productive in the satisfaction of the debt, it would be strange, if the creditor can, upon such ground, claim that the debt still exists. And such is, in effect, this case. The security of the plaintiff, as I have said, was in the nature of a mortgage; the stipulation to reconvey on payment of his claims, provided for nothing beyond the legal result of the transaction. The reconveyance, it is true, was to be made to the appointee of the corporation; but that clause, considered by itself, involved nothing illegal, or even *ultra vires*. The plaintiff actually sold a part of the property for the payment of his debt, and he received the money; no one but himself questions, or can question, his right to make the security available in that manner. He does not pretend or suggest that he cannot hold the money thus obtained; on the contrary, he insists upon retaining it against all the world; but, at the same time, claims that

his debt is neither paid nor reduced. Much has been said in the books (sometimes, I think, without reflection) about the powers of corporations and the consequences of exceeding those powers; but no authority can be found to justify the position of the plaintiff in respect to the matter here considered. I feel no hesitation in saying, that the sum of \$11,500, produced by the sale of the steamboat, pursuant to the power contained in the mortgage, must be applied toward the satisfaction of the plaintiff's demand.

It becomes unnecessary to examine further into the claims covered by the security. After charging the plaintiff with \$11,500, the parties still differ upon the question whether those claims were satisfied, at the time of the alleged conversion of the canal boats. It is conceded, however, that no such sum remained due, as the referee awarded to the plaintiff, by way of damages for that conversion. The utmost that is claimed to be due, after allowing that sum, is a balance ranging from \$1000 to \$3000, and I incline to think, without a special examination, however, that the smallest of these sums is nearest to the truth. The plaintiff recovered \$8,400, as the full value of the boats; this recovery, therefore, can only be sustained, on the ground that, if any sum, however small, was due, the legal measure of damages for the conversion of the property mortgaged was necessarily the full value of that property. From the case, and the opinion of the learned referee, I am not able to say, whether he proceeded on this ground, or on the ground that the debt still due, after rejecting the credit of \$11,500, exceeded the value of the boats, or whether his conclusion rested on both of these grounds. Allowing, as we do, that credit, the last mentioned ground becomes untenable; and it remains, therefore, only to inquire whether the other can be maintained.

It has already been observed, that the defendant and his co-trustees were in possession of the boats, either as mortgagees, or, if they were not included in the mortgage to them, then as bailees or agents of the company; their possession was, at all events, a lawful one, because it had the full sanction and authority of the company. It must follow, that any defence to this suit, whether legal or equitable, whether a full or a partial one, which the company might have, if they had converted the property, is available to the defendant. Could, then, entire damages, or, in other words, the full value of the property, be recovered against the railroad company? I think, this question must be answered in the negative.

In the common-law action of trover, the measure of damages, it is true, was usually the value of the property converted. If the suit was against a mere stranger, and parties other than the plaintiff had legal or equitable interests in the property, the sum recovered would be held by him, upon a trust

corresponding with those interests. A mortgagee, having the right of possession, before forfeiture, and the absolute legal title, afterwards, could sue in trover for the conversion of the chattel mortgaged, and, without regard to the amount of his debt, could recover the full value against a stranger guilty of such conversion. But the mortgagor, even after forfeiture, had an equitable right to redeem on payment of the debt. If, therefore, the mortgagee should, in such a case, recover the entire value, in this form of action, the fund, after satisfying the debt, would belong in equity to the mortgagor, and could be recovered by suit in equity, or in the equitable action for money had and received. And from this it necessarily results, that in trover by the mortgagee against the mortgagor, the damages should not exceed the amount of the debt; this is a conclusion which avoids a circuitry of remedies. If, in the legal action of trover, the mortgagee recovers a sum, as the value of the property, beyond the amount due to him, on principles of equity, he must refund to the mortgagor, if the equities of the latter have not been in any manner foreclosed or lost; but the law will attain the same result in a more direct manner, by adjusting the damages, in the first instance, according to the actual rights of the parties.

This would be so, if the law were administered according to the former system, under which the separation between legal and equitable rights and remedies was distinctly marked. It is more plainly so now, because, under the existing system of procedure, legal and equitable remedies are merged, and actions of the former class are subject to defences which belong to the latter. Thus, a mortgagee of chattels may, by action in the nature of trover, assert his legal right; but the mortgagor, or those claiming or holding under him, may also defensively assert their equitable rights.

Without examining other questions in this case, it results, from the facts and principles which have been stated, that the judgment entered upon the decision of the referee was erroneous, and that the supreme court were right in granting a new trial. This being our conclusion, the order must be affirmed, and judgment final must be rendered against the plaintiff, according to his stipulation, unless he elects to withdraw his appeal and pay the costs thereof.

DENIO, J., stated the following conclusions as the result of his examination of the case:

1. The canal boats were not embraced in the description of the property mortgaged to the defendant and the other trustees; the personal property mentioned was not all such as belonged to the company, but such as belonged or appertained to the railroad. The writer of the paper had enumerated locomotives, engines, tenders, cars, tools and

machinery, and then, thinking apparently that there might be other property of a similar kind which would not be embraced in this language, added, "all other personal property" "in any way belonging or appertaining to the railroad of said company." The canal boats did not belong or appertain to the railroad, though they were considered as belonging to the company. Their use in a transportation line between Rouse's Point and New York might be beneficial to the income of the road, and so would anything else which should facilitate traffic upon it; but that was not the kind of relation called for by the words used in the mortgage.

2. I consider the boats to have been in the possession of the railroad company, at the time of the execution of the instrument of August 4th, 1854; and that the company owned them so far as it was possible for it to own personal property which it had purchased and paid for, but which it was not authorized, under its charter, to use in any business which it could legitimately carry on. The builders or former owners had no title, for they had sold the boats and had been fully paid for them. Church had no title; for he had paid nothing towards them, but had acted throughout, in the purchase, as the servant or agent of the corporation. Moreover, he had put the company in possession of the boats, by employing them in the transportation line which was actually operated by the company. I am of opinion, that the company could pass a title to property thus situated, by a sale or mortgage thereof to a third person, which title would be good against the company and against any person claiming under it. They would be, themselves, estopped from setting up the infirmity of their title; and the defendant, claiming under the company, would likewise be estopped.

The same principle will establish the validity of the mortgage of the steamer Boston. As to that part of the case, I am of the opinion, that it was quite lawful for the plaintiff to lend the company money to take up its acceptance, though the paper was given for the purchase of property which it had no right to use. The plaintiff is accountable for the proceeds of the sale of the steamer, after deducting what he was obliged to pay in order to enable him to convey a good title.

3. It is made a question, whether the mortgage to the plaintiff was not void, under the provisions of the statute. 1 Rev. St. p. 603, § 4. The plaintiff was shown to be a stockholder; and if the company had refused the payment of any of its evidences of debt in specie or lawful money, within the meaning of the section referred to, it could not transfer to him any of its property for the payment of his debt. The mortgage of August 4th, 1854, was such a transfer, though it was made as a security,

and not in payment. The provision, in my opinion, embraces conditional transfers as well as absolute ones, where the object is to provide for the payment of the debt. But the mere suffering its acceptance to lie over, because it had not, at the moment, the means of payment, is not a suspension of specie payments, within the meaning of the act. The words "refuse the payment of any of its notes," &c., mean something more than a mere neglect to pay by the day. The company, so far as it appears, had never intended to avoid the payment of this acceptance in specie or its equivalent. It is not shown that payment had been demanded of the company; the very transaction which is challenged as illegal was entered into in order to raise money to pay the acceptance, and it was effectual for that purpose.

4. Nor was the mortgage forbidden by the latter part of that provision, which prohibits preferential conveyances, in contemplation of the insolvency of the company; for it was not executed in contemplation of insolvency, within the meaning of that provision. The evidence, no doubt, shows that the company was greatly embarrassed; but the mortgage in question appears to me to have been given in the course of an honest endeavor to struggle along, in the expectation that it would eventually get through with its difficulties. It was not made in contemplation of insolvency, but in the hope of preventing insolvency. *Curtis v. Leavitt*, 15 N. Y. 9, 110-142.

5. If I am right thus far, the plaintiff had the title to the boats, as mortgagee, and the defendant, by refusing to yield to and recognize that title, was guilty of a conversion, unless the mortgaged debt due the plaintiff had been otherwise paid before that time. To determine that question, it becomes necessary to look at the contested items of the account. The statement of the respondent's counsel, which I assume to be accurate, except in the instances to be presently mentioned, shows an overpayment by the company to the plaintiff of \$79.03. The award of Parrott, which is put down to the debit of the company at \$2,089.13, cannot be increased on account of the mistake which is shown to have been made. The plaintiff can only stand on his mortgage, which, in this respect, is limited to "the sum of or amount of the award of W. P. Parrott." But the plaintiff should not have been charged with the gross amount of the proceeds of the sale of the steamer Boston. He was obliged to pay \$1,522.41, more or less, in obtaining possession of the steamer; and this was a charge upon the fund, and should be taken out of the amount for which the steamer was sold. This correction alone would leave nearly that amount due on the mortgage. The defendant was not entitled to charge the plaintiff the sum claimed for the use of the cars; by the terms of the mortgage agreement, claims

of this nature were to be applied on the mortgage debt, or not, at the option of the plaintiff.

6. The last question which I have thought it necessary to consider is, whether, assuming that the plaintiff was entitled to recover (as I think he was), he has not recovered too much. The rule of damages which the referee applied was the value of the boats; and he reported in favor of a recovery for \$9,023.86. This was correct, if the defendant stood in the situation of a stranger; but if he held the possession under and by the authority of the railroad company, who were the plaintiff's mortgagors, then, inasmuch as the plaintiff would not be accountable over, in consequence of the conversion by the defendant, his recovery should have been limited to the amount of the unpaid balance of his mortgage-debt. The latter was, I think, the fair result of the evidence. Mr. Lee was the president of the corporation, and he had the possession of the boats, nominally as a private individual, and under a charter-party to himself; but this was a mere cover; as the boats, up to the time of the surrender to the trustees, were run for the benefit of the corporation, and by its agents and servants. When the road, engines, cars, &c., came to be surrendered to the mortgage trustees, on the 6th October, 1854, they were also permitted to, and did, take the charge of the canal boats and run them, as they had theretofore been run, in connection with the road; they only engaging to indemnify Lee for any personal liabilities he had incurred by running them under the charter-party. As to the road, the trustees were mortgagees in possession. The canal boats were not really embraced in the mortgage, but they

had always been used in connection with the road; and the parties, namely, the officers of the corporation, on one side, and the trustees, on the other, without making any question as to whether they were within the mortgage or not, consented that the trustees should take and use them. The trustees were, at least, the bailees of the corporation, as to these boats, and they ought not to be made responsible to the plaintiff, except for his actual damages. As to the remainder of the value of the boats, the trustees are accountable to the corporation, or to its representative, and not to the plaintiff.

It follows, that a new trial was properly ordered, on account of the erroneous rule of damages which was applied at the trial; and as the plaintiff has stipulated for judgment final against him if the order for a new trial should be affirmed, such judgment must be given, unless the plaintiff is permitted to withdraw his appeal and take a new trial. I am of opinion, that he should be permitted to do this, upon the payment of all the respondent's costs of the appeal. Otherwise, there should be judgment final for the defendant.

I have not intended to make a precise statement of the account, but only to examine it so far as was necessary to determine that the balance was less than the recovery, but that it was so considerable, that it would be unjust to hold the plaintiff to his stipulation. It will be subject to adjustment on another trial.

SELDEN, J., expressed no opinion; all the other judges concurring.

Ordered accordingly.

TRACY v. TALMAGE.

STATE OF INDIANA v. LEAVITT.

(14 N. Y. 162. 1856.)

The North American Trust and Banking Company was, in July, 1838, organized in the city of New York as a corporation, under and by virtue of the act "to authorize the business of banking," Laws 1838, p. 245. By the articles of association the capital was \$2,000,000, with power to increase the same to \$50,000,000. The amount of the capital was subscribed, a small portion thereof paid in cash, and the residue secured by bonds and mortgages and stocks.

In August, 1838, the company purchased \$1,000,000 of Arkansas bonds, paying therefor \$300,000 in cash, and issuing certificates of deposit for \$700,000, the residue of the price payable monthly, during some fifteen months. Of these bonds \$200,000 were deposited with the comptroller of the state as security for bank notes issued to the company, and the residue were sent to Europe, and sold on behalf of the company to meet drafts which it had drawn on its correspondents in London. About the 15th of September, 1838, the company commenced receiving deposits and discounting commercial paper. The company never received from the comptroller bank notes to exceed \$330,000. In January, 1839, the Trust and Banking Company purchased of the Morris Canal and Banking Company, a corporation created by the laws of the state of New Jersey, but which had an office and did business in the city of New York, bonds made by the state of Indiana, to the amount of \$1,200,000, at par, and gave therefor, to the Morris Canal and Banking Company, its obligations, in the form of negotiable certificates of deposit, payable with interest at a future day. The most of these bonds were sent to the correspondents of the Trust and Banking Company, in London, and there sold at a discount to raise funds to meet the drafts of the company. In the fall of 1839 the Trust and Banking Company agreed to purchase, of the Morris Canal and Banking Company, bonds of the state of Indiana, amounting to \$1,000,000 at par, and to pay for the same, at 98 per cent., in negotiable certificates of deposit, made by the Trust and Banking Company, payable at a future day. This agreement was not in writing. On or about the 28th of October, 1839, these bonds were delivered by the Morris Canal and Banking Company to the Trust and Banking Company, and the latter made and delivered to the former certificates of deposit for the amount of the purchase price. The most of these certificates were for \$1,000 each. They respectively bore date October 28, 1839, were signed by the president and cashier of the North American Trust and Banking Company, and stated that James Kay had deposited in the bank a sum, which

was named, payable to his order, on the return of the certificate, on demand after a future day, which was specified; each certificate was endorsed by Kay in blank. These Indiana bonds were sent to London by the Trust and Banking Company to be sold to raise funds to meet its drafts and obligations payable there; and they were sold there at a large discount soon after the purchase. Kay, the payee named in and who endorsed the certificates, was a clerk for the Morris Canal and Banking Company; he never deposited any money with the Trust and Banking Company, and had no interest in the certificates. On the 11th of December, 1839, a written agreement was made between the Morris Canal and Banking Company and the state of Indiana, which recited that the former was indebted to the latter for Indiana state stocks, theretofore sold and delivered by the latter to the former, and by which the Morris Canal and Canal and Banking Company agreed to deliver to the state of Indiana, among other securities, certificates of deposit in the North American Trust and Banking Company to the amount of \$196,000. Subsequently, and during the same month, the Canal and Banking Company transferred and delivered to the state of Indiana \$196,000 of the certificates issued to it by the Trust and Banking Company under date of October 28, 1839, and payable after January 1st, 1841, and the same were receipted by the state of Indiana on the back of the agreement last above mentioned. On the 2d of January, 1841, the state of Indiana surrendered to the Trust and Banking Company a portion of these certificates, to the amount of \$175,000, and received therefor eighteen other certificates of deposit, in the aggregate, for the same amount, dated on that day, signed by the president and cashier of the Trust and Banking Company, and payable to the order of, and endorsed by, James Kay. Five of these certificates were for \$9,000 each, and thirteen of them for \$10,000 each. Each stated that James Kay had deposited, with the Trust and Banking Company, a sum, which was specified, and that the company engaged to repay the holder of the certificate this sum upon the surrender thereof at a future day named, with interest, at the rate of seven per cent. per annum. Of these eighteen certificates, the one first due was payable five months from date, and one became payable every month thereafter. The purchases of the Indiana bonds were negotiated and consummated in the city of New York, and all the certificates were issued there.

In August, 1841, the plaintiff herein, being a stockholder and creditor of the Trust and Banking Company, commenced this suit against it in the court of chancery. The bill was filed under the Revised Statutes (2 Rev. St. p. 463, §§ 39-42), and alleged that the company was insolvent, and that it had vio-

lated the law, &c. It prayed that the company might be enjoined from transacting business, that a receiver of its effects might be appointed and the corporation dissolved, &c. In September, thereafter, David Leavitt was appointed receiver, with the usual powers; and in June, 1843, a decree was made in the suit by which the Trust and Banking Company was adjudged to be insolvent, and it and its officers were perpetually enjoined, &c. An order was made in October, 1845, that the creditors of the company exhibit their claims to the receiver or be precluded from sharing in the funds, and providing that any claimant might enter his appearance in the action; and that if any claim were disallowed by the receiver, it should be referred to referees. Pursuant to this order the state of Indiana, in December, 1845, exhibited the claim in controversy to the receiver. In the notice of the claim furnished to the receiver it was stated that the state of Indiana had a debt against the Trust and Banking Company of \$175,000 with interest thereon from the 2d of January, 1841, for a balance due at that date for bonds issued by said state and sold and delivered to the Trust and Banking Company by the Morris Canal and Banking Company or otherwise. That this debt was owned by the state of Indiana, and that it should be allowed and paid to it, or that it should be allowed in the name of the Morris Canal and Banking Company for the use and benefit of the state of Indiana, and paid to the latter as the assignee of the demand. Attached to the notice of claim were the eighteen certificates for \$175,000, above mentioned, which it was alleged were issued by the Trust and Banking Company for the debt claimed. In March, 1846, the receiver disallowed the claim, and in March, 1847, an order was made referring it to three referees, who, after hearing the proofs, in September, 1850, reported against the validity of the claim. The report of the referees contained all the evidence given before them; and stated that they were of opinion, upon the proofs, that the claim was not valid, and that there was nothing due from the Trust and Banking Company or its receiver to the claimant. Other than this the particular conclusions of the referees as to the facts or law did not appear. The evidence proved the facts above stated. It also proved that the Indiana bonds were purchased by the Trust and Banking Company with the intention of selling them to raise money, and that they were so sold, principally in England, at a large discount. There was some evidence tending to prove that the Morris Canal and Banking Company knew at the time of the sale that the Trust and Banking Company purchased the bonds with this intention. It also appeared that the Trust and Banking Company, both before and after the purchase of the \$1,000,000 of bonds in October, 1849, was accustomed to make and issue negotiable certificates of deposit, payable on time; and that during the

time it carried on business, it issued negotiable paper, payable at a future day, to over \$15,000,000. All the certificates issued on account of the Indiana bonds, except those in question, appeared to have been paid. There was evidence tending to prove that in making the sale of the bonds, the Morris Canal and Banking Company was in fact the agent of the state of Indiana. The state of Indiana filed exceptions to the report of the referees, which, in September, 1851, were overruled at a special term of the supreme court held in New York by Justice Edmonds, and the report made by the referees affirmed. An appeal was taken by the state of Indiana, and in 1854, the court, at a general term held in New York, reversed the judgment rendered at special term, and adjudged that the claim was lawful and valid against the Trust and Banking Company, and was justly due and owing to the claimant, with interest from January 2d, 1841, "as the balance remaining unpaid for state bonds sold and delivered to the Trust and Banking Company by the Morris Canal and Banking Company, and by the last mentioned company transferred to the claimant." The decree fixed and adjudged the amount of the demand to be \$343,437.50, being the amount of the \$175,000 and interest from January 2d, 1841; and the receiver was directed to pay the same in the due administration of the assets of the company. From this decree the receiver appealed to this court.

The cause was argued in this court in 1855, and the court ordered a re-argument. It was again argued at the March term, 1856.

SELDEN, J. To avoid confusion, I shall consider this case in the first instance as though the Morris Canal and Banking Company, instead of the state of Indiana, was the claimant upon the record. The general ground upon which the claim is resisted is, that it arises upon an illegal contract. Three grounds of illegality are alleged: (1) That the purchase of state stocks by the North American Trust and Banking Company for the purpose of re-sale, upon speculation, was beyond the scope of its corporate powers, and, therefore, illegal, and that the Morris Canal and Banking Company knew that such was the object of the purchase. (2) That the North American Trust and Banking Company had no power to issue negotiable promissory notes upon time; that such notes, therefore, and the contract of sale which provided for receiving them in payment, are illegal and void. (3) That the certificates or post notes delivered in payment for the state stock, being calculated and intended for circulation, were issued in violation of the restraining act; and that the Morris Canal and Banking Company was particeps criminis.

In examining the first of these grounds, I shall not notice the position taken by the counsel for the receiver, that a mere excess of authority on the part of a corporation in

making a contract, is equivalent in its effect to the violation of a positive penal enactment; because, so far as the alleged illegality consists in the purpose for which the stocks were purchased, the case can, I think, be disposed of upon principles which do not involve that question. That the North American Trust and Banking Company made the purchase with a view to a re-sale, and not to a deposit with the comptroller, seems to be established by the proof; and that such a purchase and re-sale were unauthorized and beyond the scope of the corporate powers of the company, was settled by this court in the case of *Talmage v. Pell*, 7 N. Y. 328.

It is contended by the counsel for the claimant, that there is no evidence that the vendors, the Morris Canal and Banking Company, had any knowledge of the object of the vendees in making the purchase. I shall, however, assume that they had such knowledge; because, in the view I take of the subject, it cannot affect the result. The question presented upon this branch of the case is, whether the bare knowledge by a vendor that the purchaser intends to make an unlawful use of the article sold, will prevent a recovery for the purchase money. Although I deem this question clear upon principle, I shall, nevertheless, rest my opinion in regard to it mainly upon the authorities.

A question somewhat analogous arose in the court of king's bench, in England, in the case of *Faikney v. Reynous*, 4 Burrows, 2069. The plaintiff and one of the defendants had been jointly concerned in stock-jobbing; and the plaintiff, in contravention of an express statute, had advanced £3,000, in compounding certain differences, for one-half of which the defendants had given the bond upon which the action was brought. Upon demurrer to a plea setting up these facts, the court held the plaintiff entitled to recover. Although that case differs from the one under consideration, in its facts, yet the principle upon which the case was decided, viz. that a party to a contract, innocent in itself, is not responsible for or affected by the use which the other may make of the subject of the contract, is equally applicable here. Lord Mansfield said, in speaking of the act of the defendant in giving the bond: "This is not prohibited. He is not concerned in the use which the other makes of the money; he may apply it as he thinks proper. But certainly this is a fair, honest transaction between these two."

There is a class of English cases which seems to me identical in principle with the present, and concerning which the decisions have been unvarying. I refer to the cases of goods purchased for the express purpose of being smuggled into England, in violation of the revenue laws, and where the object of the purchase was known to the vendor. The first of these cases is that of *Holman v. Johnson*, Cowp. 341, where the plaintiff, residing at Dunkirk, had sold to the defendant

a quantity of tea, knowing that the latter intended to smuggle it into England, but had himself no concern in the smuggling. The action was brought for the price of the tea, and it was held, upon these facts, that the plaintiff could recover. The principle of the case is the same as that adopted in *Faikney v. Reynous*, supra, that mere knowledge by the vendor of the unlawful intent did not make him a participator in the guilt of the purchaser. Lord Mansfield, who delivered the opinion in this case also, says: "The seller indeed knows what the buyer is going to do with the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods."

Where, however, the seller does any act which is calculated to facilitate the smuggling, such as packing the goods in a particular manner, he is regarded as *particeps criminis*, and cannot recover; as is shown by the subsequent cases of *Biggs v. Lawrence*, 3 Term R. 454; *Clugas v. Penaluna*, 4 Term R. 466; and *Waymell v. Reed*, 5 Term R. 599. These were all cases where the plaintiff had sold goods to the defendant, knowing that they were to be smuggled into England; and in each of them the plaintiff was nonsuited. But they all differed from the case of *Holman v. Johnson*, in this, that the plaintiff had in each case done some act, in addition to the sale, in aid and furtherance of the defendant's design to violate the revenue laws, and the decision was in each case placed distinctly upon this ground. The language of Buller, J., in the case of *Waymell v. Reed*, is very explicit. He says: "In *Holman v. Johnson*, the seller did not assist the buyer in the smuggling. He merely sold the goods in the common and ordinary course of trade. But this case does not rest merely on the circumstance of the plaintiff's knowledge of the use intended to be made of the goods; for he actually assisted the defendants in the act of smuggling, by packing the goods up in a manner most convenient for that purpose."

In each of the three cases last cited, special care is taken to guard against any inference that it was intended to impair the force of the decision in *Holman v. Johnson*. Indeed, that decision seems to have been uniformly followed by the courts of England from that day to the present. In 1835 the question again arose in the case of *Pellecat v. Angell*, 2 Crompton, M. & R. 311, and the court held that the plaintiff could recover the price of goods sold to the defendant, although he knew at the time of the sale that they were bought to be smuggled into England. Lord Abinger says: "The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels or otherwise, there he must take the consequences of his own act." Again he says: "The plaintiff sold the goods; the defendant might smuggle them if he liked, or he might change his mind the next

day; it does not at all import a contract, of which the smuggling was an essential part." It is true, the chief baron in one part of his opinion seems to lay some stress upon the fact that the plaintiff was a foreigner; but it is clear that this can have nothing to do with the principle upon which those cases rest, which is, that the act of selling is not in itself a violation of the law; and the mere fact of knowledge of the unlawful intent of the vendee does not make the vendor a participator in the guilt. The language of the associates of the chief baron goes to show that the domicile of the plaintiff had no influence upon the decision. Bolland, B., says: "I think the distinction pointed out by the lord chief baron, between merely knowing of the illegal purpose, and being a party to it by some act, is the true one." Alderson, B., says: "If the plea disclosed circumstances from which it followed, that permitting the plaintiff to recover would be permitting him to receive the fruits of an illegal act, the argument for the defendant would be right; but that ground fails, because the mere sale to a party, although he may intend to commit an illegal act, is no breach of law." That the place of residence of the vendor has nothing to do with the question, and that the principle of the case of *Holman v. Johnson* is sound, is further shown by the case of *Hodgson v. Temple*, 5 Taunt. 181, decided by the court of common pleas in England. There, as it would seem, all the parties resided in London. The plaintiffs, who were distillers, had sold spirituous liquors to the defendant with full knowledge that the latter intended to retail them, in express violation of the revenue laws. It was insisted, in defence to an action brought for the purchase money of the liquors, that the plaintiffs were particeps criminis, and could not recover. But Mansfield, C. J., said: "This would be carrying the law much further than it has ever yet been carried. The merely selling goods knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; but to effect that it is necessary that the vendor should be a sharer in the illegal transaction."

Opposed to this series of cases, holding one uniform language, and sanctioned by such names as Mansfield, Buller, Kenyon, Abinger and others, I know of but a single English case, viz., that of *Langton v. Hughes*, 1 Maule & S. 593. By a statute of 42 Geo. III. c. 38, brewers were prohibited from using anything but malt and hops in the brewing of beer. The plaintiffs, who were druggists, had sold to the defendants, who were brewers, certain drugs knowing that they were to be used contrary to the statute. In the 51 Geo. III. c. 87, another statute was passed prohibiting druggists from selling to brewers certain articles, and among them those sold to defendants. The sale in question was made before the latter statute, but

the suit was brought afterwards. The court held that the plaintiff could not recover. It is difficult to ascertain from the opinions the precise ground upon which the court intended to rest its decision. The case was so clearly within the terms of the statute of 51 Geo. III. that the judges were evidently induced to resort to a somewhat strained construction of the previous statute, and even to an attempt to connect that with the statute passed after the sale, for the sake of sustaining the defence. *Le Blanc, J.*, after stating the question, says: "That depends upon the provisions of 42 Geo. III. coupling them in their construction with those of 51 Geo. III." It is apparent, I think, upon a review of the whole case, that it was not very well considered, and that the decision was really produced by the reflex influence of the latter statute. This case, therefore, which does not appear to have been followed either in England or in this country, and which is virtually overruled by the subsequent case of *Pellicat v. Angell*, 2 Crompt., M. & R. 311, can have but little weight in opposition to the numerous authorities to which I have referred, going to establish the contrary principle.

There is another class of English cases which have been sometimes supposed to conflict with the doctrine advanced in *Faikney v. Reynous* and *Holman v. Johnson*, supra, but which, when the precise ground upon which they were decided is considered, will be found to support rather than to detract from the doctrine. That ground is this: that it was the express object of the plaintiffs in those cases, in selling the goods or lending the money, that they should be used for an unlawful purpose, and that such purpose entered into and formed a part of the contract of sale or loan. A brief reference to those cases will show that this is the principle upon which they rest. The first case of this class is that of *Lightfoot v. Tenant*, 1 Bos. & P. 551. The action was upon a bond given for goods sold, and the defendant pleaded that the plaintiff sold the goods "in order that" they should be shipped to the East Indies without the license of the East India Company, in violation of an express statute. The issue upon this plea was found for the defendant, and a motion for judgment non obstante veredicto was denied. *Eyre, C. J.*, argues, that the jury having found that the plaintiff sold the goods "in order that" they should be shipped, &c., it cannot be said that he had no interest in their future destination; that he may well have sold the goods for an enhanced price, relying exclusively upon the profits to be realized from the illicit trade for payment. He says: "It is a possible case, that a tradesman may wish to speculate in this contraband trade, and to do it by dividing the profits with some man of spirit and enterprise, but without capital. Such a man would stipulate that the goods

which he sold should be put on board a ship under a foreign commission, and should be sent to Calcutta to be there sold. His share of the profits would be found in the price originally fixed on the goods, but his hopes of payment would rest entirely on the returns of this contraband trade." Again he says: "But the jury having found for the plea, the court cannot say that the plaintiff had nothing to do with the future destination of the goods; unless it was impossible to state a case in which they could have anything to do with it." The decision in this case clearly is based upon the fact, that the future use to be made of the goods entered into and formed a part of the contract of sale. There are two other English cases belonging to the same class. The first is that of *Cannan v. Bryce*, 3 Barn. & Ald. 179. The defendant had lent money to a firm, which afterwards became bankrupt; for the purpose of paying a balance due upon certain illegal stock-jobbing transactions, and which had been applied to that object. He having afterwards received money belonging to the bankrupts, the assignees brought their action to recover those moneys, and it was held that the defendant could not set off his demand for the money loaned. The other case is that of *McKinnell v. Robinson*, 3 Mees. & W. 434, which was an action of assumpsit for money lent. The defendant pleaded that the money was lent in a certain common gambling room, for the purpose of the defendant's illegally playing and gaming therewith; and on demurrer the plea was held good. In each of these cases it will be seen that the illegal use was the express object for which the money was lent; and this is relied upon by the court in both cases in giving their judgment. In the case of *Cannan v. Bryce*, Abbott, C. J., says: "It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object;" and in the case of *McKinnell v. Robinson*, Lord Abinger, in stating the principle by which the case was governed, says: "This principle is, that the repayment of money lent for the express purpose of accomplishing an illegal object, cannot be enforced."

It is worthy of note that the three cases last referred to present the views respectively of the heads of the three principal English courts, viz., Abbott, chief justice of the king's bench, Eyre, chief justice of the common pleas, and Abinger, chief baron of the exchequer; and their concurrence in resting their decisions upon the fact that the illegal object was in the contemplation of both parties, and formed a part of the original contract, goes strongly to confirm the doctrine of the cases of *Faikney v. Reynous* and *Holman v. Johnson*, supra. Indeed the whole current of English authority goes to support

those cases, with the single exception of *Langton et al. v. Hughes*, supra. They have also frequently been referred to by the courts in this country as containing sound doctrine. *De Groot v. Van Duzer*, 17 Wend. 170; *Bank v. Spalding*, 12 Barb. 302; *Armstrong v. Toler*, 11 Wheat. 258. In the latter case, Chief Justice Marshall refers to the case of *Faikney v. Reynous* in the following terms: "The general proposition stated by Lord Mansfield, in *Faikney v. Reynous*, that if one person pay the debt of another at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law, has never been held to alter the case."

The principles established by this strong array of authorities are in entire accordance with the case of *Talmage v. Pell*, 7 N. Y. 328, decided by this court. It was a part of the contract in that case, between the banking company and the commissioners of the state of Ohio, that the bonds should remain in the hands of the agent of the state, to be sold on account of the banking company; and this fact is referred to and relied upon by Gardiner, J., by whom the opinion of the court was delivered. He says: "I am, for the reasons suggested, of the opinion that this bank had no authority to traffic in stocks as an article of merchandise, or to purchase them for the purpose of selling, as a means of obtaining money to discharge existing liabilities; that as the object of the purchase in this case was known to both parties, and made a part of their contract, the debt for the purchase money cannot be enforced by the vendors, and that the collateral securities must stand or fall with the principal agreement." The case contains no intimation whatever that the mere knowledge, by the agents of the state of Ohio, that the banking company purchased the bonds with a view to a resale, would have defeated a recovery. On the contrary, such an inference was carefully guarded against by the learned judge who delivered the opinion, as appears from the extract just given.

I consider it, therefore, as entirely settled by the authorities to which I have referred, that it is no defence to an action brought to recover the price of goods sold, that the vendor knew that they were bought for an illegal purpose, provided it is not made a part of the contract that they shall be used for that purpose; and provided, also, that the vendor has done nothing in aid or furtherance of the unlawful design. If, in this case, the bank had had no right to purchase state stocks for any purpose, then the contract of sale would have been necessarily illegal, and the vendor would, perhaps, be precluded from all remedy for the purchase money. But here the purchase and sale for

a lawful object was a contract which each party had a perfect right to make. Suppose the banking company, although intending at the time of the purchase to use the stocks for trading purposes, had, the next day, abandoned this intention, and deposited them with the comptroller; would this change of purpose reflect back upon the contract of purchase, if it was corrupt, and divest it of its illegal taint? This could hardly be pretended; and, if not, then the consequence of the doctrine contended for here, would inevitably be, that the vendor of the stocks, without having participated in any illegal act, or even illegal intent, but having simply known of such an intent subsequently abandoned, would be punished with a total loss of the property sold, and that for the benefit of the party alone guilty, if guilt could be predicated of such a transaction.

I am not aware of any principle which could justify this. The law does not punish a wrongful intent, when nothing is done to carry that intent into effect; much less, bare knowledge of such an intent, without any participation in it. Upon the whole, I think it clear, in reason as well as upon authority, that in a case like this, where the sale is not necessarily *per se* a violation of law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase money.

It follows, from this, that the sale of the stocks would have created a valid and legal obligation on the part of the banking company to pay the purchase money, but for the form of the security agreed to be taken in payment; and this brings me to the consideration of the second ground of defence, viz., that the North American Trust and Banking Company had no authority to issue negotiable promissory notes, payable at a future day; and consequently, that the contract which provided for their issue and for receiving them in payment, was illegal and void.

In considering this branch of the case, I shall not examine at length the questions so ably argued at bar, in regard to the nature of corporations and the limitations of their powers, but shall assume it to have been established, for the purposes of this case, at least, that associations under the general banking law, even prior to the act of 1840 (Laws 1840, p. 306, § 4), had no power to issue negotiable notes upon time; placing this assumption, however, not upon the safety fund act of 1829 (Laws 1829, p. 167), but upon the general principle of law which limits corporations to the exercise of powers expressly given to them, or such as are necessarily incident thereto, and upon the statute confirmatory of that principle. 1 Rev. St. p. 600, § 3.

It follows, that in issuing the certificates of post notes delivered to the Morris Canal and Banking Company in consideration of

the stocks transferred, the North American Trust and Banking Company exceeded its corporate powers. That those certificates were negotiable promissory notes, is clear. *Bank v. Merrill*, 2 Hill, 295; *Leavitt v. Palmer*, 3 N. Y. 19; *Talmage v. Pell*, 7 N. Y. 328. Does this act of the Trust and Banking Company, thus transcending its legitimate powers, so taint and corrupt the contract of sale as to deprive the vendors of the stocks of all remedy for the purchase money? The counsel for the claimants sought upon the argument to maintain that the sale of the stocks and the receipt of the certificates were distinct transactions; and, hence, that the debt created by the sale would remain, notwithstanding the illegality of the securities. In this, however, he is not sustained, I think, by the evidence. The proof seems to be clear, that the agreement to receive the certificates or post notes was simultaneous with and formed a part of the contract of purchase. It becomes necessary, therefore, to meet the question whether the consent and agreement of the vendors to receive the certificates in payment, will prevent a recovery in any form for the stock sold.

It results, from what has been previously said, that there was nothing in the contract of sale, considered by itself, separately from the agreement in relation to the security, to impair the validity of the debt; but, on the contrary, that the sale of the stocks created as valid and meritorious a consideration for the obligation assumed by the Trust and Banking Company as if the money had actually been deposited according to the tenor of the certificates. The objection to the claim, therefore, rests upon the nature of the securities alone, and acquires no additional force from the want of power in the Trust and Banking Company to traffic in stocks.

It has long been settled that contracts founded upon an illegal consideration, or which contemplate the performance of that which is either *malum in se*, or prohibited by some positive statute, are void. But the application of this rule to contracts made by corporations, the sole objection to which consists in their being *ultra vires*, is comparatively modern. The doctrine rests mainly upon three recent English cases, viz.: *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 7 Eng. Law & Eq. 505; *McGregor v. Manager*, 16 Eng. Law & Eq. 180; and *Mayor, etc., of Norwich v. Norfolk Ry. Co.*, 30 Eng. Law & Eq. 120.

That a contract by a corporation, which it has no legal capacity to make, is void and cannot be enforced, it would seem difficult to deny; and this principle alone is abundantly sufficient to sustain the cases above cited, which were all actions founded upon and affirming the validity of the illegal contract. But it is quite another question whether such a contract is so tainted with corruption, that the party dealing with

the corporation will be refused all remedy in a suit proceeding upon the ground of a disaffirmance of the contract, and asking only such relief as equity demands. Whether a contract of this nature can fairly be brought, consistently with either reason or adjudged cases, within the range of the maxim, "*ex turpi causa non oritur actio*," cannot be considered as settled by the cases referred to; especially as in the last of those cases the court was equally divided, and it was only disposed of by one of the judges withdrawing his opinion with a view to an appeal.

Prior to the case of *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, supra, the rule which denied all relief, in equity, as well as at law, to any party to an illegal contract, had been generally applied only to cases where the contract was either *malum in se* or specifically prohibited by statute. It was wholly unnecessary to the decision of that case to resort to any extension of that rule; because, to enforce a contract against a party, which that party was incompetent in law to make, would, indeed, be, in the language of some of the cases, "to make the law an instrument in its own subversion." The courts, however, in that as well as the two subsequent cases, do appear to have been inclined to hold that contracts of corporations, which are *ultra vires* merely, come within the general rule which denies all aid to either party to a contract made in violation of law. But it will not be necessary here to pass upon the correctness of this doctrine advanced in those cases, as in the view I take of this case, it falls clearly within an exception to that rule; and, for the purposes of this question, I shall concede: (1) That the issuing and delivery by the North American Trust and Banking Company, of its promissory notes payable on time, was *ultra vires*; and that the effect of this upon the contract was the same as if it had been specifically prohibited under a penalty, and (2) that the notes issued were calculated and intended for circulation as money, and were, therefore, issued contrary to the inhibitions of the restraining act. These concessions are made for the purposes of this case only, and without intending definitely to decide the points conceded.

There are one or two classes of cases to which it will be necessary to refer in order to afford a clear view of the question here presented. The first consists in a series of cases in which a distinction has been taken between those illegal contracts where both parties are equally culpable, and those in which, although both have participated in the illegal act, the guilt rests chiefly upon one. The maxim "*ex dolo malo non oritur actio*" is qualified by another, viz., "*in pari delicto melior est conditio defendantis*." Unless, therefore, the parties are in *pari delicto* as well as *particeps criminis*, the courts, although the contract be illegal, will afford

relief, where equity requires it, to the more innocent party.

It was insisted by the counsel for the receiver, upon the argument, that in no case would relief be afforded to any party to an illegal contract, unless he applied for such relief, or, at least, had elected to disaffirm the contract while it remained executory. This position cannot, I think, be sustained. It overlooks distinctions which are clearly settled. The cases in which the courts will give relief to one of the parties on the ground that he is not in *pari delicto*, form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it is executed. It is essential, to both classes, that the contract be merely *malum prohibitum*. If *malum in se*, the courts will in no case interfere to relieve either party from any of its consequences. But where the contract neither involves moral turpitude nor violates any general principle of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance (1) where he is not in *pari delicto*; or (2) in some cases where he elects to disaffirm the contract while it remains executory. In cases belonging to the first of these classes, it is of no importance whether the contract has been executed or not; and in those belonging to the second, it is equally unimportant that the parties are in *pari delicto*. This will clearly appear upon a brief review of some of the leading cases.

The first case which I deem it material to notice is that of *Smith v. Bromley*, Doug. 695, note. The plaintiff's brother having become bankrupt, and a commission having been taken out against him, the plaintiff advanced £40 to the defendant, who was the principal creditor, to induce him to sign the certificate. The action, which was brought to recover this money, was sustained. In reply to the argument that the plaintiff was seeking to recover back money paid upon an illegal contract, Lord Mansfield said: "If the act is in itself immoral, or a violation of the general laws of public policy, then the party paying shall not have this action; for when both parties are equally criminal against such general laws, the rule is '*potior est conditio defendantis*.'" But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover; and it is astonishing that the reports do not distinguish between violations of the one sort and the other." Two things are to be noted in this extract: That a distinction is taken between contracts *malum prohibitum* merely, and such as are immoral or contrary to general principles of policy; and also that stress is laid upon the fact that the law contravened in this case was intended to protect one party from op-

pression by the other. The first is a valid distinction, which runs through all the subsequent cases—the last was merely incidental to the particular case, and not essential to the principle. The first cases in which the principle was applied, were naturally those where the statute violated was intended for the special protection of the party seeking relief from some undue advantage taken by the other, because those were the cases in which the injustice of applying the same rule to both parties would be the most glaring. But it soon came to be seen that the principle was equally applicable to cases where the law infringed was intended for the protection of the public in general.

The case of *Jaques v. Golightly*, 2 W. Bl. 1073, was an action brought to recover back money paid for insuring lottery tickets. The defendant kept an office for insurance contrary to the statute 14 Geo. III. c. 76. It was urged that the plaintiff being particeps criminis, and having knowingly transgressed a public law, was not entitled to relief; but the action was sustained by the unanimous opinion of the court. Blackstone, J., said: "These lottery acts differ from the stock-jobbing act of 7 Geo. II. c. 8, because there both parties are made criminal and subject to penalties." The rule here suggested for determining whether the parties are in *pari delicto*, seems reasonable and just. There are, undoubtedly, other cases in which the parties are not equally guilty; but it is safe to assume, that whenever the statute imposes a penalty upon one party and none upon the other, they are not to be regarded as *pari delictum*. In *Browning v. Morris*, 2 Cowp. 790, Lord Mansfield, after referring with approbation to the case of *Jaques v. Golightly*, reiterates the argument of Blackstone, J., in that case. He says: "And it is very material that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side,—upon the officekeeper."

The question next arose in the case of *Jaques v. Withy* (1 H. Bl. 65), which is identical with the case of *Jaques v. Golightly*, decided by the same court fifteen years before. The action was brought to recover back money paid for insurance to the keeper of a lottery insurance office, and it was held to lie. It will be seen that these two cases are not like that of *Smith v. Bromley*, where an undue advantage was taken of the peculiar situation of the plaintiff; and that although some effort is made in *Jaques v. Golightly*, and by Lord Mansfield in *Browning v. Morris*, *supra*, to bring them within the reasoning of that case, they are really placed upon the broad ground that the parties are not in *pari delicto*, and, as evidence of this, the court rely upon the fact that the penalty was imposed upon the defendant alone. A similar question came before the court of king's bench in the case of *Williams v. Hedley*, 8 East, 378, where the previous cases were

ably and elaborately reviewed by Lord Ellenborough. The action was brought to recover back money which had been paid by the plaintiff to compromise a *qui tam* action pending against him for usury. The principle of the decision cannot be better stated than by transcribing the head note of the reporter, which is this: "Money paid by A. to B., in order to compromise a *qui tam* action of usury brought by B. against A. on the ground of a usurious transaction between the latter and one E., may be recovered back in an action by A. for money had and received; for the prohibition and penalties of the statute of 18 Eliz. c. 5, attach only on the informer or plaintiff or other person suing out process in the penal action making composition, &c., contrary to the statute, and not upon the party paying the composition; and, therefore, the latter does not stand, in this respect, in *pari delicto*, nor is he particeps criminis with such compounding informer or plaintiff."

These are the leading English cases on this subject; and it is plain that they do not rest solely upon the ground that the statute infringed was intended to protect one party from acts of oppression or extortion by the other; and equally plain that relief is granted in this class of cases entirely irrespective of the question whether the contract be executed or executory. It was, in fact, executed in all these cases.

The series of cases here referred to have never been overruled. On the contrary, they have been expressly sanctioned and approved in several American cases. In *Inhabitants v. Eaton*, 11 Mass. 368, Chief Justice Parker, after referring to the cases of *Smith v. Bromley* and *Browning v. Morris*, *supra*, and to the distinction there taken, says: "This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption as a principle of common law in this country." The case of *White v. Bank*, 22 Pick. 181, proceeds upon the same distinction. It is impossible, as it seems to me, to distinguish this case in principle from that now before the court. The Revised Statutes of Massachusetts (chapter 36, § 57) prohibited banks from making any contract "for the payment of money at a future day certain," under a penalty of a forfeiture of their charter. The plaintiff had deposited money with the defendant in February, to remain until the 10th day of August; and the action was brought to recover this money. It was objected that the contract was illegal and the parties particeps criminis, but the defence was overruled. This is by no means an anomalous case, as the counsel for the receiver upon the argument of this case seemed to suppose. On the contrary, it belongs clearly to the same class with the English cases just reviewed. Wilde, J., who delivered the opinion of the court, after referring to those cases, and quoting

the remarks of Chief Justice Parker in *Inhabitants of Worcester v. Eaton*, given above, says: "The principle is in every respect applicable to the present case, and is decisive. The prohibition is particularly leveled against the bank, and not against any person dealing with the bank. In the words of Lord Mansfield, 'the statute itself, by the distinction it makes, has marked the criminal.' The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter."

Again, in the case of *Lowell v. Railroad Co.*, 23 Pick. 24, where the objection was raised that the parties were particeps criminis, the same justice says: "In respect to offences in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers." The same doctrine was reiterated in *Atlas Bank v. Nahant Bank*, 3 Metc. 581. The principle of these cases was also adopted by our own supreme court in the case *Mount v. Waite*, 7 Johns. 434. The action was to recover back money which the plaintiffs had paid to the defendants for insuring lottery tickets contrary to the policy of a statute passed in 1807. Kent, C. J., says: "The plaintiffs here committed no crime in making the contract. They violated no statute, nor was the contract *malum in se*. I think, therefore, the maxim as to parties in *pari delicto* does not apply, for the plaintiffs were not in *delicto*."

This case is the last of the class to which I shall refer; and I think it would be difficult to find a series of cases, running through almost a century, more uniform and consistent in tone and principle and in the distinctions upon which they are based. They have never, so far as I am aware, been overruled; and I know of no principle which would justify this court in disregarding them. The doctrine seems to me eminently reasonable and just, and I discover no principle of public policy to which it stands opposed. On the contrary, I concur in the sentiment which Judge Wilde, in *White v. Bank*, expresses, thus: "To decide that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute by taking advantage of the unwary and of those who may have no actual knowledge of the existence of the prohibition, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank."

This language is as applicable to the case before us as to that in which it was used. It is said that all persons dealing with banks and other corporations are presumed to know

the extent of their powers. This is no doubt technically true, and yet we cannot shut our eyes to the fact, that in very many cases it is a mere legal fiction. If we take the present case as an example, it is plain that it would not have been easy for the Morris Canal and Banking Company, with the charter of the Trust and Banking Company and the restraining act both before them, to determine whether the issue of these certificates in payment for state stocks would violate either; and yet, upon the doctrine here contended for, an honest mistake in this respect would visit upon the former company a forfeiture of the entire amount of stocks transferred, which the latter company, if disposed, might pocket. Such a principle would afford the strongest possible inducement for banks to transgress the law. All that they could get into their hands, by persuading others to take their unauthorized paper, would be theirs. Under such a rule, arguments to make it appear that they have power to do what they really have not, might be made to constitute the most available portion of their capital; and unauthorized dealing in large amounts, with foreign states or corporations not familiar with our laws, the most profitable branch of their business. These considerations go, in my judgment, to strengthen and confirm the doctrine of the cases referred to, which hold that relief may be granted to the more innocent, when the parties are not in *pari delicto*.

The rule laid down in those cases for determining which is the more guilty party is directly applicable to the present case so far as the transaction is held to fall within the provisions of the restraining act. It has been conceded, as was contended by the counsel for the receiver upon the argument, that the issuing of the certificates in this case was a violation of sections 3, 6 and 7 of the act concerning unauthorized banking. 1 Rev. St. 712. It will be seen, by referring to those sections, that the penalties are imposed exclusively upon the corporation violating the provisions of the act, and upon its officers and members. So far, therefore, as the defence is based upon a violation of the restraining act, there is that statutory designation of the guilty party upon which most of the cases to which I have referred are made to rest. But it is obvious that the general principle for which I contend applies equally to that branch of the defence which rests upon the ground that the act of the banking company in issuing the notes, was *ultra vires* and against public policy. The imposition of the penalties for a violation of the restraining law upon the corporation alone, does not make it the guilty party, but it is simply evidence that the legislature so regarded it; and the reasons are equally strong for fixing the principal guilt upon the same party where its acts merely violate the principle of public policy. Although persons dealing with corporations are, for certain

purposes, presumed to know the extent of their corporate powers, yet this is by no means a safe rule by which to measure the moral delinquency of the respective parties. To me, therefore, it seems plain, that whether we regard the act of the Trust and Banking Company in issuing the certificates in question as a violation of the restraining law, or as simply ultra vires, or as against public policy, the corporation is to be regarded as comparatively the guilty party.

I wish here briefly to refer to another class of cases decided in this state, and known as the "Utica Insurance Cases," not as authority for my conclusion, but by way of illustrating the distinctions to which I have adverted. The first of these is *Insurance Co. v. Scott*, 19 Johns. 1. The action was upon a promissory note discounted by the insurance company in the ordinary way of discounting by a bank. It was held that the insurance company had no power to discount notes; and that in so doing it had violated the restraining act. But the court say: "In analogy to the statute against gaming, the notes and securities are absolutely void, into whatever hands they may pass, but there is a material distinction between the security and the contract of lending. The lending of money is not declared to be void, and, therefore, whenever money has been lent, it may be recovered although the security itself is void." Judgment was, however, given for the defendant in that case, because the action was brought upon the note alone. The next case was that of *Insurance Co. v. Kip*, 8 Cow. 20. This, also, was an action upon a note discounted by the insurance company; but the declaration also contained a count for money lent. The plaintiff recovered; and the court say: "The illegal contract, if any, was not the loan, for the plaintiffs had a right to loan the money to the defendants; but it was the agreement to secure the loan by a note discounted. Avoiding what was illegal, does not avoid what was lawful. The action for money lent, is rather a disaffirmance of the illegal contract." Similar decisions were made in three subsequent cases, viz.: *Insurance Co. v. Cadwell*, 3 Wend. 296; *Insurance Co. v. Kip*, Id. 369; and *Insurance Co. v. Bloodgood*, 4 Wend. 652.

These cases have never been overruled; and yet, I think I may say, they have generally been regarded with some suspicion as to their soundness. In *New Hope Delaware Bridge Co. v. Poughkeepsie Silk Co.*, 25 Wend. 648, Nelson, J., in speaking of them, says: "Whether the doctrine of these cases is well founded and may be upheld upon established principles or not, or whether the result was not ultimately influenced by the peculiar phraseology and powers of the charter of the Utica Insurance Company, in respect to which they arose, it is not necessary at present to examine. I am free to say, in either aspect, I should have great difficulty in assenting to them." There is, undoubted-

ly, "great difficulty" in reconciling these cases with the settled rules in regard to illegal contracts; and the difficulty consists precisely in this, that the court, in the Utica insurance cases, have given to the guilty party the benefit of a principle which is only applicable to the more innocent. In the first case in which the insurance company recovered, viz., *Insurance Co. v. Kip*, the court cite and rely upon the following passage from Comyn: "Where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that he should recover." 2 Comyn, Cont. p. 2, c. 4, art. 20. Comyn cites, as authority for this passage, the case of *Jaques v. Withy*, 1 H. Bl. 65, which is one of the cases to which I have referred, in which the plaintiff recovered on the ground that he was not in *pari delicto* with the defendant; and on turning to that case it will be seen that the passage is copied verbatim from the argument of Sergeant Adair, counsel for the plaintiff. It is thus made apparent that the doctrine of the Utica insurance cases is built, in part, at least, upon the principles and arguments which lie at the foundation of the class of cases just passed in review. More can scarcely be needed to justify the doubt which has been cast upon these insurance cases. How principles, appropriately used to sustain a recovery against a party, upon the express ground that he is the party upon whom the prohibition and penalties of the law attach, can be made available to justify a recovery by a party so situated, is certainly difficult to comprehend.

But, notwithstanding the misapplication to these cases of the principles for which I contend, the cases themselves afford strong evidence of the appreciation, by the court, of the soundness of those principles. Indeed, few, as it seems to me, will be found to deny either the justice or policy of the rule which refuses to permit the guilty party to retain the fruits of an illegal transaction at the expense of the more innocent. But were it otherwise, the rule, as I have shown, is indisputably established; and that the present case falls within that rule is entirely clear. We have next, then, to ascertain the relief to which the Morris Canal and Banking Company would, if the claimant upon the record, be entitled.

The illegal contract itself is of course void, and no part of it can be enforced. It is impossible, I think, to sustain the reasoning adopted in the Utica insurance cases, by which that part of the contract which embraces the loan (in this case, the sale) is separated

from the portion relating to the security, and upheld as a distinct and valid contract. The contract there, as here, was entire; and it is contrary to all the rules which have been applied to illegal contracts to discriminate between their different parts, and hold one portion valid and the other void. Recoveries are not had in such cases upon the basis of the express contract, which is tainted with illegality; but upon an implied contract founded upon the moral obligation resting upon the defendant to account for the money or property received. The claim presented by the state of Indiana to the referees was in general terms, and broad enough to embrace a demand arising upon an implied contract to pay for the bonds transferred; and it has been repeatedly held that a corporation may become liable upon such a contract founded upon a moral obligation, like that existing in this case. *Bank v. Patterson*, 7 Cranch, 299; *Danforth v. Turnpike Road*, 12 Johns. 227; *Bank v. Danbridge*, 12 Wheat. 64.

It follows from these principles, that if the Morris Canal and Banking Company was the claimant upon the record, it would be entitled to recover, not the specific balance due upon the certificates, nor the price agreed to be paid for the stocks, but so much as the stocks transferred were reasonably worth at the time of such transfer, with interest, deducting therefrom whatever has been actually paid in any form by the North American Trust and Banking Company for the same, and leaving, however, the contract of sale, so far as it has been executed by payment, or its equivalent undisturbed.

The only remaining question is, whether the state of Indiana has succeeded to the rights of the Morris Canal and Banking Company in this respect. If, as it seems to have been held by the supreme court both at special and general terms, the Canal and Banking Company acted in the sale of the stocks as the agent of the state of Indiana, then, of course, the latter, as the principal, is the proper party here. But, aside from this, I cannot doubt that a court of equity would hold, upon the face of the transaction, that it was the intention of the Morris Canal and Banking Company to transfer to the state its entire claim against the Trust

and Banking Company, growing out of the sale of the stocks, and would, if necessary, compel any formal defects in such transfer to be supplied; and as the proceeding here is of an equitable nature, the court, upon well settled principles, will regard what ought to be done as having been done. The judgment of the supreme court should be modified in accordance with these principles, and the proceedings remitted.

MITCHELL, J., delivered an opinion in favor of affirming the judgment of the supreme court at general term. He was of the opinion that the evidence did not establish that the Morris Canal and Banking Company, or the state of Indiana, had knowledge when the bonds were sold that the Trust and Banking Company purchased them for an illegal purpose, or with intent to make an illegal use of them, and that the last named company, at the time of the purchase, in 1839, had authority to make and issue notes or certificates payable at a future day. He held, that associations organized under the general banking law were not subject to the provision contained in the safety fund act (Laws 1829, p. 173, § 35), prohibiting moneyed corporations subject to the provisions of that act from issuing bills or notes, payable on time; and that such associations might lawfully issue such notes for a legitimate purpose, until prohibited by the act of 1840 (Laws 1840, p. 306, § 4).

DENIO, C. J., was also in favor of affirming the judgment, on substantially the same grounds as those stated by Judge MITCHELL.

COMSTOCK, HUBBARD, T. A. JOHNSON, and WRIGHT, JJ., concurred in the foregoing opinion delivered by Judge SELDEN, and were in favor of modifying the judgment in accordance with the principles stated in that opinion.

A. S. JOHNSON, J., dissented. He was in favor of reversing the judgment rendered at general term and affirming that rendered at special term.

Judgment modified.

ST. LOUIS, V. & T. H. R. CO. v. TERRE HAUTE
& I. R. CO.

(12 Sup. Ct. 953, 145 U. S. 393. May 16, 1892.)

Appeal from the circuit court of the United States for the southern district of Illinois. Affirmed.

STATEMENT BY MR. JUSTICE GRAY.

This was a bill in equity, filed July 6, 1887, by the St. Louis, Vandalia & Terre Haute Railroad Company, a corporation of Illinois, against the Terre Haute & Indianapolis Railroad Company, a corporation of Indiana, to set aside and cancel a conveyance of the plaintiff's railroad and franchises to the defendant for a term of 999 years. The bill contained the following allegations:

That the plaintiff was incorporated by a statute of Illinois of February 10, 1865, amended by a statute of February 8, 1867, to construct and maintain a railroad from the left bank of the Mississippi river, opposite St. Louis, eastward, through the state of Illinois, to a point on the Wabash river, convenient for extending its road to Terre Haute, in the state of Indiana; and was not authorized by its charter, or by any law of Illinois, to lease its railroad, or by any other contract or conveyance to part with the entire possession, control, and use of its property and franchises, or to deprive itself of and vest in others the power of control in the management of its said road and other property, and in the exercise of its franchises, including the right to impose and collect tolls for the transportation of passengers and freight, indefinitely, or for any fixed period of time.

That the defendant was incorporated by a statute of Indiana of January 26, 1847, amended by a statute of March 6, 1865, to construct and maintain a railroad from some point on the western line of the state of Indiana, eastward, through Terre Haute, to Indianapolis; and was not authorized by its charter, or by any law of Indiana, to make or accept any lease, contract, or other conveyance by which it should acquire or obtain, either indefinitely or for a fixed time, the ownership, management, or control of any railroad located beyond the limits of Indiana.

That the plaintiff proceeded to construct, and on or about July 1, 1870, completed the construction and equipment of, its road; that in order to obtain money for this purpose, on April 6, 1867, it executed a mortgage or deed of trust of all its railroad, property, and franchises, to secure the payment of bonds amounting to \$1,900,000, and agreeing to set apart annually from its earnings the sum of \$20,000, as a sinking fund for payment of the bonds; that on March 13, 1868, it executed a second mortgage to secure the payment of additional bonds to the amount of \$2,600,000; that all the bonds aforesaid were sold, and outstanding and unpaid; and that no sinking fund had been created, as provided for in the first mortgage.

That on February 10, 1868, the plaintiff and the defendant executed a pretended lease (set forth in the bill, and copied in

the margin¹) of the plaintiff's railroad, property, and franchises to the defendant for 999 years, the defendant retaining 65 per cent. of the gross receipts, and the rest to be applied to the payment of inter-

¹ Whereas, a contract for the construction and equipment of the St. Louis, Vandalia & Terre Haute Railroad, belonging to a corporation of the state of Illinois, has been entered into this day, by which arrangements have been made to complete and equip said road between East St. Louis and the state line of Indiana, in the manner set forth in said contract:

And whereas, the Terre Haute & Indianapolis Railroad Company, a corporation of the state of Indiana, has proposed to construct, without delay, a first-class railroad, being an extension of their present road from Terre Haute to the state line of Indiana, upon such location as will connect properly and directly with the St. Louis, Vandalia & Terre Haute Railroad at the state line of Illinois:

And whereas, it is desirable that the said lines when connected should be operated by the Terre Haute & Indianapolis Railroad Company as one road between Indianapolis and St. Louis, and the said Terre Haute & Indianapolis Railroad Company having proposed to lease and operate the said St. Louis, Vandalia & Terre Haute Railroad for a period of 999 years: It is, therefore, agreed, first—

That upon the completion of the road between East St. Louis and the state line of Indiana, the Terre Haute & Indianapolis Railroad Company shall take charge of and operate the same, with its equipment, for a period of 999 years, for which they shall be allowed 65 per cent. of the gross receipts from all traffic moved over the line, or business done thereon, and from the property of the company, as a consideration for working and maintenance expenses, the remaining 35 per cent. to be appropriated as follows: (1) To the payment of interest on the first and second mortgage bonds of the St. Louis, Vandalia & Terre Haute Railroad Company according to their legal priority. (2) All the surplus of said 35 per cent. to be paid over to the St. Louis, Vandalia & Terre Haute Railroad Company, semiannually, to be disposed of by it for the benefit of its stockholders.

If the 35 per cent. should from any cause not be sufficient in amount to protect the interest on mortgage bonds, and sinking funds therefor, as they mature, from time to time, together with the payment of taxes and proper cost of maintaining organization, so that the rights of stockholders may be preserved, then and in that event the lessee shall advance for the company whatever amounts may be needed, to be accounted for under the yearly averages of this lease during this contract.

It is further agreed that the Terre Haute & Indianapolis Railroad Company, as lessee, shall enjoy all the rights, powers, and privileges of the St. Louis, Vandalia & Terre Haute Railroad Company, so far as the same may be needful to maintain and operate said railroad; also, to impose and collect tolls and rates for transportation, and do all other acts and things, as fully and as effectually as the said St. Louis, Vandalia & Terre Haute Railroad Company could do if operating said line, it always being understood and agreed that the gross proceeds from through or joint traffic or business shall be divided on the *pro rata* basis per mile for distance moved on the road of each party.

In witness whereof the parties have respectively hereunto affixed, this, the tenth day of February, 1868, their official signatures and seals under authority of their boards of directors.

THE ST. LOUIS, VANDALIA AND TERRE HAUTE
RAILROAD COMPANY,

[Seal.] By J. F. ALEXANDER, President.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD
COMPANY,

[Seal.] By W. R. McKEEN, President.

est on the mortgage bonds, and any surplus paid to the plaintiff.

That on January 12, 1869, the plaintiff's board of directors passed a resolution, undertaking to authorize its president to change the terms of said lease, so that the defendants should be allowed 70, instead of 65, per cent. of the gross receipts, "but if the working and maintenance expenses of said road shall be less than seventy per cent. of the gross receipts aforesaid, then all of such excess shall be paid over to" the plaintiff.

That by a statute of Illinois of February 16, 1865, in force at the time of the execution and delivery of the pretended lease, it was not lawful for any railroad company of Illinois, or its directors, to consolidate its railroad with any railroad out of the state, or to lease its railroad to any railroad company out of the state, or to lease any railroad out of the state, without the written consent of all its stockholders residing within the state; and that 59 of the plaintiff's stockholders, residing in Illinois, never consented to or ratified the lease.

That, on the completion of the plaintiff's road, the defendant took possession of and had ever since operated it, and had received, in tolls and otherwise, more than \$21,600,000; that the pretended lease was void, for want of lawful power in either party to enter into it; that the defendant, by taking possession of the plaintiff's railroad and property without right, became in equity a trustee of the plaintiff, and liable to account to it for the property and for all tolls and emoluments which the defendant had, or ought to have, collected and received therefrom, and to restore the property to the plaintiff; that the defendant had refused, though requested, to turn over to the plaintiff the road and property, or the income thereof, and had thus rendered the plaintiff unable to establish a sinking fund, as required by the first mortgage; and that great and irreparable injury would be done to the plaintiff and its stockholders unless it was restored to the possession and control of the railroad, property, and franchises.

That, at the time when the lease was executed by the plaintiff, its officers supposed that it had lawful power to do so; but that it had recently been advised by counsel that it had no such power, that it was its duty at once to repudiate this pretended lease, and to resume the possession, control, and use of its property and franchises, and that it had rendered itself liable to have its charter forfeited by the state; that the present income was more than sufficient to pay the interest on the bonds and to establish a sinking fund; and that, by reason of the failure to establish a sinking fund, proceedings might at any time be instituted to foreclose the first mortgage.

That the taking of long and complicated accounts, covering a period of nearly 17 years, and involving a great many items, was necessary for the protection and enforcement of the plaintiff's rights; that the pretended lease was a cloud on the plaintiff's title; that a court of law had no

jurisdiction adequate to take the account, or to cancel the lease; and that the defendant was daily withdrawing large sums of money from the jurisdiction of the court, to the irreparable injury of the plaintiff. The bill, as originally framed, prayed for a cancellation and surrender of the lease, for a return of the railroad and other property held under it, for an injunction against disturbing the plaintiff in the possession and control thereof, and for an account of the sums which the defendant had received, or with due diligence might have received, from the use and operation of the railroad and property; or if the lease should be held valid, for an account of the sums due under the lease; and for further relief.

The defendant demurred to the bill, for want of equity, for laches, for multifariousness, and because the plaintiff had an adequate remedy at law. The circuit court sustained the demurrer, on all these grounds, as stated in its opinion, reported in 33 Fed. Rep. 440. The plaintiff thereupon, by leave of court, amended the bill, by striking out the prayer for alternative relief in case the leases should be held valid. The defendant demurred to the amended bill, on the same grounds as before, except multifariousness. The court, delivering no further opinion, sustained the demurrer, and dismissed the bill; and the plaintiff appealed to this court.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The object of this suit between two railroad corporations, as stated in the amended bill, is to have a contract, by which the plaintiff transferred its railroad and equipment, as well as its franchise to maintain and operate the road, to the defendant for a term of 999 years, set aside and canceled, as beyond the corporate powers of one or both of the parties.

The contract, dated February 10, 1868, recites that the plaintiff is a corporation of Illinois, and the defendant a corporation of Indiana; that their railroads connect at the line between the two states; that it is desirable that the two roads should be operated by the defendant as one road; and that the defendant has "proposed to lease and operate" the plaintiff's road for a period of 999 years. "It is therefore agreed" that, upon the completion of the plaintiff's road to the state line, the defendant "shall take charge of and operate the same with its equipment" for that period, and "shall be allowed 65 per cent. of the gross receipts from all traffic moved over the line, or business done thereon, and from the property of the company as a consideration for working and maintenance expenses," and shall appropriate the rest of such receipts to the payment of interest on the plaintiff's mortgage bonds, and pay any surplus to the plaintiff, for the benefit of its stockholders. Within a year afterwards, the contract was modified by providing that the defendant should be allowed 70, instead of 65, per cent. of the gross receipts, "but if the working and maintenance expenses of said road shall be less than 70 per cent. of

the gross receipts aforesaid, then all of such excess shall be paid over to the "plaintiff. It is further agreed in the contract that the defendant "shall enjoy all the rights, powers, and privileges of the" plaintiff, "so far as the same may be needful to maintain and operate said railroad," and may "impose and collect tolls and rates for transportation, and do all other acts and things, as fully and as effectually as the" plaintiff "could do if operating said line."

In short, by this contract one railroad corporation undertook to transfer its whole railroad and equipment, and its privilege and franchise to maintain and operate the road, to another railroad corporation for a term of 999 years, in consideration of the payment from time to time by the latter to the former of a certain portion of the gross receipts. This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorized by the state which created it, and which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other. *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 630, 6 Sup. Ct. Rep. 1094, and 7 Sup. Ct. Rep. 24; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. Rep. 478.

Upon the question whether this contract was *ultra vires* of either corporation, this case cannot be distinguished in principle from *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, above cited.

By the statute of Illinois of February 12, 1855, all railroad companies incorporated under the laws of the state were empowered to make "contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof." *Priv. Laws Ill. 1855*, p. 304; *Rev. St. 1874*, c. 114, § 34. By the grammatical and the natural construction, the words "their roads" include roads of Illinois corporations, as well as roads of corporations of other states, and the power conferred on corporations of Illinois to make contracts "for leasing" such roads includes making, as well as taking, leases thereof. Such was the opinion expressed in the case just cited, at page 309, 118 U. S., and page 1102, 6 Sup. Ct. Rep., and we see no reason for departing from it.

The plaintiff relies on the statute of Illinois of February 16, 1865, (in force at the date of this contract, but since repealed by the Revised Statutes of 1874,) by which it was enacted that "it shall not be lawful for any railroad company of Illinois, or for the directors of any railroad company of Illinois, to consolidate their road with any railroad out of the state of Illinois, or to lease their road to any railroad company out of the state of Illinois, or to

lease any railroad out of the state of Illinois, without having first obtained the written consent of all of the stockholders of said roads residing in the state of Illinois, and any contract for such consolidation or lease which may be made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void;" and it was provided "that nothing in this act shall be so construed as to authorize the consolidation of any of said railroads with railroads out of the state of Illinois." *Pub. Laws Ill. 1865*, p. 102.

Although this statute, in terms, declares that any such lease, made without the written consent of the Illinois stockholders, "shall be null and void," it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny. *Zabriskie v. Railroad Co.*, 23 How. 381, 398; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 42, 60, 11 Sup. Ct. Rep. 478; *Davis v. Railroad*, 131 Mass. 258, 260; *Beecher v. Rolling Mill Co.*, 45 Mich. 103, 7 N. W. Rep. 695; *Thomas v. Railway Co.*, 104 Ill. 462.

The decision of the supreme court of Illinois in *Archer v. Railroad Co.*, 102 Ill. 493, cited by each party at the argument, does not appear to have any important bearing upon this case. The point there decided was that the contract now in question, not being satisfactorily proved in that case to have been either assented to or ratified by the stockholders residing in Illinois, had no effect, as a lease, to convey title to the defendant, and could be sustained, if at all, only as a contract for the connection of the two railroads, and, in either aspect, did not confer on the defendant any right to maintain a bill in equity against collectors of taxes to restrain the collection of taxes assessed to the present plaintiff. Upon questions discussed in the opinion and not necessary to the judgment, or not considered at all, the case cannot be regarded as a decision, because, as observed by Mr. Justice CURTIS, speaking for this court, "to make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties." *Carroll v. Carroll*, 16 How. 275, 287.

It is unnecessary, however, to express a definitive opinion upon the question whether the contract between these parties was beyond the corporate powers of the plaintiff, because, as is established by the decisions of this court, already cited, a contract beyond the corporate powers of either party is as invalid as if beyond the corporate powers of both, and the contract now in question was clearly beyond the corporate powers of the defendant.

The case in this respect is governed by the direct adjudication of this court in the case of *Pennsylvania R. Co. v. St.*

Louis, A. & T. H. R. Co., above cited, which was much considered, both upon argument at the bar, and upon petition for a rehearing. The only differences between that case and this are that the contract in that case was for 99 years, whereas in this it is for 900 years more; that the rent is computed in a different way, which does not alter the nature and effect of the transaction; and that in that case the two roads did not connect at the state line, but a few miles east of it, which was held to be immaterial. 118 U. S. 295-297, 6 Sup. Ct. Rep. 1095, 1096.

The plaintiff in that case, like the defendant in this, sought to support the validity of the contract under the statute of Indiana of February 23, 1853, c. 85, of which section 1 authorized any railroad company of Indiana "to intersect, join, and unite its railroad with any other railroad" constructed in an adjoining state, at any point on the state line, or elsewhere, to which the charters of the two companies authorized their roads to go, and to consolidate the stock of the two companies; section 2 authorized any railroad company of Indiana, whose road went to the state line, "to extend its said railroad into or through any other state," under such regulations as might be prescribed by the laws thereof; and section 3 authorized any railroad company of Indiana, whose road met and connected at the state line with a railroad in an adjoining state, "to make such contracts and agreements with any such road, constructed in an adjoining state, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper." Rev. St. Ind. 1881, §§ 3971-3973.

At the argument of that case, indeed, the third section, being the one affording the most plausible ground, was principally relied on, and was the only section of this statute discussed in the original opinion. 118 U. S. 312, 6 Sup. Ct. Rep. 1104. But in that opinion reference was made to *Tippecanoe Com'rs v. Lafayette, etc., R. Co.*, in which the supreme court of Indiana held that this statute did not authorize one railroad corporation to lease its railroad to another with a right of perpetual renewal, and said: "To connect one road with another does not fairly mean to lease or sell it to another." 50 Ind. 85, 110; 118 U. S. 312, 6 Sup. Ct. Rep. 1104. And upon the petition for rehearing, all three sections of the statute in question, as well as other statutes of Indiana, were cited by counsel and examined by the court, although its conclusions were briefly stated, according to its usage in an opinion delivered on a petition for rehearing. 118 U. S. 633, 634, 7 Sup. Ct. Rep. 25.

It is argued for the defendant that this suit is distinguished from the former one, in being brought, not, as that was, in Indiana, but in Illinois, and must therefore be controlled by the law and policy of Illinois; and it is contended that the statute of Illinois of 1855, above cited, empowered the defendant, though an Indiana corporation, to take a lease of a railroad in Illinois. But such a suit as this is governed, so far as regards the validity

of the contract, not by the law of the forum, but by the law of the contract; and the statute of Illinois was manifestly intended to confer power on domestic corporations only, leaving the powers of corporations incorporated elsewhere to be determined by the laws by and under which they were incorporated, even if a state could confer on a foreign corporation powers which it did not have by the laws of its own state. *Railway Co. v. Gebhard*, 109 U. S. 527, 537, 3 Sup. Ct. Rep. 363; *Christian Union v. Yount*, 101 U. S. 352; *Starkweather v. Bible Soc.*, 72 Ill. 50; *Santa Clara Academy v. Sullivan*, 116 Ill. 375, 385, 6 N. E. Rep. 183.

It may therefore be assumed, as contended by the plaintiff, that the contract in question was *ultra vires* of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it, at law or in equity, against the other.

It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of *ultra vires* has undergone in the English courts within the last 50 years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts not of last resort, and present no sufficient reasons for maintaining this suit. *Auburn Academy v. Strong*, Hopk. Ch. 278; *Atlantic & P. Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary, 541, 1 Fed. Rep. 745; *Western Union Tel. Co. v. St. Joseph & W. Ry. Co.*, 1 McCrary, 565, 3 Fed. Rep. 430; *Union Bridge Co. v. Troy & L. R. Co.*, 7 Lans. 240; *Railway Co. v. Simpson*, 21 Fed. Rep. 533.

The English cases relied on by the plaintiff were either suits to set aside marriage brokerage bonds, as in *Drury v. Hooke*, 1 Vern. 412, and *Smith v. Bruning*, 2 Vern. 392, *nom. Goldsmith v. Bruning*, 1 Eq. Cas. Abr. 89; or to recover back money paid for the purchase, without leave of the crown, of a commission in the military or naval service, as in *Morris v. McCulloch*, Amb. 433, 2 Eden, 190. Those cases have sometimes been justified upon the ground that, the agreement being against the policy of the law, the relief was given to the public through the party. *Debenham v. Ox*, 1 Ves. Sr. 276; *St. John v. St. John*, 11 Ves. 526, 536; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. Rep. 847. But Sir WILLIAM GRANT explained them as proceeding upon the ground that the plaintiff was less guilty than the defendant. *Osborne v. Williams*, 18 Ves. 379, 382. And *Morris v. McCulloch* can hardly be reconciled with his decision in *Thomson v. Thomson*, 7 Ves. 470, or with the current of later authorities.

The general rule, in equity, as at law, is *in pari delicto potior est conditio defendantis*; and, therefore, neither party to an illegal contract will be aided by the court, whether to enforce it, or to set it aside. If the contract is illegal, affirmative relief against it will not be granted,

at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall. 349, 355; *Springs Co. v. Knowlton*, 103 U. S. 49; *Story*, Eq. Jur. § 298.

While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose. *Adams*, Eq. 175. Consequently, it is well settled, at the present day, that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and canceled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defense. *Story*, Eq. Jur. § 700a, and cases cited; *Simpson v. Howden*, 3 Mylne & C. 97; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 282.

When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, above cited; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back at law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee that the conveyance cannot be considered the voluntary act of the grantor. *Worcester v. Eaton*, 11 Mass. 368, and 13 Mass. 371; *Atwood v. Fisk*, 101 Mass. 363; *Bryant v. Peck & Whipple Co.*, 154 Mass. 460, 28 N. E. Rep. 678; *Williams v. Bayley*, L. R. 1 H. L. 200; *Jones v. Society*, [1892,] 1 Ch. 173, 182, 185, 187.

In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of 999 years was beyond the defendant's cor-

porate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the state, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was *in pari delicto* with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration, from time to time, for 17 years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches. *Harwood v. Railroad Co.*, 17 Wall. 78; *Graham v. Railway Co.*, 2 Hall & T. 450, 2 Macn. & G. 146; *Flooks v. Railway Co.*, 1 Smales & G. 142, 164; *Gregory v. Patchett*, 11 Law T. (N. S.) 357.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him, and had no right to retain. *Springs Co. v. Knowlton*, 103 U. S. 49; *Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. Rep. 496, and cases there cited.

But the case is one in which, in the words of Mr. Justice MILLER, in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 316, 317, 6 Sup. Ct. Rep. 1091. See, also, *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 468, 469, 6 Sup. Ct. Rep. 809; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 56, 57, 61, 11 Sup. Ct. Rep. 478.

Decree affirmed.

LONDON & N. W. RY. CO. et al. v. PRICE
et al.

(11 Q. B. Div. 485. 1883.)

Special case stated in an action in the county court of Shropshire holden at Shrewsbury.

The case stated the following material facts:

The action was brought to recover a sum of £1. 11s. 2d., in respect of charges made by the plaintiffs for weighing coal for the defendants.

The defendants were coal merchants carrying on business at Minsterley Station, which is on a branch line of the Shrewsbury and Welchpool Railway. The railway and branch line were constructed under powers given by a local act (19 & 20 Vict. c. 132), and were subsequently transferred to and became the property of the plaintiffs under the provisions of the local acts 27 & 28 Vict. c. 196, and 23 & 29 Vict. c. 299.

The defendants, for the purposes of their business, occupied, as tenants to the plaintiffs, a wharf in the yard of the station adjoining a siding of the railway, and they paid to the plaintiffs a rent of 1s. per square yard per annum for the land so occupied. All the coal supplied to the defendants for their business at Minsterley Station was conveyed thither by the plaintiffs upon their railway, and delivered to the defendants at the wharf, and therefrom sold and delivered by the defendants to their customers.

The plaintiffs had a weighing-machine suitable for weighing coals fixed in the yard of the station, and used by them from time to time for their own purposes. The defendants, on receiving consignments of coal at the station, generally had occasion to weigh the coal before delivering the same to purchasers. There was no other machine than that belonging to the plaintiffs suitable for weighing coal at or near the station. For some years previously to April, 1882, the defendants, and other wharfholders at Minsterley Station, had used the plaintiffs' weighing-machine without charge; but in February, 1882, the plaintiffs put up a printed notice in the station addressed "to the public," and stating that on and after the 1st of April, 1882, the sum of 1d. per ton, or part of a ton, would be charged by them for the weighing of all coal over their machines, whether the persons for whom the weighing was done were wharfholders or not. The defendants had knowledge of this notice.

The defendants continued to weigh coal on the plaintiffs' machine during the months of April and May, 1882, and paid the plaintiffs' charges, in respect of coal so weighed, according to the notice. The defendants subsequently to May, 1882, weighed coal on the machine, but refused to pay any charge therefor, and it was agreed that, if the action was maintainable, the sum of £1 2s. was due from the defendants to the plaintiffs in respect thereof.

At the hearing in the county court the defendants contended that the charges made and claimed by the plaintiffs did not come within their tariff of charges, and were made without any statutory authority.

The judge nonsuited the plaintiffs, holding that the services and charges in respect of which the claim was made were ultra vires of the plaintiffs' statutory authority.

The question for the opinion of the court was whether or not the charges were ultra vires of the plaintiffs' statutory authority.

WATKIN WILLIAMS, J. I am clearly of opinion that the nonsuit in this case was wrong, and that the judgment of the county court judge must be reversed. It is only necessary to state the facts to shew that the case is absolutely clear in favour of the plaintiffs. [His lordship stated them.] It is to my mind an astonishing proposition that the defendants, having used the plaintiffs' weighing machine, and having agreed to pay for the use of it—for that is the effect of the facts stated in the case—should now be entitled to say that the contract was ultra vires and void, and so could not be the foundation of any action at law. No doubt if the contract was ultra vires, no effect whatever can be given to it; the court cannot travel beyond the legal result of the parties' acts. But I am of opinion that the contract was not ultra vires. The observations of Lord Justice James in *Attorney General v. Great Eastern Ry. Co.*, 11 Ch. Div. 480, are applicable to this case. He asks, "Where is this notion of ultra vires to stop?" and states various instances in which it would be absurd to say that the doctrine applied. I think that his observations cover this case, and I am of opinion that the plaintiffs, who possessed the weighing-machine for the purposes of their railway, and as incidental to their business as carriers, had a perfect right to allow, not only the persons for whom they carried coals, but also the public at large, to have the occasional use and convenience of the machine, and were entitled to make a fair charge for the use of it. I cannot distinguish this case from the cases of refreshment rooms and other conveniences in stations, not strictly connected with the business of a railway company, but established for the advantage of those with whom they come into contact in the course of their business.

SMITH, J. I am also of opinion that the plaintiffs were entitled to succeed, and I rest my decision solely on the facts of this case. The plaintiffs carried coals for the defendants, and at the termination of the carriage the plaintiffs warehoused the coals, which were in bulk and supplied in large quantities. The defendants request the plaintiffs to weigh the coal for them on the plaintiffs' machine, knowing perfectly well that a charge of 1d. per ton will be made for the use of the machine. The coal is weighed, and in answer

to an action for the weighing charges, the defendants set up that the whole transaction was ultra vires on the part of the company, who are therefore not entitled to recover.

The argument of the defendants' counsel convinced me that the charge was not expressly authorized by any of the acts of parliament relied on by the plaintiffs' counsel. The question arises, assuming that the charge is not within the direct terms of those acts, whether or not this action can be maintained on the ground that the service is incidental and convenient to the exercise of the plaintiffs' powers as carriers of goods for the defendants. It seems to me most convenient that the company should do what they have done. It was argued that the notice informing persons of the charge to be made was invalid. I give no opinion upon that. I think the notice formed no part of the contract. If it had been necessary to put the notice in at the trial, could it have been suggested that it must be stamped as being the contract between the parties? The plaintiffs are entitled to say to the defendants: "At your request

we weighed the coal, and you knew the charge, which was a reasonable one, because you knew of the notice." I am of opinion that this case comes clearly within the principle of the decision in *Attorney General v. Great Eastern Ry. Co.*, 5 App. Cas. 473. In that case the lord chancellor, agreeing with the judgment of Lord Justice James, in *Iron Co. v. Riche*, L. R. 7 H. L. 653, said that this doctrine of ultra vires ought to be reasonably, and not unreasonably, understood and applied, and that whatever might fairly be regarded as incidental to, or consequent upon, those things which the legislature had authorized, ought not (unless expressly prohibited), to be held by judicial construction to be ultra vires. It is manifest that in the present case the charge made is not expressly prohibited. I am of opinion that it was made for work done and services rendered, which were incidental to, and consequent upon, those things which the legislature had authorized; and therefore in my judgment the action is maintainable.

Judgment for the plaintiffs.

HOLMES & GRIGGS MANUF'G CO. v.
HOLMES & WESSELL METAL CO. et al.

(27 N. E. 831, 127 N. Y. 252.)

Court of Appeals of New York, Second Division.
June 2, 1891.

Appeal from supreme court, general
term, first department.

HAIGHT, J. This action was brought to recover the amount of a promissory note bearing date December 1, 1884, executed by the defendant the Holmes & Wessell Metal Company, and indorsed by the defendants Morse and Shonnard. The defenses were *ultra vires*, no consideration, and a non-tender of certain stock for the purchase price of which the note was given. The plaintiff is a manufacturing corporation organized under the general act of 1848 for the purpose of manufacturing sheet and rolled brass wire tubing and other articles composed wholly or in part of metal, in the city of New York. Its president was Charles E. L. Holmes, and its secretary and treasurer was George C. Edwards. On the 12th day of July, 1881, Holmes and Edwards entered into an agreement with the defendants Shonnard, Morse, and one Charles Wessell to organize a new company for the manufacture of brass, nickeline alloys, and other composite metals, under the corporate name of the "Holmes & Wessell Metal Company;" the capital stock of such company to be \$100,000, the whole amount to be issued and paid up in cash; three-fourths thereof to be subscribed and paid by Holmes and Edwards, and the remaining one-fourth by the other parties to the agreement. The agreement, in its preamble, recites that Holmes and Edwards propose to transfer the rolling-mill belonging to the plaintiff, including all of the machinery, tools, and appliances connected therewith, together with the lease of the premises occupied by the plaintiff, for the sum of \$50,000. Subsequently, and at an annual meeting of the plaintiffs' stockholders held on the 20th day of July, 1881, the president and secretary were instructed to sell to the Holmes & Wessell Metal Company the entire machinery and plant owned by the plaintiff, for the sum of \$50,000; and also authorized them to sell to the same company all the material, manufactured, unmanufactured, and in process of manufacture, owned by the plaintiff, and to also subscribe for 3,000 shares of the capital stock of the company, and to pay for the same out of the proceeds of the sale of the mill and materials. It further appears that the Holmes & Wessell Metal Company was incorporated on the 15th day of July, 1881, and that Charles E. L. Holmes subscribed for 2,000 shares, and George C. Edwards 1,000 shares, of the capital stock. Thereafter, and on the 23d day of July, 1881, the new company, at a meeting of its stockholders, authorized the purchase from the plaintiff of its plant and machinery, and to pay therefor the sum of \$50,000, and for the entire stock of materials, manufactured and unmanufactured, owned by the plaintiff the sum of \$31,333.96; and, on the 1st day of September thereafter, such sale was

completed by the transfer of the plaintiff company to the defendant company of its entire plant, machinery, etc.; and, in payment therefor, the defendant company issued to George C. Edwards, trustee, the stock subscribed for by Holmes and Edwards, amounting to \$75,000, and the balance, \$6,333.96, was paid in cash. After such transfer, the plaintiff discontinued its business. On the 1st day of December, 1884, the plaintiff entered into a contract with the defendants Morse, Shonnard, and said Charles Wessell, in which the plaintiff agreed to sell to the other parties thereto 1,440 shares of the stock of the defendant company, standing in the name of Edwards, as trustee, for the sum of \$30,000, payable, \$5,000 in cash, and the balance by certain promissory notes, of which the note in suit is one. The agreement further provided that the stock should remain in the name of Edwards or some other officer of the plaintiff, as trustee, that it might be voted upon by him until delivered, as specifically provided in the contract.

It is doubtless true that a corporation cannot purchase or deal in stocks of other corporations, unless expressly authorized by law so to do. *Talmage v. Pell*, 7 N. Y. 328; *Berry v. Yates*, 24 Barb. 200; *Milbank v. Railroad Co.*, 64 How. Pr. 20; *Mechanics, etc., Mut. Sav. Bank and Bld. Ass'n v. Meriden Agency Co.*, 24 Conn. 159; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *Hazlehurst v. Railroad Co.*, 43 Ga. 57; *Valley R. Co. v. Lake Erie Iron Co.*, (Ohio,) 18 N. E. Rep. 486; *People v. Trust Co.*, 130 Ill. 268-284, 22 N. E. Rep. 798; *Franklin Co. v. Lewiston Institution*, 68 Me. 43; *Hill v. Nisbet*, 100 Ind. 341-349. It is equally true, however, that it may do whatever may be necessary in the exercise of its corporate franchises. The selling of property and collection of debts is among the powers given; and hence it may take title to all kinds of property, even the stock of another company, in the payment of a debt. *Talmage v. Pell*, supra, and cases above cited. The statute under which the plaintiff was incorporated provides that "it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation." *Laws 1848, c. 40, § 8*. The funds here spoken of evidently mean the money of the company, and the statute was not intended to limit the powers of the corporation beyond that already indicated. The plaintiff was a private manufacturing corporation. It exercises no powers of a public nature, and has attempted no combination by which the public may in any manner be prejudiced. There are, consequently, no questions affecting public policy to be considered. The purpose of the company is expressed in a preamble to the resolutions adopted authorizing the sale of its plant and stock of materials on hand to the defendant company. It was, in short, to increase the business of the stockholders by adding to the manufacture of brass that of German silver and nickle alloys. The scheme adopted was the organization of a new corporation, bringing in some other persons with additional capital. The stock in the new company was subscribed for by Holmes and Edwards individually,

and the stock when finally issued was issued to Edwards. It is true, he takes it as trustee, and holds it as such for the plaintiff; but this we do not regard as necessarily *ultra vires*. The plaintiff had the right, with the consent of its stockholders, to sell its plant and retire from business; and it appears from the evidence in this case that the consent of all the stockholders was given to the sale that was made. In *Kent v. Mining Co.*, 78 N. Y. 159-186, *FOLGER, J.*, in delivering the opinion of the court, says that "a corporation may not do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interests of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders, dealing in good faith with the corporation, will be protected in reliance upon those acts." In the case of *Treadwell v. Manufacturing Co.*, 7 Gray, 393-405, it was held that the directors of a manufacturing corporation may sell the whole property of the corporation to a new corporation, taking payment in shares of stock of the new company, to be distributed among the stockholders of the old company. In *Howe v. Carpet Co.*, 16 Gray, 493, it was held that one manufacturing corporation may take the shares of another in payment of a debt. *CHAPMAN, J.*, in delivering the opinion of the court, in commenting upon the case of *Treadwell v. Manufacturing Co.*, supra, says that "while corporations *quasi* public may be restrained and directed in the management of their affairs, yet corporations established for trading and manufacturing purposes may wind up their affairs whenever they think proper to do so, and in the manner adopted in that case. The legality of the transaction could not have depended on the intention of the corporation to wind up its affairs immediately. If it had taken the stock in the payment for goods, or for the sale of a building or land, or water-power, which it did not want or desire to sell, while it still carried on its business, the act must have been equally legal." In *Hodges v. Screw Co.*, 1 R. I. 312-347, facts were in many respects similar to those under consideration. *GREENE, C. J.*, says: "Nor have we any doubt that the screw company might have rightfully taken this stock in the iron company in payment for their rolling-mill, if it had been taken with a view to sell it again, and not permanently hold it. Again, it is to be observed, the directors were not investing the funds of the screw company in the stock of the iron company. They had on hand an unsala-

ble rolling-mill, and they owed a heavy debt for it, and one great object in taking the stock in the iron company was to realize for the rolling-mill, and in part pay thereby the debt." *State v. Canal Co.*, 40 Kan. 96, 16 Pac. Rep. 349; *Leathers v. Janney*, 41 La. Ann. 1120, 6 South. Rep. 884; *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.*, 13 Fed. Rep. 516; *Taylor v. Mining Co.*, 79 Cal. 285, 21 Pac. Rep. 753; *Ditch Co. v. Zellerbach*, 37 Cal. 543; *State v. Butler*, 86 Tenn. 614, 8 S. W. Rep. 586; *Mor. Priv. Corp.* § 212. The plaintiff has sold its rolling-mill, machinery, etc., to the defendant. It has taken stock in the latter company in payment therefor. Inasmuch as this was done with the consent of all the stockholders, it being the act of a private corporation, not in any manner harming the public, we see no reason for condemning its title to the stock so obtained. *Palmer v. Cemetery*, 122 N. Y. 429-435, 25 N. E. Rep. 983.

But, assuming the transaction to have been *ultra vires*, the defenses interposed would still be unavailable. The plaintiff has the stock, and has paid for it. It cannot be recovered back by the defendant, for the transaction is completed and closed. While the contract remained executory, if it was unauthorized, a stockholder or person interested might have interfered by injunction, and prevented the transfer of the property of the plaintiff to the defendant. But, the contract having become executed, the title of the stock now vests in the plaintiff, and it has the power to sell and dispose of the same. *Sistare v. Best*, 88 N. Y. 527-533; *Milbank v. Railroad Co.*, supra. The contract under which the note in suit was given was made in December, 1884, nearly four years after the plaintiff became the owner of the stock. No claim is made that that contract is for any reason illegal or void. Numerous cases are found in which the courts have refused to execute contracts that were *ultra vires*, but this action is not based upon such a contract. The courts will not permit the plea of *ultra vires* to prevail, whether interposed for or against a corporation, where it would not advance justice, but would accomplish a legal wrong. *Raft Co. v. Roach*, 97 N. Y. 378-381; *Arms Co. v. Barlow*, 63 N. Y. 62. To hold that the plaintiff could not dispose of the stock would deprive it of the consideration received for the transfer of its rolling-mill and material, thus accomplishing a wrong, and not advancing justice. Our conclusions are that it had title to the stock, and that, consequently, there was a valuable consideration for the note in suit. The question raised in reference to the non-tender of the stock was properly disposed of by the general term. The judgment should be affirmed, with costs.

All concur.

NEW YORK & S. CANAL CO. et al. v. FULTON BANK.

(7 Wend. 412. 1831.)

This was an action of assumpsit, tried at the New York circuit, in November, 1829, before the Hon. Ogden Edwards, one of the circuit judges.

The declaration contained the common money counts, and the pleas were the general issue and payment. On the trial of the cause, the incorporation of the New York and Sharon Canal Company by the legislature of the state of New York, and of the Sharon Canal Company, by the legislature of Connecticut, was duly proved. A witness for the plaintiffs testified, that as a commissioner for taking up subscriptions to the capital stock of the two companies, the plaintiffs in this cause, he received certain monies. The plaintiffs then offered to prove that such monies were received by the witness for the account of the two companies jointly, and that the same were deposited on the joint account of the plaintiffs, in the Fulton Bank; that by the by-laws of the two companies, the capital stocks of the two companies had been consolidated into one stock; that the subscriptions to the stock of the two companies were originally made by the subscribers to the stock so consolidated; that the same persons were appointed officers of both companies; that both companies were under the same control and management; and that the monies sought to be recovered were received for the companies jointly, and for the purpose of making one entire canal; and that to procure water for the supply of the canal contemplated to be made by the canal company incorporated by the legislature of New York, it was necessary to proceed into the town of Sharon, in the state of Connecticut; which evidence thus offered was objected to, and rejected by the judge, and the plaintiffs were nonsuited. The plaintiffs now moved to set aside the nonsuit, and that a new trial be granted.

SAVAGE, C. J. It cannot be necessary to decide whether it is in the power of the two corporations, who are plaintiffs, to consolidate their stock, or to form a partnership. General principles are against the power of corporations to do such acts. They have no powers but such as are granted, and such as are necessarily incident to the grant made to them. Corporations at common law have certain powers, but not such as would authorize the forming of a partnership, or the consolidation of two corporations into one.

These two companies had certain monies in the hands of their officer; they were both interested in those monies, and probably in equal degree. Not being partners, they were tenants in common; in that character they made the deposit of the money, and in that character I can see no objection to their sustaining an action for it. Cannot two banks or insurance companies take security from a person in failing circumstances, indebted to both? May they not be mortgagees in the same mortgage, or obligees in the same bond; or may they not take together an assignment of a chattel? If they may, they can enforce their rights by action. Without looking into the transaction by which the plaintiffs became jointly interested in the fund in question, it seems to me sufficient to know that they were so interested. Their money is withheld from them; how are they to obtain it? Can each maintain an action for his share? The bank cannot know what is the share of each, and are not bound to take the responsibility of deciding that question. If each cannot bring a separate action, and both cannot unite in a joint action, then the defendants are safe in the possession of a fund acknowledged to belong to the plaintiffs; or the plaintiffs are driven into a court of chancery. In my opinion, the law affords a remedy, and in this form of action.

The nonsuit must be set aside, and a new trial granted; costs to abide the event.

CATSKILL BANK v. GRAY et al.

(14 Barb. 471. 1852.)

This cause was tried at the Greene circuit in April, 1849, before Mr. Justice Parker, a trial by jury having been waived by the consent of parties.

In September, 1843, the Ulster Iron Company leased to one Horace Gray, for the term of five years, their Iron Works at Saugerties, in the county of Ulster. The company covenanted that Gray might expend, in putting the works in order, and in additional machinery, a sum not to exceed \$5,000, and for the amount so expended, the company was to allow him interest, at six per cent. from the date of the expenditures until the rent should be equal to the sum, and then the rent should be applied in liquidation thereof. Gray was to pay to the company as rent for the demised premises "one-fourth part of the net profits arising from the said demised premises, and the manufacture of iron thereon, after deducting all charges, (excepting commissions on sales at New York, the personal services of Gray, and the general superintendence at Saugerties, which were not to be charged in making up profits.) One half of the profits were to be paid annually, and the balance at the end of the demised term. On such balance, Gray was to allow and pay interest to the company at the rate of six per cent. per annum; which interest was to be added yearly to the principal. The first \$5,000 of profits which would fall to the share of the company, was to be applied to liquidate the expenditures for repairs. The company was not to be liable to repay any moneys already previously received by them as rent, or be liable for any loss or deficiency at the end of the term demised. It was further agreed that the Stockbridge and Port Henry pig iron might be used in the manufacture of iron on the demised premises, and if so used, should be charged at the fair market price. Gray was to provide all the finances necessary for the manufacture of bar iron on the demised premises; and to furnish all the necessary capital, in cash or otherwise, as should be required for the said manufacture, to the greatest advantage, he charging on his advances interest from the date thereof, at the rate of six per cent. per annum, and allowing the same interest on all moneys in his hands arising from such manufacture. Gray, at the end of the term, was to surrender the premises peaceably and quietly, unless in the meantime he should elect to purchase the same at the sum of \$100,000. It was also provided that the company might re-enter if the portion of the net profits to be received as rent, should be behind and unpaid for the space of thirty days next after any of the days of payment, or if the manufacture should be stopped by Gray, for the term of six months, without the written consent of

the company, unless some severe breakage or casualty should take place. From and after such re-entry, the covenants on the part of the company were to cease, determine, and be absolutely void.

In the fall of 1847, one William Burt, as superintendent of the Ulster Iron Works, obtained from the Catskill Bank, loans upon three drafts or bills of exchange, drawn by himself as superintendent, on Horace Gray & Co., of Boston, and accepted by them. These drafts were discounted by the bank, and amounted in the whole to \$19,500. Burt was at that time acting as the agent or superintendent of the Ulster Iron Works. He stated, in his testimony, that the accounts were kept at the works with Horace Gray as lessee, and he acted as the agent of such lessee. He never received any directions from the Ulster Iron Company, nor any of its officers, nor ever borrowed any money for them. The money received by Burt from the bank was used at the works, in paying off men, and other contingent expenses, such as freight, &c. It was admitted on the trial that the drafts had never been paid, and were duly protested.

The counsel for the company insisted before the judge, that such company was not liable jointly with Horace Gray, as no partnership had been shown to exist between them, and that the officers of the company could not enter into a partnership with Gray which would be binding upon the company; that the transactions between Burt and the plaintiffs were not loans to the Ulster Iron Company, as copartners with Horace Gray & Co., but were purchases or discounts of negotiable paper; that the only remedy of the plaintiffs was directly upon the drafts or bills of exchange, against the parties thereto; and that the fact of the money obtained by Burt on the discount of the drafts having been applied to carrying on the business, conducted with the iron works leased by Horace Gray & Co., did not create any liability of the Ulster Iron Company as copartners with Horace Gray & Co., or otherwise, to pay the drafts so discounted, or the amount so applied to carrying on the said business.

The counsel for the plaintiffs contended that the defendants were liable to the plaintiffs under the pleadings and proofs, for the amount loaned of the plaintiffs for the purpose of carrying on the manufacture of iron at their manufactory in the village of Saugerties.

The judge decided that the plaintiffs were entitled to recover against the defendants for the sum loaned by them to the witness Burt, as superintendent, which were used in and about the business of manufacturing iron in the manufactory at Saugerties, as testified to by him; to which decision the counsel for the company excepted.

The judge further decided that the plaintiffs should recover from the defendants the

sum of \$21,104.67, to which decision the counsel for the company excepted.

WRIGHT, J. The judge who tried the cause decided that the defendants, under the pleadings and evidence, were jointly liable to the plaintiffs for the moneys loaned by the latter, and which were used in and about the business of manufacturing iron at the Ulster Iron Works, in 1847. This is correct, if by the terms of the agreement of September, 1843, Horace Gray and the Ulster Iron Company sustained the relation of partners, as respected third persons, and the money was loaned to the supposed partnership or to the agent of the partnership as such. If they are to be made to respond jointly for the debt due to the bank, it must be on a construction of that agreement; the money having been used at the works during its continuance in the business of manufacturing iron.¹ * * *

It is unnecessary to decide whether under this agreement, as between the parties themselves, they would be partners; but as respects third persons, it appears to me that that relation legally exists. What was to be received by the company was only payable out of profits actually made in the manufacture of iron. They had then a direct interest in such profits. As was said in *Dob v. Halsey*, 16 Johns. 40, "he who takes a part of the profits indefinitely, shall by operation of law be made liable for losses; upon the principle, that by taking a part of the profits, he takes from the creditors a part of that fund which is the security for the payment of their debts. See, also, *Everett v. Coe*, 5 Denio, 180; *Hesketh v. Blanchard*, 4 East, 144. The case is not like that *Heinstreet v. Howland*, 5 Denio, 68, where one leased a ferry to another, the latter to take charge of the business, pay all the expenses, and pay over to the lessor one-half of the gross receipts for ferriage; and it is clearly distinguishable from *Bowyer v. Anderson*, 2 Leigh, 550, and *Perrine v. Hankinson*, 11 N. J. Law, 181.

It is urged that the Ulster Iron Company, being a corporation, could not legally form a partnership with an individual. This company was incorporated in 1831, for the purpose of manufacturing iron. It might, therefore, lawfully exercise the powers expressly granted to it, and those necessarily to be implied, to enable it to answer the specific purpose of its creation. I entertain no doubt that under its charter, the company was capable of making the contract with Gray set forth in the pleadings. That contract related to the business for which the company was incorporated, and was but a mode of furthering the specific purpose of its creation. Strictly, perhaps, corporations should be, and are restricted from con-

tracting partnerships with individuals or corporations, and as between the parties to the contract, acting upon equal knowledge, a question of validity might be raised; but a corporation may contract with an individual in furtherance of the object of its creation, the effect of which contract may be to impose upon the company as respects the community, the liabilities of a partner. I cannot think that a corporation may so shape its contracts relating to the business for which it was incorporated, as to share jointly with an individual in the profits of such business; subtract its interest in the profits, from the fund on which the creditors of the concern had a right to rely for the payment of the debts due to them; and when called upon by such creditors, be permitted to escape liability altogether, on the ground that the profits were realized as the partner of an individual, which relation the corporation could not legally occupy. I know of no sound reason why a corporation, more than a natural person, who participates in the profits, as such, of a particular business in which it may lawfully engage, should not be holden liable to the public for losses.

It is further insisted by the counsel for the company, that the money was not loaned to the supposed partnership, or to the agent of the partnership as such; that the loans were made to Burt as agent of Horace Gray, on his drafts on H. Gray & Co.; that the transaction was a discount and purchase of negotiable paper, and the plaintiffs' remedy is confined to the paper; that the fact that the money received by Burt was applied to the business of the partnership, does not entitle the plaintiffs to recover it of the copartners. The money sought to be recovered was loaned to Burt, as superintendent of the Ulster Iron Works, and applied by him to the business being conducted under the agreement of September, 1843. The plaintiffs do not seek to directly charge the defendants as parties to the bills of exchange, but on a joint liability for money had and received. The fact that Burt was superintendent of the iron works when the loan was effected and applied, is found by the judge. He was the superintendent or agent at the works, in carrying out the agreement between Gray and the company. The money was obtained by him as such superintendent and applied for their joint and mutual benefit. The bank certainly knew that Burt was acting as the agent of third persons in procuring the loan. He professed to act for others; and it is not unreasonable to conclude that the plaintiffs, in loaning these funds, had regard to the eventual liability of the principals, whoever they might be, if it should become necessary to resort to them. In *Emly v. Lye*, 15 East, 6, the action being upon a bill of exchange drawn by one of the partners of a concern, in his own name, which was discounted by the plaintiffs, and the money went to the

¹ Part of the opinion, relating to the construction of the agreement, is omitted.

use of the firm, it was held that the plaintiffs could not recover, either upon the bill or the money counts. Lord Ellenborough observed that the counts on the bill had been properly abandoned, for unquestionably on a bill of exchange drawn by one only, it cannot be allowed to supply by intendment the names of others, in order to charge them; and considering it a mere discount or sale of the bill, he also held that there was no joint liability of the defendants for money had and received, and that it was the individual transaction of the partner who drew the bill; and all the other judges expressed similar opinions. I do not, however, deem this case in all its aspects similar to the one under consideration. The agreement of September, 1843, contemplated that there should be a general superintendent of the business of manufacturing iron,

though as between the parties thereto, payment for his services was not to be charged in making up the account of profits. This superintendent draws the bills that were discounted by the plaintiffs, signing them in the character of superintendent. He must have acted exclusively as the agent of Gray, in drawing and negotiating the bills, to render the facts of this case similar to those of *Emly v. Lye*. The facts must have shown the transaction to have been a mere discount or sale of bills. But it seems to me necessarily to be implied from the decision of the judge that he found the fact that Burt acted as the agent of the defendants, and not exclusively as the agent of Gray. Whether that finding is sustained by the evidence, is not a question to be entertained on a bill of exceptions.

New trial denied.

ALLEN et al. v. WOONSOCKET CO.

(11 R. I. 288. 1876.)

Bill in equity brought by the surviving copartners of the firm of Philip Allen & Sons against the respondent corporation, charging that there had existed between the respondent and the complainants a copartnership to carry on the business of calico printing. The prayer of the bill was for an account and settlement. The facts as found by the court are sufficiently stated in its opinions.

POTTER, J. The old firm of P. Allen & Sons having failed, and all the parties having made assignments in 1857, a new firm, under the same name, was formed by the same parties, by an agreement in writing, November 26, 1858.

In June, 1858, the print works formerly owned by P. Allen & Sons were sold by their assignees, and purchased by the Woonsocket Company (a corporation chartered by the legislature in 1832), who had occupied them on lease from the assignees of P. Allen & Sons after their failure.

The bill alleges that said defendant corporation, by Crawford Allen, its agent, on November 26, 1858, formed a partnership with P. Allen & Sons to carry on said printing business, the corporation to furnish the works and capital, the said P. Allen & Sons to manage the business and devote their skill, attention and influence to it, and to receive for such services a salary of \$200 per month, and twenty per cent. of the profits of the business, and that said business was so carried on until Philip Allen's death, on December 16, 1865, when the agent notified said P. Allen & Sons that their interest in the business ceased; that large profits were made, and that complainants received the salary, and a portion but not all of the share of profits they were entitled to, and praying for an account and payment of the balance that may be found due.

The answer denies the partnership, contends that such a partnership could not legally exist, as being *ultra vires* on the part of said Woonsocket Company; that, if it existed, it was terminated when the mill stopped in December, 1864, or when the accounts were closed and a new arrangement begun in May, 1865, instead of December 16, 1865, the date of Philip Allen's death; and that, therefore, the suit is barred by the statute of limitations, the bill not being filed until December 15, 1871; denies that any moneys were paid to P. Allen & Sons as a part of profits, but that what was paid over and above the salary was a gratuity, and for the use of a trade-mark, and not of right under contract; that stated and true accounts were rendered and allowed and settled by the parties, the last in December, 1870. The respondent claims the benefit of these allegations as if pleaded.

The answer also sets out other matters which, though bearing on these questions by way of inference and evidence, need not be noticed now.

The answer further alleges, that on December 12, 1871, P. Allen, Jr., one of the complainants, released all claims against the respondent for services as partner or individually.

The first point of defence is that the respondent, being a corporation chartered by the legislature of Rhode Island, had no power to enter into a partnership; that the whole proceeding would be *ultra vires*.

The grounds on which the proceedings of corporations have been held to be void, as being beyond the powers given them by their charter, have been chiefly these:

First. Because public policy requires that corporations should be confined to the business, and to the mode of managing that business prescribed by the charter, which is their law, and which they are bound to obey.

The act incorporating this company was passed at the January session, A. D. 1832. It incorporates the Woonsocket Company. It seems strange, but is true, that no portion of the act specifies what business is to be done by the company, nor can its business be inferred from anything in its name.

Second. Because the individual stockholders of the company have a right to require that the corporation shall be confined to its legitimate business. They have invested their money on the faith that it will be so confined. A majority have no power to change it. The stockholders have invested their money also on the faith that its business will be managed by the officers provided for in the charter, and in whose election they have a voice; and while a majority, through their officers and agents, may make many binding contracts, they cannot transfer the whole control of their affairs to a body foreign to themselves.

Now, in this case, the charter does not specify by what officers the business of the corporation shall be managed; and during the whole period involved in this suit, the Woonsocket Company had but one single stockholder. Crawford Allen owned the whole stock. There was no other stockholder with any right to complain that the business had been changed, or that the corporation had put the management of any portion of its business beyond its own control. And this, we think, makes a material difference between the present case and the cases to which we have been referred on the part of the respondent. The reason of the rule ceasing, the rule does not apply.

And besides, the partnership here set out was merely a partnership at will; and the corporation could terminate it, and resume the full control of their business at pleasure.

And if the agreement was merely an agreement to pay a part of profits for services without giving the complainants the control

as partners, then it would not on any principle be *ultra vires*.

In this case this point is raised in the answer, and the respondent claims the benefit of it as if he had demurred or pleaded.

As presented in the answer, it does not seem to be the proper subject of a plea. The point that a corporation cannot enter into a partnership is a pure matter of law.

The rules of the United States supreme court of 1822 (7 Wheat. x., rule 23), and the similar Rhode Island rules of 1837 (1 R. I. xxii., rule 20), allowed all defences to be made by answer. But after a temporary trial of it the United States supreme court altered its rule in 1842 (17 Pet. lxvii.; 1 How. liii., rule 39), and our supreme court followed in July, 1857 (4 R. I. 570, rule 40), so that a defence which is a proper subject of demurrer ought now to be made by demurrer as anciently. The English rules have always required it, although the chancery commissioners recommended a greater latitude.

While even if it appeared upon the hearing that the complainant was not by law entitled to relief, he would not prevail, still, where it is a mere matter of law, it should be so presented. In the present case, if the contract was void for that reason, no answer would be required, the pleadings would be simplified, the litigation ended, and the time of the court and of the parties would be saved. Payment of costs is but a small penalty.

There may be many cases where it may be difficult to determine whether to plead or demur, and there should always be a reasonable indulgence with liberty of amendment. In the present case, the fact that the respondent is a corporation, which the respondent relies on, does appear in the bill; but the important fact, that Crawford Allen was sole stockholder of the respondent company, does not appear until the answer is put in.

All we mean to say is that questions of law should be raised by demurrer, where it can be done; and if not by demurrer, then as soon as possible in limine.

The bill alleges a partnership. The respondent was to furnish the works and capital, the complainants to have the charge and management, and devote their skill, attention, and influence to it, and for their services were to receive a salary and a certain portion of the profits.¹ * * *

We are therefore of opinion that the complainant is entitled to relief.

After the foregoing opinion had been given, the case was re-argued at the request of the respondent.

July 22, 1876. POTTER, J. The brief of the respondent, on the reargument of this

case, complains of several misconceptions of fact and misstatements of law in the former opinion of the court.² * * *

Out attention has again been called to the doctrine of "*ultra vires*," and it has been strenuously contended that the Woonsocket Company had no power to purchase and operate print works or to enter into a partnership.

The grounds, as before stated by us, on which proceedings of corporations have been held void as being beyond their charter powers, have been (see Kindersley, V. C., in *Shrewsbury v. Railroad Co.*, 35 L. J. Ch. 156, 172; quoted in *Brice on Ultra Vires*, by Green, p. 35. See, also, *Selden, J.*, in *Bissell v. Railroad Co.*, 22 N. Y. 231):

First. Because the charter when accepted, constitutes a contract between the stockholders that the corporation shall be confined to its proper business, and that a majority cannot change it. A minority have been held bound in some cases by the fact of the acquiescence in or ratification of the acts of the majority.

In the present case there was no one who had a right to complain on this ground, Crawford Allen being sole stockholder.

Second. Because public policy requires that they should be confined to the business and the mode of managing business prescribed by the charter, which is their law.

In the present case the charter was passed in 1832. No portion of the act specifies even by implication the business to be done, and nothing can be implied even from its name.

Where a corporation is created for special purposes, there is no doubt that it must be confined in its operations to those purposes, and it can only exercise the powers expressly granted or impliedly necessary to carry out these purposes. But in the construction of its powers it may be sometimes very important to consider whether the corporation is bound to show that the act done is within its granted powers, or whether the contestant is bound to show that it is beyond them.

In the present case the question is very important. The powers to buy and sell land, &c., &c., are merely the powers usually granted to all corporations for whatever purpose incorporated. But the purpose or object is nowhere declared.

And the general rule may be stated to be that it lies on those who impeach the contract to show that it is avoided. *Brice, Ultra Vires* (by Green) c. 1, § 3, and cases cited.

The contrary rule, which is contended for so earnestly by the counsel for the respondent, would probably produce a great deal of litigation in this state. It is believed there are many charters of corporations doing a very large business where in the charter itself no purpose whatever is specified (although in one, the *Lonsdale*, it is de-

¹ Part of the opinion, relating to questions of partnership, is omitted.

² Part of the opinion, relating to the dissolution of the old form, is omitted.

scribed in the title of the act, and there only as a manufacturing corporation), and a still greater number where the intended business can only be inferred from the name.

In such cases the fact that the persons incorporated were doing a particular sort of business when incorporated, and the fact that the legislature and the corporators have acquiesced in the doing of a particular business, or in a continued course of dealing, might be entitled to weight.

In this case the contention is that the respondent had no right to form a partnership, that a corporation must transact its business through its proper officers, and cannot delegate its powers in such a manner as to put its business beyond its control.

If the partnership had been for a definite period, it might well be argued that the respondent had no right to make such a contract. But it was a mere partnership at will, terminable at any moment by either party. The respondent, therefore, did no more part with the control of the business than if it had employed Philip Allen & Sons simply as agents, and its right to do that cannot very well be denied.

We have examined carefully the authorities to which we have been referred. Brice, *Ultra Vires*, pt. 3, c. 2, subd. 6, does indeed say, that "agreements between companies which create a partnership between the parties thereto are void." The leading case he refers to is *Charlton v. Railroad Co.*, reported in 7 Wkly. Rep. 731, but more fully in 5 Jur. (N. S.) 1097, before Page-Wood, V. C., where two corporations contracted for a permanent amalgamation. This would have been equivalent to the creation of a new corporation without the consent of parliament.

And it is recognized by this author, that certain arrangements may be made for division of profits or as to traffic, where there is no transfer of the powers of the corporation or merger of either separate corporation in a constituted whole.

The counsel have referred us to four American cases:

1. *Whittenton Mills v. Upton*, 10 Gray, 582. The Whittenton Mills were incorporated for the purpose of manufacturing cotton goods. In 1842, the persons who had previously furnished machinery, &c., for them failed, and William Mason bought the tools, machinery, and stock, and hired the foundry, &c. Mason and the Whittenton Mills then made an agreement by which the Mills were to advance the money to pay for said tools, machinery stock, and rent, and for the labor required. Mason was to have a salary, and the profits of their business, patents, &c., were to be divided for five years. Subsequently the agreement was extended to seven years, the business to be done under the name of W. Mason & Co., buildings and additional machinery obtained, and it was afterwards extended for three years more. In the purchase of machinery for the Whit-

tenton Mills, the parties dealt with each other as strangers. Mason contributed to the partnership nothing but his skill and patent rights. And it appeared that other corporations for manufacturing cotton and woolen goods had machine-shops for making their own machinery, and some such corporations had sold machinery to other mills. The court hold that the corporation (page 596) could not make a contract by which the control of its business should be put beyond the control of its officers or agents; that (page 597) the corporation could not engage in any business foreign to that for which it was created, or enter into any partnership for that purpose; and (page 598) that the charter was a public law, and all persons dealing with them must take notice of the extent of their powers. The court say it was not necessary to decide the question of the liability to third persons, nor the question of ratification by stockholders. The suit was to set aside proceedings in insolvency, and they were set aside.

2. *New York & S. Canal Co. v. Fulton Bank*, 7 Wend. 412. A canal was made partly in Connecticut and partly in New York. The projectors obtained a separate charter from each state, but the corporations had the same stockholders and the same officers, and by by-law they had consolidated the stock. The suit was to recover funds deposited in bank in the joint name. The court said it was not necessary to decide whether corporations might consolidate or form a partnership, although general principles were against such powers, but they were tenants in common of the funds and could sue for them.

3. *Bank v. Gray*, 14 Barb. 479. The Ulster Iron Company leased to Gray its works for five years, reserving a part of the profits for rent, &c., with privilege to purchase at the end of the term. The suit was on drafts, drawn by the superintendent and accepted by Gray, and the claim was to hold the Ulster Iron Company as partners. Counsel for the Ulster Iron Company contended there was no partnership, and the company could not form one. Held, that the Ulster Iron Company had an interest in the profits as profits, and were liable to third persons as partners, and that they could make such a contract as was made.

4. *Bank v. Ogden*, 29 Ill. 248. The Marine Bank was incorporated under the general law and could only receive ten per cent., and its stockholders were individually liable. The Chicago Insurance Company, under an old charter, could take twelve per cent. on loans. Both were under public acts. They had the same stockholders and officers and used the same room and vault, but their accounts were kept separate, and separate dividends were made. The profits of the bank in selling exchange, and of the insurance company on loans, were divided between the two. All the moneys in the vault

were the property of the insurance company. Checks upon the bank were paid by the officers of the insurance company, and charged in account against the bank. The plaintiffs had deposited money with the insurance company, and sued the bank on the ground of liability as partner. There had been a depreciation in bank bills. Held, that it was a general deposit, and the holder of the check was not obliged to take payment in depreciated funds. Held, also, that the two corporations could not form a partnership but could make joint contracts. Here they were not jointly sued. The court below had instructed the jury, that if they were satisfied the bank was the real party in interest, and the insurance company only its agent to carry on the business, they might hold the bank liable, although the business had been done in the name of the agent. The verdict was for the plaintiff, and it was affirmed.

We can see nothing in these cases to affect the principle we have laid down.

To the argument, that the fact that there was only one stockholder cannot enlarge the powers of the corporation, we can only say that no such inference can properly be drawn from the language of the former opinion. That fact is only of importance upon the point that there were no stockholders with any right to complain of the acts of the corporation.

To the argument, that if the payments before 1865 prove a partnership they would also prove it afterwards, it is only necessary to say that we considered them as entitled to weight as evidences of an indebtedness before Philip Allen's death, which had not been settled.

We intend to decide, and do decide, that we consider a contract of partnership, not of hire, proved. That the contract continued to the death of Philip Allen, we consider as most positively proved. If so, the defence of the statute of limitations is of no avail.

There is no satisfactory evidence that the agreement of 1865 had any effect upon the former relations of Philip Allen & Sons and the Woonsocket Company. They were not

ousted from their former control of the business, nor had they any notice that their control or interest was in any way affected by it.

And as to the proportion of profits, the complainants were to be entitled to that is to our minds satisfactorily proved.

Mr. Nightingale, who went into the business in 1861, says (page 2 of printed evidence): "The fact that a so much larger amount than the nominal salary was paid led me to suppose that Messrs. Philip Allen & Sons had an interest in the business, and at an interview with Mr. Crawford Allen relative to my share in the business I proposed that it should be twenty per cent., and Mr. Allen said, that is what my brother has." Mr. Nightingale afterwards (pages 10, 64) said he was unable to fix the date of this conversation. He also states another conversation with Crawford Allen in 1865. We have also the statements of Crawford Allen made to Wilkinson and Dorr, the figures in his own handwriting and the evidence of Philip Allen, Jr. And upon the general subject of the contract, see also the evidence of Hennessy, who, for aught that appears, is entirely disinterested.

It is also strongly urged that the contract between Philip Allen & Sons and Crawford Allen was merely a personal contract, or, as counsel say, a personal confidence. We can only repeat that the mode in which the accounts were kept and the receipts given satisfies us that the contract was considered by both parties to be made with the respondent corporation.

We have considered all the points made on the reargument. We have noticed some of them in this opinion. We cannot see any reason for changing our former decision.

Former decision affirmed.

Decree establishing the fact of the partnership as charged, declaring that the complainants were during such partnership entitled to a salary of \$200 per month and to twenty per cent. of the profits, and referring the cause to a master in chancery to take an account. Decree entered October 2, 1876.

STANDARD OIL CO. v. SCOFIELD.

(16 Abb. N. C. 372. New York Supreme Court, Special Term. 1885.)

Trial of issues raised by demurrer to complaint.

The Standard Oil Company, an Ohio corporation, brought this action against William C. Scofield and others, composing the firm of Scofield, Shurmer & Teagle, for an accounting, payment, &c., under a contract made between the parties as to the business of refining and dealing in crude petroleum.

The complaint alleged the incorporation of the plaintiff under certain specified statutes of Ohio, the partnership of defendants, the making of the contract annexed as part of the complaint, its suspension by notice from the plaintiff as provided therein; the defendants' application to their own use of large sums in excess of their just proportion; and their refusal to furnish plaintiff with a statement of the joint business.

The contract appears in a note.¹

The defendants demurred to the complaint as not stating facts sufficient to constitute a cause of action.

BARTLETT, J. Three objections are urged upon this demurrer to the complaint as not stating facts sufficient to constitute a cause of action: First, that the contract sued upon is *ultra vires* as to the plaintiff; secondly, that the contract is void, as being in restraint of trade, and therefore against public policy; and, finally, that the complaint does not allege due performance by the plaintiff of all the conditions of the contract on his part.

I will consider these objections in the order in which I have stated them.

1. Is the contract in suit *ultra vires*?

The complaint refers to the particular acts of the Ohio legislature under which the plaintiff corporation was organized and exists. The demurrer admits that it was incorporated under these statutes. Assuming that this admission brings the charter of the plaintiff before the court, it is argued that no authority can be found therein which warrants a corporation in entering into a partnership with individuals, as the plaintiff did in making the contract now under consideration; and I am referred to a decision to this effect made in a suit between these same parties, by the court of common pleas in Cuyahoga county, Ohio, on an application to enjoin the defendants from refining more oil than the quantity specified in the agreement.

I concur with the Ohio court in the view that the relation established between the plaintiff and the defendants was practically one of partnership, and adopt the construction which that tribunal puts upon the statutes of its own state in holding that the act

of incorporation does not authorize the plaintiff to become a copartner with individuals. But while this conclusion justified the court there in refusing to interfere by injunction to aid the plaintiff in enforcing its claims under such portion of the contract as remained executory, can the fact that the joint undertaking was *ultra vires* on the part of the plaintiff avail the defendants in answer to a claim that, so far as the contract has already been executed, they have applied to their own use large sums of money to which they are not entitled?

I think not. "Contracts with corporations made in excess of their powers, which are purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation, should not be enforced, because such contracts contemplate an unauthorized diversion of corporate funds, and therefore a breach of private trust. But the executed dealings of corporations must be allowed to stand for and against both the parties, when the plainest rules of good faith so require." *Parish v. Wheeler*, 22 N. Y. 494, 508. So far as this specification of their demurrer is concerned, the defendants say to the plaintiff in substance: "Yes; we made an agreement with you. We carried on business with you under it. We have taken more than our share of the profits, and now you cannot have any redress, because the contract between us was really one of copartnership, which you could not make without exceeding your corporate powers." In my opinion, it needs no argument to show that to permit such a position to be successfully maintained would be to disregard the plainest principles of good faith.

2. Is the contract void as being in restraint of trade, and, therefore, contrary to public policy?

I assume that the demurrer is not to be upheld on this ground, if the agreement is susceptible of any view consistent with the facts set out in the complaint, which would make it valid. Although upon a trial, where all the facts could be disclosed, it might appear that the true purpose of the arrangement between the parties was to effect a combination inimical to the interests of the public, this is not to be inferred upon a demurrer, where the instrument is capable of a construction consistent with a lawful intent.

Regarding the relation between the plaintiff and the defendants as substantially that of partners, the contract is not necessarily such as the law forbids. A man who proposes to put money into a joint undertaking with strangers may lawfully bind them not to do more business than he thinks will be warranted by the capital to be employed, even if the result be to limit the production of a particular commodity. In such cases as the present, the controlling question must be the purpose of the parties. If it be their

¹ The contract is omitted.

design artificially to enhance the price of a necessary commodity by keeping the product of others out of the market, their contracts to that end are illegal. *Arnot v. Coal Co.*, 68 N. Y. 558. A vast number of authorities might be cited in support of this proposition, but it is commonly applied only where the unlawful purpose has been found by the trial court as a matter of fact (68 N. Y. 558, 565) or is necessarily to be inferred from the circumstances of the case.

I think the most that can be said upon the pleadings here (outside of which I can consider nothing), is that the facts pleaded point to a probability that the contract was intended to be in restraint of trade. Those facts, however, are also consistent with a lawful intent. "The presumption is in favor of the legality of contracts. The law does not assume an intention to violate the law, nor will an agreement be adjudged to be illegal where it is capable of a construction which will uphold it and make it valid." *Lorillard v. Clyde*, 86 N. Y. 384, 387. This is expressly held to be the rule applicable in cases of

demurrer. All reasonable intendments are to be indulged in support of the pleading. Construing the complaint herein accordingly, it must be held good so far as the second objection is considered.

3. Is the absence of an averment that the plaintiff duly performed all the conditions of the contract on its part fatal to the complaint?

The complaint does allege that the plaintiff and defendants "entered upon and continued to carry on" the joint business provided for in the contract between them; that the defendants have applied to their own use from the receipts and profits of said business large sums of money greatly exceeding the proportion thereof to which they were entitled (amounting in the aggregate to \$80,000); and that they refuse to account.

I think these averments are sufficient to entitle the plaintiffs to maintain their action for an accounting.

There must be judgment for the plaintiff on the demurrer, with the usual leave to answer over on payment of costs.

BLOCK v. FITCHBURG R. CO. et al.

(1 N. E. 348, 139 Mass. 308. 1885.)

Contract, against the Fitchburg Railroad Company and seven other railroad corporations, described in the writ as "doing business together as a line for the purpose of carrying freight, under the name of 'Erie and North Shore Despatch,'" and having a usual place of business in Boston. The declaration alleged a delivery of a package of goods to the defendants at Boston, to be delivered to the plaintiff at Denver, Colorado, under a bill of lading, and the non-delivery thereof. The bill of lading, which was headed "Erie and North Shore Despatch Fast Freight Line," and acknowledged the receipt of the package, contained the following clauses:¹ * * *

Trial in the superior court, before Staples, J., who ordered a verdict for the defendants. The plaintiff alleged exceptions, which appear in the opinion.

MORTON, C. J. The evidence at the trial tended to show that the several defendant corporations formed an association or company under the name of the "Erie and North Shore Despatch Fast Freight Line," for the transportation of merchandise between Boston and Chicago; that the association had an agent in Boston, who was authorized to receive goods at Boston for transportation over the line to Chicago, and to give bills of lading or contracts for transportation like the one upon which the plaintiff sues; that the plaintiff delivered goods to such agent, and received the bill of lading in suit; and that a part of the goods were lost between Boston and Chicago.

By the bill of lading, the "Erie and North Shore Despatch" contracts to carry the goods from Boston by the Fitchburg Railroad, and thence by the Erie and North Shore Despatch, to Chicago, and there to deliver them to connecting railroad lines, to be forwarded to Denver, their destination. The several railroad companies which form the association are not named in the contract. It is a single and indivisible contract, by which the Erie and North Shore Despatch Line agrees to carry the goods to Chicago, the freight to be earned upon the delivery there to the connecting line. So far as the question in this case is concerned, it is unlike those cases where a railroad forming one link in a line of connecting roads between two points receives goods to be transported

over its line and delivered to the connecting road, in which it has been held in this commonwealth that each railroad in the continuous line is liable only for loss or damage happening on its own road. *Darling v. Railroad Corp.*, 11 Allen, 295; *Gass v. Railroad Co.*, 99 Mass. 220; *Burroughs v. Railroad*, 100 Mass. 26; *Aigen v. Railroad*, 132 Mass. 423.

The defendants formed a company, and in its name made a special contract to carry the plaintiff's goods from Boston to Chicago. They are, so far as the plaintiff is concerned, partners, and liable jointly and severally for any loss or damage to his goods between Boston and Chicago, unless they are exempted from liability by the terms of the contract. *Hill Manuf'g Co. v. Boston & L. R. Corp.*, 104 Mass. 122. The principal difficulty in this case is as to the true construction of the contract of carriage. It contains the provision, that, in case of loss or damage to the property received, "whereby any legal liability or responsibility shall or may be incurred, that company shall alone be held answerable therefor in whose actual custody the same may be at the time of the happening thereof." It also contains a provision, that, in case of loss or damage of any of the goods "for which either of said companies may be liable, it is agreed that said company, shall have the benefit of any insurance effected" thereon by the owner.

The defendant contends that the expression "that company," in the clause above cited, means that railroad company in any part of the continuous line between Boston and Denver, so that, although the plaintiff's loss occurred between Boston and Chicago, that railroad company in whose custody the goods were when lost is alone liable. This is not the necessary, and we do not think it is the fair, construction of the defendants' contract.² * * *

The effect of this interpretation is, what seems to have been in the minds of the parties, to release the Despatch Company from liability after it had carried the goods to the end of its route, according to its contract, and had delivered them to the connecting carrier, and to hold it liable to the point to which it had assumed and contracted to transport the goods as a common carrier.

We are of opinion that this is the fair construction of the contract, and therefore that the learned justice who presided at the trial in the superior court erred in directing a verdict for the defendants.

Exceptions sustained.

¹ The clauses are omitted, the substance being stated in the opinion.

² Part of the opinion is omitted.

SWIFT et al. v. PACIFIC MAIL STEAMSHIP CO. et al.

(12 N. E. 583, 106 N. Y. 206. 1887.)

Appeal from judgment of the general term of the supreme court in the first judicial department, entered upon an order made May 8, 1885, which affirmed a judgment in favor of plaintiffs entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought by the plaintiffs, as shippers, against the defendants, as common carriers, to recover damages for breach of a joint contract for the carriage of whale oil from Panama to New York.

The complaint alleged that the plaintiffs were copartners, and that the defendants were corporations organized under the laws of this state; that the business of the Panama Railroad Company, among other things, was the transportation of freight from Panama by rail to Aspinwall, and there to deliver the same to the Pacific Mail Steamship Company, whose business it was, among other things, to transport the freight so received by vessel to New York; that the defendants, for a single price named, entered into a joint contract to carry the oil from Panama to New York; that they entered upon the performance of their contract in the months of January and February, 1873, and delivered a portion of the oil received by them from the plaintiffs, in the city of New York, about the 23d of April, 1873; that, owing to the negligence, delay and improper handling of the oil, and the casks containing the same, by the defendants, the oil was greatly damaged and injured, and a large part of it was lost by leakage while at Panama, on its way across the isthmus, at Aspinwall, and also on the passage from Aspinwall to New York; and that by reason of negligence, improper conduct and mismanagement of the defendants, the plaintiffs suffered damages in the sum of \$20,000 besides interest. Each of the defendants, by a separate answer, among other things, denied the joint contract and the joint liability alleged in the complaint; alleged that the oil was delivered and carried under a special contract printed and in writing, copies of which were delivered to plaintiffs, wherein the several rights and liabilities of plaintiffs and defendants, and each of them, with respect to plaintiffs and to each other, relative to the subject-matter of the complaint, were limited, defined and determined, and that its undertaking in regard to the oil was only under such contract, which it had fully performed; that it was not liable for losses accruing upon the route of the other defendant; and each defendant also alleged, as a separate defense, that there was a defect of parties plaintiff, and that several other persons named were then, and also, at the time of the making of the contract and the transportation of

the oil, jointly interested with the plaintiffs in the oil. The further material facts are stated in the opinion.

EARL, J. A point is made on behalf of the defendants that the plaintiffs cannot maintain this action on the ground that some of the seamen on the whaling vessels were to some extent joint owners with them of the oil. It is undoubtedly the general rule in this state that an action against a common carrier for the breach of his contract, or of his duty to carry must be brought in the name of the owner of the goods, although the contract may have been made or the goods shipped by another. *Green v. Clarke*, 12 N. Y. 343; *Krulder v. Ellison*, 47 N. Y. 36. The rule has, however, been much questioned and has some exceptions. *Blanchard v. Page*, 8 Gray, 281; *Finn v. Railroad Corp.*, 112 Mass. 524; *Arbuckle v. Thompson*, 37 Pa. St. 170. Where the consignor, although not the general owner, has a lien upon or a special interest in the goods, and makes the contract and pays the consideration for their carriage, he may bring an action for the breach of the contract in his own name in order that he may protect his rights. Here these plaintiffs made this contract in their own names, and with their own money paid the agreed freight, and they were both consignors and consignees. It does not appear what ownership if any in the oil the seamen had, nor does it appear what the relations between the plaintiffs and them were. For aught that appears, the plaintiffs were under a special duty to deliver this oil in the city of New York, and had a special interest in the whole of the oil to protect. As they were in control of the oil and made the contract for its transportation, being both consignors and consignees, in the absence of proof to the contrary, it must be assumed that they had sufficient title and right to maintain this action and enforce their contract with the defendants; and in so holding it is believed that we are in conflict with no authority.

But the evidence does not show that the seamen were joint owners with the plaintiffs of the oil. It was simply testified that "they were interested in the oil," and that evidence was not sufficient to establish that they were either partners or joint owners with the plaintiffs. It is more reasonable to suppose, from such evidence, that they were simply interested in the proceeds of the oil, and such is believed to be the common arrangement between the owners of whaling vessels and their seamen, when the latter have an interest in the product of the whaling voyage. *Baxter v. Rodman*, 3 Pick. 435; *Grozier v. Atwood*, 4 Pick. 234; *Bishop v. Shepherd*, 23 Pick. 492. We are, therefore, of opinion that the seamen were not necessary parties to the action.

The Panama Railroad Company was organized to construct, maintain and operate a

railroad across the isthmus, from Panama to Aspinwall; and the Pacific Mail Steamship Company was organized to navigate steamships on the Pacific and Atlantic oceans. Laws 1848, c. 266; Laws 1850, c. 207. It is not disputed that the Panama Railroad Company could receive freight at Panama and contract to carry it beyond its terminus through to the city of New York, and that the Pacific Mail Steamship Company could receive freight at the city of New York, and contract to carry it to Aspinwall and thence by the railroad to Panama.

It is the well settled law in this state that a carrying corporation over a portion of a continuous line of transportation may contract to carry beyond the terminus of its route, and that such a contract is not ultra vires. *Weed v. Railroad Co.*, 19 Wend. 534; *Wylde v. Railroad Co.*, 53 N. Y. 156; *Root v. Railroad Co.*, 45 N. Y. 524; *Condict v. Railroad Co.*, 54 N. Y. 500. Such contracts have been upheld sometimes upon the ground of estoppel, and sometimes upon the ground that they were incident to the business for which the contracting corporation was organized. While the defendants admit that such contracts could be made, they contend that the Pacific Mail Steamship Company could not contract to receive goods away from its terminus and to transport them to such terminus over the route of another carrier, and thence transport them over its own route to their destination. That is, while they admit that the steamship company could receive goods at the city of New York and contract to carry them to Panama on the Pacific coast, they deny that it could receive goods at Panama and agree to transport them to the city of New York. We see no reason for distinguishing between the two kinds of contracts, and for holding that the company could make the one kind and not the other. If when it receives goods at New York for transportation to Panama it is engaged in business authorized by its charter, or incident to such business, then when it procures freight at Panama for transportation to Aspinwall and thence to New York it is also engaged in promoting the legitimate business for which it was organized. It thus procures freight for transportation upon its steamships, and the business it thus does at Panama and across the isthmus is just as legitimate as it would be to establish agencies on the Pacific coast to solicit freight for transportation from Aspinwall to New York, or to contract with newspapers there to advertise the carrying of such freight. Cannot a railroad company take freight for transportation at a point a few rods from its depot? And if it may a few rods, why not a few miles? If it may have a depot for the receipt of freight one mile from its terminus, why may it not have a depot fifteen or twenty miles therefrom, and transport the freight thence to its road by any means that it chooses to adopt? The Panama Railroad Company

terminated on the Pacific coast at Panama, and there it owned lighters to go out into the ocean to take freight from vessels. If it could send its lighters out one mile, why could it not send them out several miles for the same purpose to some convenient port or roadstead? The main business of the steamship company between Aspinwall and New York was to transport passengers and freight which came from the Pacific coast, and instead of taking the passengers and freight at Aspinwall, why could it not take them at Panama? We see no reason for holding that it might not do so in the prosecution of its corporate business, and as incident thereto. Then again, if when the steamship company receives goods at New York under contract to carry them to Panama it is estopped from denying its authority and power to make the contract, why when it receives goods at Panama under contract to be carried to New York should it not be equally bound by estoppel?

We think, therefore, that it is clear upon principle and authority that both defendants were competent to enter into contract to carry this oil from Panama to New York. And as each was competent to contract alone it cannot be doubted that they were competent to make a joint contract to do it. They could even become partners in the transportation business between Panama and New York, and so far as we have discovered, the power of corporations thus to become joint carriers has never been denied but has frequently been recognized. *Aigen v. Railroad Co.*, 132 Mass. 423; *Block v. Railroad Co.*, 139 Mass. 308, 1 N. E. 348; *Gass v. Railroad Co.*, 99 Mass. 220; *Railroad Co. v. Trippe*, 42 Ark. 465; *St. Louis Ins. Co. v. St. Louis & T. R. & I. R. Co.*, 104 U. S. 146; *Barter v. Wheeler*, 49 N. H. 9; *Wylde v. Railroad Co.*, supra; *Hutch. Carr.* § 160. The right of a corporate carrier to go beyond its terminus to procure freight and passengers, and to transport them to its terminus for carriage over its route, is not absolute and unqualified, but has some limitations. What those limitations are, it is not possible, in a general way, to define. The New York Central and Hudson River Railroad Company, could not establish a line of steamers between Liverpool and New York to carry passengers and freight from Liverpool to New York, in order that it might secure the business of transporting such passengers and freight over its route to Buffalo; but it might run ferry boats from Staten Island, or from the New Jersey shore for the purpose of securing passengers and freight for transportation over its route. The right to go beyond its terminus to procure passengers and freight for transportation over its route, by a corporate carrier, must be exercised within reasonable limits and under such circumstances that it may fairly be said to be incident to its legitimate corporate business; and our holding is that the Pacific Mail

Steamship Company, engaged in transportation upon both the Pacific and Atlantic oceans, did not go beyond reasonable limits in contracting to take freight at Panama and transport it over the Panama Railroad for delivery to its steamship at Aspinwall, its main business being to take freight coming to it over that railroad.

The plaintiffs claim that the contract for the carriage of this oil was made in the city of New York between them and one Bellows, who was the vice-president and general agent of both defendants at that place, and that it was made by correspondence with Bellows and a personal interview had with him. On the other hand the defendants claim that the contract was contained in and evidenced by the bills of lading signed at Panama by one Corwin, who was the agent of both defendants at that point, which bills of lading expressly stipulated that the defendants should not be jointly liable for any loss or damage to the oil; that neither of them should be liable in any event for any loss or damage accruing upon the route of the other, nor accountable for leakage arising from improper or defective casks, nor for damages of any kind to articles perishable in their nature, nor for unavoidable detention and delay. The trial judge submitted all the evidence bearing upon the contract to the jury, and instructed them to find whether it was made with Bellows as claimed by the plaintiffs, or whether it existed in the bills of lading as claimed by the defendants; and he also instructed them to find whether the contract was the joint contract of the defendants or the individual contract of the Pacific Mail Steamship Company; and he charged them that if they found the contract existed in the bills of lading they should render a verdict in favor of the defendants; but that if they found it was made with Bellows as claimed by the plaintiffs, and that it was the joint contract of both defendants they should then render a verdict in favor of the plaintiffs against both defendants. The jury must, therefore, have found that the contract was made with Bellows as claimed by the plaintiffs, and that it was joint, and the only further inquiry is whether there was any evidence to authorize their findings. * * *

The correspondence, together with what was said at the interview between Swift and Bellows, the joint agent of the defendants, made a special contract between the parties under which the plaintiffs were to deliver the oil at Panama, and the principals of Bellows were to receive the oil from plaintiffs' vessels, take it upon lighters to the docks and promptly carry it across the isthmus to Aspinwall without delay, care for the oil upon the isthmus and see to the cooping of the casks so that there would be no leakage there, and from Aspinwall transport it to the city of New York. And

all this was to be done for the single price stipulated.

The contract, so far as it went, was complete. It was doubtless expected that bills of lading would be executed, but it could not have been expected that by them the contract so made should in any way be modified.

Under this contract, all the oil was delivered in January, 1873, from plaintiffs' vessels, and the only ground the defendants have for claiming that this was not the contract under which the oil was transported, is the fact that two months afterwards, on the 27th of March, 1873, the common agent of the defendants executed bills of lading, which were sent to the plaintiffs and received by them April seventh. By some delay on the isthmus, the oil did not reach Aspinwall and was not delivered on the steamships until the second or third of April. After the receipt of the bills of lading, the plaintiffs did not discover the peculiar stipulations contained in them, at variance with the contract which they had previously made. Upon the landing of the oil in New York, the loss of the oil from leakage was discovered, and the plaintiffs paid the stipulated freight, giving notice of their claim. Under the evidence, the main features of which we have alluded to, it was certainly competent for the jury to find that the oil was parted with to the defendants for transportation, and that the defendants entered upon the transportation thereof under the contract claimed by the plaintiffs. The defendants could not, therefore, abrogate or alter that contract by merely signing and mailing bills of lading, which did not reach the plaintiffs until after the oil had left Aspinwall, and much, if not all, the loss had occurred. There certainly was no conclusive evidence that the plaintiffs consented to accept the bills of lading in place of the prior contract, and that contract must, therefore, control. *Bostwick v. Railroad Co.*, 45 N. Y. 712; *Guillaume v. Transportation Co.*, 100 N. Y. 491, 3 N. E. 439; *Wheeler v. Railroad Co.*, 115 U. S. 29, 5 Sup. Ct. 1061, 1160.

It is clear that the plaintiffs did not understand that they were making several contracts for the transportation of their oil from Panama to New York, but they evidently supposed they were making a single contract with an agent who had authority to contract for the entire route. While the evidence is not conclusive, not even very satisfactory, that the defendants contracted jointly to carry this oil, yet we think there was enough to justify the jury in finding such a contract. Here was the steamship company engaged in transportation both upon the Pacific and Atlantic oceans, making contracts to carry from ports upon one ocean to ports upon the other, and such contracts could be performed only by carriage across the isthmus over the Panama Railroad, and

that railroad was engaged in transportation across the isthmus of freight almost wholly to or from vessels of the steamship company. The two companies had common agents upon the isthmus and in New York. Goods were transported in all cases for a single through freight from ports on the Pacific to ports on the Atlantic, and the freight money, after deducting compensation for lighterage, was equally divided between the companies, and the same person was vice-president of both companies.

Taking into consideration all these matters, the situation of the two companies and all the circumstances surrounding them, and the methods of their business as disclosed in the evidence, it is not an improbable nor an unjustifiable inference that they were jointly engaged in business and jointly contracted with the plaintiffs.

If the contract was made by the correspondence and personal interview with Belows, as claimed by the plaintiffs and found by the jury, then, if the defendants are not jointly liable for plaintiffs' loss, they are severally liable. The whole loss was apparently primarily due to unexplained, unjustifiable

delay and carelessness upon the isthmus while the oil was in the possession of the railroad company. For that delay and loss it is liable as a common carrier upon general principles. The steamship company made a special contract to transport the oil without delay from Panama to New York, and to care for it and cooper the casks upon the isthmus, and it is liable for the loss by virtue of that special contract. Therefore the defendants are either severally or jointly liable for the loss; and whether they shall be held for the loss jointly or severally cannot be very important to them, because it is quite certain from their relations to each other that they will be able to adjust between themselves in a satisfactory manner the joint recovery. The objection to the joint recovery, therefore, appears to be merely technical and should not prevail unless the judgment is plainly and clearly wrong and such we think it is not.

A careful consideration of the whole case has, therefore, led us to the conclusion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

HUTCHINSON v. WESTERN & A. R. CO.

(6 Heisk. 634. 1871.)

From Hamilton.

Appeal from the judgment of the circuit court, July term, 1871; J. B. Hoyl, Judge.

The Western & Atlantic Railroad Company, of which the state of Georgia was the sole owner and stockholder, was by its charter authorized to construct and operate a line of railroad from Atlanta, Georgia, to Chattanooga, Tennessee. Without any authority in its charter, it undertook to run in connection with its road a line of steamers on the Tennessee river. Two of these steamers collided in port at Chattanooga, and the husband of the plaintiff, who was mate upon one of them, was wounded and afterwards died from the injuries received. This action was brought under the statute to recover the damages resulting to the widow and children.

Upon the trial there was proof tending to show that the boat was imperfectly equipped and perhaps negligently managed. The defendant, in addition to other defenses, insisted that it had no authority to run a line of steamers upon the Tennessee river, that the doctrine of *ultra vires* applied, and that it could not be held liable for injuries resulting from negligence in the prosecution of this unauthorized business. But it appeared that the profits were received by the company.

The circuit judge charged the jury in effect that the charter did not confer upon the corporation the right to run steamers on the Tennessee river, that if the agents of the corporation undertook to do so, the act would be *ultra vires*, the corporation would not be bound by it, and would not be liable for injuries resulting from negligence in its execution.

Verdict and judgment were for the defendant, and the plaintiff appealed in error to this court.

TURNEY, J., delivered the opinion of the court.

The doctrine "*ultra vires*" is not applicable in this case.

In arriving at a true solution of the question involved, the only use to be made of the charter granted by Georgia and Tennessee to Western & Atlantic Railroad, is to show the fact that it had a corporate existence.

If a corporation, chartered for one purpose, engage in a business different from that authorized by charter, or if its employees engage in such different business in the name of the principal, and the principal, with a knowledge of such departure, receive the profits arising therefrom, employ agents to superintend it, or in any other distinct mode recognize it as their business, and in its prosecution by its agents an injury results there-

from to another's person or property, the party so injured is entitled to maintain his action for the damages resulting from the wrongful act.

The fact that the act from which the injury resulted was unauthorized by the charter of incorporation, is no defense for the wrong-doer.

With corporations as with individuals, if it be engaged in a lawful business, and to promote that lawful business resort to unauthorized acts, it must be held responsible for the consequences of such unauthorized acts, else the maxim, that "no man shall take advantage of his own wrong" is violated.

This holding is not in conflict with the opinion in the case of *Pearce v. Railroad Co.*, 21 How. 444. In that case the learned judge concludes his opinion: "It is contended that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes as an endorser, and the only question is, had the corporation the capacity to make the contract in the fulfillment of which they were executed. The opinion of the court is, that it was a departure from the business of the corporation, and their officers exceeded their authority."

Here we have a clear intimation from the court, that if the owner of the boat had sued for the conversion, or if the holder or endorser of the notes had claimed under an assignment of the carrier's interest, and sued for the value of the vessel, passing by the note, the action would have been maintainable.

That there was a responsibility, not upon the notes executed by the president in the name of the defendants, but for the appropriation of the property by its agents for the use and with the knowledge of defendants.

The cases are not parallel. That was an action *ex contractu*, this *ex delicto*; there the authority was exceeded by the officers, here they are acting in conformity to orders in promotion of the object of their employment.

The fact that the defendant is the property of the state of Georgia, which is the sole stockholder, makes it none the less a corporation, able to sue and liable to be sued as other corporations. Here the defendant as a corporation, and not as the state, is sued. If the ownership by the state entitles the road to more immunities than corporations with different status, and gives it privileges in the courts of defenses not extended to others, then the principle must be allowed its full and legitimate application, and but few railroads in this state can be sued, the

state being largely interested in most of them.

By becoming owner or stockholder the state descends from its sovereign dignity to indi-

viduality so far as to place it upon an even footing of legal liability with other corporations of like character and purposes.

Reverse the judgment.

WECKLER v. FIRST NAT. BANK OF
HAGERSTOWN.

(42 Md. 581. 1875.)

Appeal from the circuit court for Washington county.

The case is stated in the opinion of the court. The verdict and judgment being for the defendant, the plaintiff appealed.

MILLER, J., delivered the opinion of the court.

A question of importance and of first impression in this state arises on this appeal. The suit was instituted by the appellant against the appellee, a national bank organized under the act of congress approved June 3d, 1864, known as the "National Currency Act." The first and second counts of the declaration aver in substance, that the defendant as part of its business as such banking association, was engaged in the sale of the bonds of the Northern Pacific Railroad Company, and in soliciting orders for the purchase of the same and receiving commissions for such sales and orders, and by means of certain specified false, fraudulent and deceitful representations made by its teller, the plaintiff was induced to and did purchase from the bank two of said bonds of \$500 each, and paid the bank therefor the sum of \$1,000, and was thereby damaged. The case was tried upon issue joined on the plea of not guilty. There was conflicting proof as to the making of the alleged false representations by the teller. The court rejected all the prayers offered on both sides, and instructed the jury in effect that the national banking act, under which the defendant was organized, limits the action of the bank to the pursuit of the objects specified in the act of congress, and that the purchase and sale of such bonds is not within the chartered powers of the defendant, and that the plaintiff cannot recover against the defendant in this action, although the jury may find from the evidence that the teller of the bank fraudulently induced the plaintiff to purchase the bonds in question by making the alleged false representations, and that she suffered loss thereby. This presents broadly and clearly the question whether the bank has authority under the act of congress to engage in the business of selling bonds of railroad companies on commission.

A bank, like other private corporations, is confined to the sphere of action limited by the terms and intention of its charter. The supreme court, in the case of *Bank v. Dandridge*, 12 Wheat. 68, states the rule by which the powers of the bank are to be determined thus: "Whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend both for their powers and the mode of exercising

them, upon the true construction of the statute itself." And in that case the court adopt, as entirely correct and applicable to the bank, the doctrine laid down by Chief Justice Marshall, in *Head v. Insurance Co.*, 2 Cranch, 167, in reference to an insurance company, viz.: "Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may be correctly said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner in which that act authorizes." And in this state the law is well-settled that a corporation created for a specific purpose not only can make no contract forbidden by its charter, but in general can make no contract which is not necessary either directly or incidentally, to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, it must be considered in the first place, whether its charter or some statute binding upon it forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfil the purpose of its existence; or whether the contract is entirely foreign to that purpose; a corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted. *Steam Navigation Co. v. Dandridge*, 8 Gill & J. 318, 319. We must, therefore, determine the true construction of the act of congress authorizing the formation of these banking associations, and whether the power to make contracts like the one in question is expressly conferred upon them, or is directly or incidentally necessary to enable them to fulfil the purpose of their creation, or is entirely foreign to that purpose.

So far as the purpose of the law is indicated by its title, it is, "to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." After prescribing in previous sections the mode by, and the conditions under, which banking associations may be formed, the 8th section declares that every association so formed shall become a body corporate, from the date of its certificate of organization, but shall transact no business "except such as may be incidental to its organization, until authorized by the comptroller of the currency to commence the business of banking." Power is then given it to adopt a corporate seal, to have succession by the name designated in its organization certificate, and in that name to make contracts and sue and be sued, to elect directors

and other officers, "and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this act." This is the only portion of the statute to which, for the purposes of this case, it is necessary to refer. By it the associations are not simply incorporated as banks, and the scope of their corporate business left wholly to implication, but the kind of banking which they may conduct is limited and defined. As we read the language of this 8th section, it authorizes the associations to carry on banking "by discounting and negotiating promissory notes," &c., and to exercise "all such incidental powers" as shall be necessary to conduct that business. The mode in which the incidental powers may be exercised is not defined, but all incidental powers which they can exercise must be necessary or incidental to the business of banking, thus limited and defined. To the usual attributes of banking, consisting of the right to issue notes for circulation, to discount commercial paper and receive deposits, this law adds the special power to buy and sell exchange, coin and bullion, but we look in vain for any grant of power to engage in the business charged in this declaration. It is not embraced in the power to "discount and negotiate" promissory notes, drafts, bills of exchange and other evidences of debt. The ordinary meaning of the terms "to discount," is to take interest in advance, and in banking is a mode of loaning money. It is the advance of money not due till some future period, less the interest which would be due thereon when payable. The power "to negotiate" a bill or note is the power to endorse and deliver it to another so that the right of action thereon shall pass to the endorsee or holder. No construction can be given to these terms as used in this statute, so broad as to comprehend the authority to sell bonds for third parties on commission, or engage in business of that character. The appropriate place for the grant of such a power would be in the clause conferring authority to "buy and sell," but we find that limited to specific things, among which bonds are not mentioned, and upon the maxim, "*expressio unius est exclusio alterius*," and in view of the rule of interpretation of corporate powers before stated, the carrying on of such a business is prohibited to these associations. Nor can we perceive it is in anywise necessary to the purpose of their existence, or in any sense incidental to the business they are empowered to conduct, that they should become bond-brokers or be allowed to traffic in every species of obligations issued by the innumerable corporations,

private and municipal, of the country. The more carefully they confine themselves to the legitimate business of banking, as defined in this law, the more effectually will they subserve the purposes of their creation. By a strict adherence to that, they will best accommodate the commercial community, as well as protect their shareholders.

Such is our construction of this statute, and it is supported by the best considered authorities and the decided preponderance of judicial opinion in other states. This eighth section is almost identical in terms (and as respects the present question completely so) with the banking act of New York of 1838, c. 260; and the court of appeals of that state, in *Talmage v. Pell*, 7 N. Y. 328, held that banking associations formed under that law have authority only to carry on the business of banking in the manner and with the powers specified in the act, and have no power to purchase state stocks, to sell at a profit or as a means of raising money, except when received as security for a loan, or taken in payment of a loan or debt. In speaking of the transaction under review in that case, the court say the banking company "purchased these bonds as they might have purchased a cargo of cotton to send to market to be sold at the risk of the vendor for the highest price that could be obtained. No authority to traffic in either commodity is expressly given by the law of 1838. It is, therefore, claimed as a power incidental to the business of banking. But the 18th section of the act declares that this business shall be carried on by discounting bills, notes and other evidences of debt, by loaning money on real and personal security, by buying and selling gold and silver bullion, foreign coin and bills of exchange, &c. The subjects pertaining to the business of banking are designated, and the express powers of the association are limited to them, and to such incidental powers as may be necessary to transact the business thus defined by the legislature."

They then proceed to show that the claim to base the validity of the contract upon any incidental power was unfounded, and pronounce the transaction illegal, and the assignment by the company of mortgages which they held as collateral security for the purchase, void. So also in recent decisions of the courts of last resort in several of the states where this act of congress, and especially its 8th section, has been considered, we find it construed in entire accord with the view we have taken of it. We refer to *Fowler v. Scully*, 72 Pa. St. 456; *Shinkle v. Bank*, 22 Ohio St. 516; *Wiley v. Bank*, 47 Vt. 546; and *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278. In the last mentioned case there is a very able opinion of the court by Allen, J., in which he says he fully concurs in the views expressed by Judge Wheeler in the *Vermont* case, and, in reference to the case of *Van Leuven v. First Nat. Bank of Kingston*,

shortly reported (the opinions of the judges not being given) in 54 N. Y. 671, which has been pressed upon our attention by the appellant's counsel, he says it decided no general principle but by a divided court it was determined "that the contract in that case, under the circumstances, was the contract of the corporation, and not the individual contract of the president."

We are therefore clearly of opinion that this business of selling bonds on commission, is not within the scope of the powers of the corporation, and the bank could not, under any circumstances carry it on; and being thus beyond its corporate powers, the defence of ultra vires is open to the appellee. *Pennsylvania, D. & M. S. Nav. Co. v. Dandridge*, 8 Gill & J. 248. And it follows from this that the bank is not responsible for any false representations made by its teller to the appellant, by which she was induced to purchase the bonds in question. Hence there was no error in the court's instruction to the jury nor in the rejection of the appellant's first and second prayers.

But by the third and fourth counts of the declaration, and the appellant's third and

fourth prayers, it is sought to give another character to the transaction, and to place the right to recover upon a different ground. They present the case in this view, viz.: that there was no sale and purchase of the bonds, but by the false representations of the teller the appellant was induced to receive them instead of money, in payment of the draft on New York, which she presented at the bank to be cashed or collected. It is argued that in this aspect, the transaction amounts to the same thing as if the teller had cashed the draft, by paying her over the counter in depreciated or worthless bank notes, representing them to be good. But the answer to this position is, that there is no evidence in the record to support it.¹ * * *

Having disposed of the case in this way, it becomes unnecessary to express any opinion upon the question argued at bar, whether an action like this will lie against a corporation in its corporate character, for deceit practiced by its officers or agents.

Judgment affirmed.

¹ Part of the opinion, relating to this question, is omitted.

SALT LAKE CITY v. HOLLISTER, Collector.

(6 Sup. Ct. 1055, 118 U. S. 256. 1885.)

Appeal from the supreme court of the territory of Utah.

MR. JUSTICE MILLER delivered the opinion of the court.

This suit was instituted by the city of Salt Lake to recover of Hollister the sum of \$12,057.75 illegally exacted by him as collector of internal revenue for the district of Utah from the city for a special tax upon spirits alleged to have been distilled by said city, and not deposited in the bonded warehouse of the United States by plaintiff as required by law.

Plaintiff alleges that, under threat of selling sufficient property of the city to pay said tax, it paid the sum demanded under protest, appealed to the commissioner of internal revenue, who failed and neglected to make any decision or to refund the money, and after six months' waiting this suit was brought.

To the petition the defendant made the following answer:

"Now comes the defendant in the above-entitled cause, O. J. Hollister, and for answer to the plaintiff's complaint admits that the plaintiff is a public municipal corporation created and organized under and by virtue of the laws of the territory of Utah, and that it has continued to be such a corporation since its organization in February, 1850, and that the defendant was at the time mentioned, and as alleged in plaintiff's complaint, and still is, the acting United States collector of internal revenue for the district of Utah.

"Defendant admits that in June, A. D. 1876, the United States commissioner of internal revenue set down to and assessed against the plaintiff a gallon tax of ten thousand seven hundred and sixty dollars upon spirits distilled by said plaintiff at various times between the 2d day of March, A. D. 1867, and the 26th day of August, A. D. 1868, and not deposited in the bonded warehouse of the United States by the plaintiff, as required by law, but denies that said gallon tax was illegally or erroneously set down to or assessed against the plaintiff by said commissioner of internal revenue, and avers that the plaintiff, during all the time for which said assessment was made, was actually engaged in distilling, producing, and dealing in, as distiller, said spirits so assessed, and said assessment of said gallon tax was made upon distilled spirits actually produced by the plaintiff, and upon which plaintiff had not paid the gallon tax required by law, said spirits not having been deposited in the bonded warehouse of the United States by the plaintiff, as required by law, but taken from said distillery by the plain-

tiff, after having been produced and distilled as aforesaid, and sold by said plaintiff, and the proceeds of said sale turned into the treasury of the plaintiff.

"Said plaintiff, during all the time it operated said distillery, and especially from said 2d day of March, 1867, to said 26th day of August, 1868, was distilling and producing spirits as aforesaid, and receiving and appropriating the benefit arising therefrom.

"Defendant further alleges that the plaintiff, during the time mentioned in plaintiff's complaint, regularly reported and paid to the collector of internal revenue of the United States the gallon tax due upon a quantity of spirits distilled and produced by plaintiff, but that plaintiff neglected to report all of the spirits it actually produced and distilled, and for and upon which the said gallon tax was due and owing to the United States, and that the tax so assessed as aforesaid is the tax due upon the spirits produced and distilled in excess of the amount so reported by said plaintiff, and upon which no tax was ever assessed and collected up to the time of the payment mentioned in plaintiff's complaint, and hereinafter stated.

"Defendant, answering, admits that the list containing the said gallon tax assessed by the commissioner of internal revenue of the United States was placed in the hands of this defendant as collector of internal revenue.

"And defendant alleges that said plaintiff having engaged in the business of distilling and producing spirits as aforesaid, and said tax having been assessed by the commissioner of internal revenue as aforesaid and placed in the hands of the defendant, as collector of internal revenue, for collection, it became and was his duty as such collector to collect said tax.

"Defendant denies that he knew that said gallon tax, so assessed as aforesaid, was erroneous and illegal, and avers that said tax was legal and correct, and was assessed and collected because plaintiff was liable to said tax.

"Defendant admits that he did threaten to seize and sell the property of plaintiff to pay said tax, as alleged by plaintiff, and that the plaintiff on the 14th day of August, 1877, paid the defendant the amount of the gallon tax, with interest which had accrued thereon from the date of said assessment, but for what reason plaintiff paid defendant said gallon tax defendant is not advised, and upon that subject has no knowledge, information, or belief, and therefore cannot answer."

A demurrer to the answer was overruled, and the plaintiff refusing to plead further, a judgment was rendered for the defendant, which was affirmed on appeal to the supreme court of the territory.

It will be perceived that this demurrer admitted that the plaintiff, the city of Salt Lake, had been for a period of about eighteen months engaged in the business of dis-

tilling and producing spirits and selling the same, and placing the proceeds of the sale in its treasury. That during this time the plaintiff made regular reports as to the quantity produced and paid the tax on the amounts so reported. But that while it thus operated said distillery, it failed and neglected to report all the spirits which it produced, and the tax assessed and collected, and which the present suit is brought to recover back, was for the spirits of which no report was made.

The commissioner of internal revenue having assessed plaintiff for these distilled spirits and placed the assessment in the hands of defendant, he, as a means of collecting the tax, did threaten to seize and sell property of plaintiff, whereupon plaintiff paid the sum mentioned.

It would seem that this unqualified admission that the city was actually engaged in the business of distilling spirits liable to taxation, and replenishing her treasury with the profits arising from the operation, ought to be a justification of the officer who collected the tax due for the spirits so distilled. And this argument is all the stronger, since the city acknowledged its liability as a distiller by paying voluntarily the tax due on the larger part of the spirits produced.

But while the city does not deny the actual fact of distillation, and of fraudulent returns by it, it denies the whole affair by argument. It says that, though it is very true the city did distil spirits, did sell them, and did receive the money into its treasury, it cannot be held liable for this because it had no legal power to do so. Its want of corporate authority to engage in distilling is to be received as conclusive evidence that it did not do so, while by the pleading it is admitted that it did. Because there was no statute which authorized it as a city of Utah to distil spirits, it could engage in this profitable business to any extent, without paying the taxes which the laws of the United States require of every one else who did the same thing.

If the territory of Utah had added to its other corporate powers that of making and selling distilled spirits, then the city would be liable to the tax, but, because it had no such power by law, it could do it without any liability for the tax to the United States or to any one else.

It would be a fine thing, if this argument is good, for all distillers to organize into milling corporations to make flour, and proceed to the more profitable business of distilling spirits, which would be unauthorized by their charters or articles of incorporation; for they would thus escape taxation and ruin all competitors.

It is said that the acts done are not the acts of the city, but of its officers or agents, who undertook to do them in its name. This would be a pleasant farce to be enacted by irresponsible parties, who give no bond, who

have no property to respond to civil or criminal suits, who make no profit out of it, while the city grows rich in the performance. It is to be taken as a fair inference on this demurrer that all that the city might have done was done in establishing this business. The officers who, it is said, did this thing, must be supposed to have been properly appointed or elected. Resolutions or ordinances of the governing body of the city directing the establishment of the distillery, and furnishing money to buy the plant, must be supposed to have been passed in the usual mode. Everything must have been done under the same rules and by the same men as if it were a hospital or a town hall. If the demurrer had not admitted this, it could no doubt have been proved on an issue denying it.

But the argument is unsound that whatever is done by a corporation in excess of the corporate powers, as defined by its charter, is as though it was not done at all. A railroad company authorized to acquire a right of way by such exercise of the right of eminent domain as the law prescribes, which undertakes to and does seize upon and invade, by its officers and servants, the land of a citizen, makes no compensation, and takes no steps for the appropriation of it, is a naked trespasser, and can be made responsible for the tort. It had no authority to take the man's land or to invade his premises. But if the governing board had directed the act, the corporation could be sued for the tort, in an action of ejectment, or in trespass, or on an implied assumpsit for the value of the land. A plea of ultra vires, in this case, would be no defence.

The truth is that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi-criminal, the corporation may be held to a pecuniary responsibility for them to the party injured.

This doctrine was announced by this court nearly thirty years ago in a carefully prepared opinion by Mr. Justice Campbell in the case of Railroad Co. v. Quigley, 21 How. 202. That was an action for libel by Quigley against the company for the publication of a letter addressed to the company in the course of an investigation by its directors in regard to the conduct of some of its subordinates. This letter contained statements in regard to plaintiff's skill and capacity as a mechanic very disparaging in that respect. This, with much other testimony, was printed and published by the board of directors, and the court decided that the corporation

could be held liable for the publication. The argument that only the individuals who ordered the publication could be made responsible was urged then as here, but the court held that if it was a libel the corporation was responsible for it in damages.

It was also insisted that the existence of malice was a necessary element in the action for libel, and that the abstract entity which constituted a corporation was incapable of malice, which could only be predicated of the officers who ordered the publication. This was likewise overruled, and it was held that if the act implied malice, the corporation was liable for it.

The whole question was very fully considered. We can here do no more than make a single extract from the able opinion. After examining the authorities, it was said: "With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their governing body and their agents with the natural persons with whom they are brought into contact or collision. The result of the cases is that for acts done by the agents of a corporation, either in contractu or in delicto, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances. At a very early period it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found in the judicial annals of both countries of suits for torts arising from the acts of their agents, of nearly every variety."

In the case of *Reed v. Bank*, 130 Mass. 443, 445, the bank was held liable to an action for malicious prosecution. The court said: "It is too late to discuss the question, once much debated, whether a corporation can commit a trespass, or is liable in an action on the case, or subject generally to actions for torts as individuals are. The books of reports for a quarter of a century show that a very large proportion of actions of this nature, both for nonfeasance and for misfeasance, are against corporations. * * * And, by the great weight of modern authority, a corporation may be liable, even where a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation, as in actions for fraudulent representations, for libel or for malicious prosecution." Many authorities are cited in

support of this proposition, which may be found on page 445 of the report of the case.

Another well considered case in which a corporation is held liable for malicious prosecution is that of *Copley v. Machine Co.*, 2 Woods, 494, Fed. Cas. No. 3,213.

It is said that Salt Lake City, being a municipal corporation, is not liable for tortious actions of its officers.

While it may be true that the rule we have been discussing may require a more careful scrutiny in its application to this class of corporations than to corporations for pecuniary profit, we do not agree that they are wholly exempt from liability for wrongful acts done, with all the evidences of their being acts of the corporation, to the injury of others, or in evasion of legal obligations to the state or the public. A municipal corporation cannot, any more than any other corporation or private person, escape taxes due on its property, whether acquired legally or illegally, and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business or transaction, by whomsoever conducted. See *McCready v. Guardians*, 9 Serg. & R. 94.

It remains to be observed that the question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud is practiced on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement. It is to this class of cases that most of the authorities cited by appellants belong—cases where corporations have been sued on contracts which they have successfully resisted because they were ultra vires.

But, even in this class of cases, the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use. *Thomas v. Railroad Co.*, 101 U. S. 71; *Louisiana v. Wood*, 102 U. S. 294; *Chapman v. Douglass Co.*, 107 U. S. 348, 355, 2 Sup. Ct. 62.

The judgment of the supreme court of Utah territory is affirmed.

NEW YORK, L. E. & W. RY. CO. v. HARING.

(47 N. J. Law, 137. 1885.)

This case was tried at the September term, 1884, of the Hudson circuit court, before Mr. Justice Knapp and a jury, and a verdict rendered for the plaintiff below, Haring, for the sum of \$1,000, and judgment being entered thereon, a writ of error was brought to this court.

The opinion of the court was delivered by BEASLEY, C. J.

The injury for which this suit was brought was an alleged unauthorized ejection from a horse railroad car that was running at the time on the road of a corporation known as the Pavonia Horse Railroad. There was evidence tending to show that, at the time in question, the plaintiff in error was using this road and running the cars over it in charge of its own agents, and was receiving the profits arising from the business; and it was properly left to the jury to find whether such usufruct of such road existed. Nevertheless, the counsel of the defendant below insisted and asked the judge to charge the jury to find against the action even though they should be of opinion that his client was thus engaged in the specified business. The ground assigned was that the plaintiff in error could not legally undertake the employment in question, not having been vested with the requisite franchise, and that consequently it was not, in its corporate capacity, liable for any of the consequences of such employment.

But the doctrine of *ultra vires* does not apply to torts of this nature. It would indeed be an anomalous result in legal science if a corporation should be permitted to set up that inasmuch as a branch of the business prosecuted by it was wrongful, therefore all the special wrongs done to individuals in the course of it were remediless. But in such situations corporate bodies, like individuals, cannot take advantage of their own wrong by way of defence. If corporations are not to be held responsible for injuries to persons done in the transaction of a series of wrongful acts, such an immunity would have a wide scope. All wrongs done by such bodies are, in a sense, *ultra vires*, and if the want of a franchise to do the tortious act be a defence, then corporations have a dispensation from liability for these acts peculiar to themselves.

There does not appear to have been much discussion of this subject, but a case decided by the supreme court of Tennessee is directly on the point. The precedent referred to is reported in 53 Tenn. 634, and is entitled *Hutchinson v. Railroad Co.* It was an action against a corporation for damages occasioned by the negligence of its employees. It appeared that the railroad com-

pany was, without authority, running a line of steamers, and the plaintiff had been hurt by the mismanagement of one of them. The defence of *ultra vires* was interposed in that case, as in the present, but it was rejected on the ground that such doctrine had no application to torts of that character.

This exception cannot prevail.

The second ground urged for a reversal of this judgment was the exclusion of the defendant's offer to make proof of what an absent witness had testified to at a previous trial of this cause. The right to put in this secondary evidence was claimed for the reason that the witness in question was out of the state, and, although requested, had refused to attend the trial.

This offer was, in my opinion, properly rejected. Mere absence from the jurisdiction, coupled with a refusal to attend as a witness, has never, in the practice of our courts, been held to authorize the introduction of the testimony of the witness previously taken. If it had been shown that this witness had left this state, and, upon diligent inquiry, his whereabouts could not be discovered, then a ground would have been laid for the course proffered. The substitution of the former testimony for the re-examination obtains only from the practical necessity of the occasion. But no such necessity exists when the residence of the witness is known and he is in the United States, and his testimony can be taken by a commission.

From the examination of this subject in the case of *Berney v. Mitchell*, 34 N. J. Law, 337, it is manifest that the practice in the different states in this particular is not uniform, but, as has been already stated, the rule must be considered settled in this state by inveterate usage.

So, I think, no fault can be found with the charge of the judge in that part of it which defined the extent to which the railroad company was liable for the act of its agent in the expulsion of the plaintiff. It was, in substance, that if the driver of the horse car, being the agent of the railroad company, and having the right to expel the plaintiff on account of his intention to ride without paying his fare, transacted the expulsion so rudely and violently as to cause the injury complained of, "then," the judge said, "I think you may say that it is a part of the act of removal, and the driver, or the company whose agent he was, would be liable." This instruction plainly limited the responsibility of the railroad company to the results of the acts of its agent in its business.

The judgment is affirmed.

For affirmance: THE CHANCELLOR, CHIEF JUSTICE, DIXON, MAGIE, PARKER, REED, SCUDDER, VAN SYCKEL, BROWN, COLE, PATERSON,—11. For reversal: None.

GUNN v. CENTRAL R. R. et al.

(74 Ga. 509. 1885.)

Gunn brought his action of trespass on the case in Clay superior court, for a personal injury caused by the careless running of a boat on which he was a passenger, whereby the boat was wrecked and he was injured. The action was brought against the Central Railroad and Banking Company of Georgia, a corporation of said state, and Samuel J. Whitesides, of Muscogee county. The declaration alleged that they were partners under the name and style of the Central Line of Boats; that the railroad company was operating railroads in Muscogee and Clay counties; that the boats were run on the Chattahoochee river for the benefit of the railroads so operated, terminating at Columbus and Fort Gaines, in the counties named; that this was with the knowledge and consent of the president of the railroad company; and that it and Whitesides, as partners, were common carriers of passengers by such boats.

Defendants demurred to the declaration, and moved to dismiss it, on substantially the following grounds:

(1) Because the Central Railroad had no power or authority, under its charter, to form any such partnership as alleged, and the acts alleged were *ultra vires*.

(2) Because the acts alleged were not performed by the Central Railroad, as a railroad company, but as a steamboat owner, which was not within the powers conferred by its charter, and being a public corporation, the court will take judicial notice of its charter powers.

(3) Because neither of the defendants was a citizen of Clay county, and the court had no jurisdiction there.

(4) Because Whitesides, being joined in action in Clay county only by virtue of the suit against the Central Railroad there, if bad as to it, the case could not stand as to him.

The court sustained the motion, and dismissed the case, whereupon plaintiff excepted.

HALL, J. 1, 2. The precise question made by this record is whether the Central Railroad and Banking Company of Georgia, a public corporation, created by and existing under the laws of this state, can enter into a partnership with a natural person to purchase and run a steamboat on one of the rivers of the state, and whether it is liable to an action for a tort arising from a breach of duty, created by a contract made with the firm of which it is alleged to be member. We have been asked to decide how far such a corporation may engage in the business of purchasing and running boats on the rivers of the state, and how far they would be liable to passengers on their boats for injuries done in consequence of the negligence of their agents or employes engaged in conducting that particular business; but from the state of the pleadings in this case, the question thus broadly propounded is not raised,

and we should be transcending our powers as a reviewing court were we to undertake to determine it, and must therefore decline to consider the request. When that question arises upon an actual case—not upon one that may come up at some future time—we will endeavor to meet and settle it, but until that time it is obvious that we would be exceeding our powers were we to consider it. Any expression of opinion, under such circumstances, upon the abstract points, would be clearly obiter, and would amount to nothing more than the views of the judge delivering the opinion; it would not have the force or effect of a judgment binding upon the court.

A corporation is an artificial person created by law for specific purposes, and its powers are limited and fixed by the act of incorporation. Code, § 1670. Besides the powers thus specially granted, there are some others common to all corporations, among which is the power to purchase and hold such property, real or personal, as is necessary to the purposes of their organization, and the doing of all such acts as are essential to the legitimate execution of this purpose. Id. § 1679. This is the law of their being, and if they transcend its bonds they are guilty of a misuser of their franchises, and thereby incur a forfeiture of the same. Id. § 1685.

In *Mills v. Upton*, 10 Gray, 582, in which the question of the ability of corporations to form a partnership with individuals and the validity of contracts made by such an association was fully considered, the supreme court of Massachusetts says: "What powers are granted expressly, or by implication, because necessary or usual for the purposes which this charter was given to effect, the corporation has, and no more. There is one obvious and important distinction between such a society as this charter creates and that of a partnership. An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation, as such, can bind the society. In a partnership each member binds the society as a principal. If, then, this corporation may enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property." Id. 595. Again it is declared (Id. 597) that "the effect of all our statutes, the settled policy of our legislation for the regulation of manufacturing corporations, is that the corporation is to manage its affairs separately and exclusively, certain powers to be exercised by the stockholders, and others by officers who are the servants of the corporation and act in its name and behalf. And the formation of a contract, or the entering into a relation by which the

corporation or the officers of its appointment should be divested of that power, or by which its franchises should be vested in a partner with equal power to direct and control its business, is entirely inconsistent with that policy. The power to form a partnership is not only not among the powers granted expressly or by reasonable implication, but is wholly inconsistent with the scope and tenor of the powers expressly conferred, and the duties expressly imposed, upon a corporation by the legislation of the commonwealth."

Farther it is said (Id. 598) that "the case rests upon broader grounds. The charter of the corporation is part of the public law. Those who deal with it must take notice of the extent of its powers, and that the corporation is legally incapable of entering into the contract of partnership, that that contract was beyond the scope of its authority, and that this incapacity resulted from considerations not personal or peculiar to the corporation or its members, but from general grounds of public policy, which the corporation and those dealing with it cannot be permitted to contravene and defeat. That policy is to confine these corporations within the limits prescribed by law, to protect the stockholders from liabilities which the charter and laws do not create; and while it imposes upon the stockholders of corporations heavy responsibilities, to retain to them the legal control of its business and conduct of its affairs." *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775; *Macgregor v. Junction Co.*, 18 Adol. & E. (N. S.) 618; *Shrewsbury & B. Ry. Co. v. Northwestern Ry. Co.*, 6 H. L. Cas. 113, 137; *Root v. Godard*, 3 McLean, 102, Fed. Cas. No. 12,037; *Berry v. Yates*, 24 Barb. 199; *Mechanics' & W. M. M. S. B. & B. Ass'n v. Meriden Agency Co.*, 24 Conn. 159;

Navigation Co. v. Dandridge, 8 Gill & J. 248; *Sumner v. Maicy*, 3 Woodb. & Min. 112, Fed. Cas. No. 13,609; *Ang. & A. Corp.* §§ 229, 239.

The Central Railroad & Banking Company has no express power, by the terms of its charter, to enter into a contract of partnership, nor is this among the powers (as we have seen) common to all corporations. Railroad companies derive their grant of corporate powers and privileges from an act of the general assembly, under the constitution of this state (Code, 5077), and all such legislative acts, published by authority, are to be held and taken as public laws. (Id. § 3815.)

After this case was argued, it was suggested that the suit was maintainable under the act of 1880 and 1881, p. 165 (Code, § 16890), as railroad companies are thereby authorized "to build, construct and run, as part of their corporate property, such number of steamboats or vessels as they may deem necessary to facilitate the business of such companies." But it is manifest, from the very terms of this law, that they were to be the separate and exclusive owners of such boats or vessels as were employed by them for the purpose of facilitating their business. There is, therefore, no necessity, and indeed it would be improper, to consider or decide the constitutional questions made upon the portion of the act from which this section is taken, and upon that subject we intimate no opinion. We decide the single point that this corporation had no power or authority to enter into the partnership set out in plaintiff's declaration, and that its acts and contracts pertaining to the business of such an association are invalid as against the firm and the corporation as a member thereof.

Judgment affirmed.

SLEE v. BLOOM et al.

(19 Johns. 456; 5 Johns. Ch. 366. In the Court for the Correction of Errors of New York. 1822.)

On appeal from the court of chancery.

The bill, filed the 24th of April, 1819, stated that the appellant, being possessed of a piece of land on Wappinger's Creek, in Poughkeepsie, on which he had erected a cotton manufactory, with 912 spindles, and finding that the factory demanded greater funds than he could conveniently command, proposed to the respondent, George Bloom, and others, to unite with him in a corporation, to be called the "Dutchess Cotton Manufactory," the stocks of which were to be divided into 600 shares of 100 dollars each. That this proposal being acceded to, the appellant, and G. Bloom, J. Tallmadge, jun. Cyrenus Crosby, George Booth, and Robert L. Reade, signed and acknowledged a certificate of their desire to become a corporation, under that name, and filed the same in the secretary's office, and became duly incorporated, on the 12th of December, 1814, pursuant to the act of the legislature, passed the 22d of March, 1811, relative to incorporations for manufacturing purposes. Sess. 34, c. 67, 1 Rev. Laws, 245. That the trustees named in the certificate of incorporation met on the 24th of January, 1815, and chose their officers, to wit, the appellant, as president, Crosby, as treasurer, and Reade, as secretary, and it was agreed that the treasurer and secretary should confer with the appellant, and report the terms on which he would sell the factory, stock, and machinery, to the company.

That afterwards, in February, 1815, at a meeting of the trustees, a report was made by the treasurer, (the secretary being absent,) of the terms on which the appellant would sell the factory, with its stock and machinery; the amount of the items, as reported, being 30,912 dollars; that this report was unanimously accepted, and a subscription book opened, by which the subscribers promised to pay to the Dutchess Cotton Manufactory, 100 dollars, for every share set opposite their names. The bill set forth the names of the subscribers, and the number of shares subscribed by each. That at a meeting of the trustees, on the 7th of March, 1815, it was resolved, that a call of five dollars on each share should be made, payable on the 1st of June following. That the appellant, soon after, executed a deed to the company of his factory, stock, and machinery, for the consideration of 30,900 dollars, which deed was now held by the company. That on the 1st of May, 1815, the appellant received scrip for 122 shares of stock, which he paid in full, by deducting the same from the amount due to him from the company. That on the 30th of September, 1815, the appellant received scrip for fifty more shares, and paid up the same, in like manner. That at a

meeting of the trustees, on the 20th of September, 1815, at which Bloom, Crosby, and others were present, a further call was made for 10 dollars on each share, payable on the 1st Monday of November then next, and the further sum of five dollars, on the first Monday of December following. That at a meeting on the 25th of January, 1816, three persons were appointed a committee to inquire into the affairs of the corporation; that at a meeting of the stockholders on the 20th of April, 1816, pursuant to public notice, seven trustees were elected. At a meeting held the 27th of April, 1816, it was resolved to make a public call of 25 dollars on each share, payable on the 1st of June then next; that the stockholders generally neglected to make payment, and in June, 1816, it was resolved that suits should be commenced to enforce payment. At a meeting October 19, 1816, it was resolved that it was inexpedient to continue the factory in operation; and the appellant, who then superintended it, was directed to shut it up, discharge the workmen, and take care of the property; and a committee was appointed to examine the accounts, and settle with the appellant. That at a meeting in November, 1816, the committee appointed to liquidate the account of the appellant reported a balance in his favor of 24,443 dollars and 35 cents; and it was resolved that a proper voucher for the balance should be given to him. A bond to the appellant was afterwards executed, signed by the president, treasurer, and secretary, and sealed with the seal of the corporation, for 23,493 dollars and 35 cents, being the sum remaining due to him, after the stock subscribed by him, amounting to 17,200 dollars, paid up in full, was deducted from the sum due to him from the company. That the appellant, having obtained a loan of the Manhattan Company of 10,000 dollars, which he expended in advances for the company, gave his note for that sum, dated the 1st of December, 1815, endorsed by Bloom, Crosby, Booth, and Cocks, payable in 12 months, and which sum went into his account, and made part of the balance found due to him. To secure his endorsers, the appellant gave them a bond and warrant of attorney to confess judgment for 20,000 dollars, on which they entered up a judgment, on the 1st of June, 1816. That when the note became due the appellant was unable to pay it, and the endorsers assumed the debt, and gave their own note to the bank for the amount, endorsed by Nathan Myers, and which note had been in part paid by moneys collected of the stockholders, and in part by the appellant himself. That in January, 1817, the appellant, finding himself pressed by a judgment obtained by some of the individuals of the company who had been endorsers of his note, commenced a suit against the company, on the bond given to him, on which a judgment was confessed and perfected, in May term, 1817, with a stay of execution until October term following, for

the penal sum of 46,986 dollars. The bill then stated various meetings of the subscribers in the year 1817, and their proceedings. That on the 12th of August, 1817, at a meeting of the trustees, it was resolved, that any person might transfer his stock, and be discharged from any future calls, on paying up the calls of fifty per cent. which had then been made, and the costs, and that no proceedings should be had to enforce the payment of further calls, other than by way of forfeiture. That on the 3d of November, 1817, at a meeting of the trustees, it was resolved to lease the factory for three years, and that the stockholders might have the privilege of forfeiting their stock to the company, by paying up thirty per cent. on their shares, by the 1st of December following, which resolution was opposed by the appellant. That most of the stockholders had availed themselves of this resolution, and wholly abandoned the factory, and everything relating to it, though they had not given up their scrip. That no election of trustees had been made since April, 1817, and the stockholders had come to a resolution never to make another election, but to abandon the factory and corporation altogether. That in October, 1817, Crosby, Bloom, Booth, and Cocks, issued a *fiery facias* against the appellant on the judgment against him, by virtue of which the real estate of the appellant, worth 9,000 dollars, besides the land and property at the factory, became liable to sale. That in November, 1817, the appellant, hearing that an execution had been issued by Bloom, and the others, on the judgment obtained by them against the plaintiff, caused a *fiery facias* to be issued on the judgment in his favor. That in January, 1818, the attorney of the company, pursuant to a previous resolution of the trustees, applied all the funds in his hands, amounting to 4,105 dollars and 59 cents, towards the payment of the note for 10,000 dollars, leaving a balance of 6,538 dollars and 53 cents. That to prevent a sacrifice of his property, to pay that balance, the appellant procured George B. Everton to become security to the bank for that amount, and, thereupon, the appellant's note for 10,000 dollars was given up, and his endorsers wholly discharged. That to secure Everton, the appellant, on the 21st of January, 1818, assigned to him all his real estate, and the avails of all the property of the company, that might be sold under his execution against the company. Under the execution on his judgment, the real estate of the company was sold, by the sheriff, in February, 1818, for 102 dollars, and the personal estate for 385 dollars and 50 cents, to George B. Everton, as the highest bidder, and after deducting the sheriff's fees, there remained the sum of 460 dollars and 18 cents, to be applied on the appellant's execution. That no payment had been made on the judgment unless the sum of 4,105 dollars, applied in part payment of the note for

10,000 dollars, to be considered as part payment of the judgment; and that if it is so considered, there will then be a balance due to the appellant of 18,958 dollars and 37 cents, which he has no means of obtaining, unless the stockholders are compelled to pay up their subscriptions. That there has been no meeting of the stockholders since May, 1817, nor have the trustees had any meeting, or transacted any business, since December, 1817; but have determined to abandon, and give up the factory and corporation, and not to make any further calls on the stockholders, nor to provide any means whatever to pay the appellant; but the trustees, with all the other respondents, have determined to suffer and cause the corporation to be dissolved, and had already suffered and caused the same to be dissolved, by their said transactions and omissions, in relation thereto. That the books and records of the corporation are in the power or possession of the respondents. That there is no debt due by the corporation, except that owing to the appellant. That he had no means of ascertaining what amount of his debt could be obtained of the corporation, except by a legal sale of their property on execution; and although it was sold at a sacrifice, yet the appellant was unable, owing to his embarrassment, &c. to bid upon it, or to cause it to be sold for a greater sum, and the trustees and stockholders, though they had notice of the sale, neglected attention to it; nor did they show any disposition to preserve the property, or keep the corporation in existence, &c. The bill prayed that those of the respondents who had made any payments on their stock might set forth the same, and that the solvent stockholders, to wit, all the respondents, (except Crosby,) might be severally decreed to pay to the appellant, for his benefit, such sum, or balance, on each and every share of stock subscribed by them, as should be sufficient, with due proportion to be allowed by the appellant on the fifty shares purchased by him of James Tallmadge, jun., Aaron Stafford, and Robert Stafford, to pay to the appellant the debt due to him from the said Dutches Cotton Manufactory, with interest, and to indemnify him for the losses he has sustained by the unjust and oppressive conduct of the trustees, and the stockholders, and that it might be left with the solvent respondents, and E. Crosby, to arrange and adjust among themselves any claims they may have on him, by reason of any balance that may remain due and unpaid on the stock subscribed by him; and that the appellant might have such other and further relief, by a decree against the respondents in their individual capacities, or as members of the said corporation, if they pretend that the same has not been already dissolved, as the nature of the case might require. * * *

¹ The statement relating to the defendant's pleading is omitted.

The cause was brought to a hearing upon the pleadings and proofs, in April, 1821; and on the 19th of July, the chancellor made the following decree: "It is declared that the plaintiff has not shown any right or title to sue the defendants, as members or stockholders of the Dutchess Cotton Manufactory, for a debt due to him from the said corporation, inasmuch as the said corporation does not appear, in judgment of law, dissolved, nor can it be dissolved within the period limited by the statute under which it was erected, for any nonuser or misuser of its franchises, without due process of law; and it is further declared that, assuming the said corporation to be dissolved, the plaintiff would not be entitled to the assistance of this court, as against the individual persons and property of those defendants, who have paid into the corporation, at the rate of thirty per cent. upon their respective shares; inasmuch as by the resolution of the board of trustees of the 16th of August, 1817, to which the plaintiff was a party, as a trustee, and by the resolution of the said board of the third day of November, 1817, to which the plaintiff, as a trustee, by repeated acts, gave his subsequent assent and ratification, the plaintiff has, in justice and equity, barred himself from the operation of any further claim, unless it be to exact the forfeiture of their shares, nor would he be entitled to the assistance of this court as against the individual persons and property of those defendants who have not paid in, at the rate of thirty per cent., except it might be to require them to pay in, upon their shares, at the rate of fifty per cent. on the amount of arrearages of former calls, prior to the 18th of August, 1817, and to exact a forfeiture of their shares for the residue. It is, therefore, ordered, adjudged, and decreed, &c., that the plaintiff's bill be dismissed without costs, as to those defendants who have not appeared, but with costs as to those defendants who have appeared and answered, to be taxed, and to be recovered by them against the plaintiff, according to the course and practice of this court."

THE CHANCELLOR assigned his reasons for this decree, which were the same as those expressed in the opinion delivered by him in the court of chancery. Vide *Slee v. Bloom*, 5 Johns. Ch. 366.

[The following is the chancellor's opinion in the court of chancery.]

THE CHANCELLOR. This is a suit against the individual stockholders of the "Dutchess Cotton Manufactory," a company incorporated in December, 1814, by filing a certificate in pursuance of the act of March 22, 1811, entitled, "An act relative to incorporations for manufacturing purposes." Every association incorporated under this act was declared to be, for the "term of twenty years next after filing their certificate, a

body politic and corporate." The bill seeks to charge the defendants personally for a judgment debt of the incorporated company on the ground that the corporation is dissolved, and that the members are individually responsible for the corporate debts, to the extent of their shares of stock. Section 7 of the statute declares, that "for all debts which shall be due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible, to the extent of their respective shares of stock in the said company, and no further."

1. The first and leading question in the case is whether the corporation is dissolved, so as to enable the plaintiff to call upon the individual members. It will not be disputed that without such a provision in the statute, the individuals would not be responsible in their private property, either before or after the dissolution of the company, for corporate debts. The facts from which an actual dissolution is inferred are, that the stockholders have not elected trustees since April, 1817, and that the trustees have not met as a body since December 31, 1817, and that all the corporate property, real and personal, was sold on an execution issued in the name, and at the instance of the plaintiff, February 1, 1818, and that the members have since abandoned all attention to the institution.

The bill was filed April 24, 1819, and it appears to me that I am not authorized, from any of the facts in the case, to consider the corporation as dissolved, at the commencement of this suit.

The omission to elect new trustees, in 1818 and 1819, did not, of itself, work a dissolution, according to the opinion of the supreme court in the case of *People v. Runkel*, 9 Johns. 147; and by the authority of the cases there referred to, a corporate election after the year would be good, upon general principles of law, if an integral part of the corporation remained; and the officers already in would continue to be good officers after the year, and until others were elected. In this case, we have the express authority of the statute under which the corporation was created, "that in case it should at any time happen that an election of trustees be not made on the day when, by the by-laws of said company, it ought to be done, the said company, for that cause, shall not be dissolved, but it shall and may be lawful on any other day to hold an election for trustees, in such manner as shall be directed by the by-laws of such company."

The members of the corporation, who are the integral part of it, are in esse, and I see no difficulty in a future meeting of the last elected trustees, and in a new election of trustees to be ordered and prescribed. In *Reg. v. Ballivos*, 1 P. Wms. 207, vacancies of the capital burgesses were to be filled up in fifteen days, and they had neglected to fill up vacancies for 22 years, until all were ex-

tinct to one man. In so extravagant a case, Lord Chief Justice Parker did not think it reasonable he should have the power of electing all the rest, but Powel, J. observed that a corporation might, upon their charter day, choose a bailiff, though there was none then in being, nor had been for 20 years before. Would these judges have hesitated, in a case like this, when there was no precise charter day mentioned in the law, to allow a new election of trustees by the stockholders, though two years had intervened, and when the old trustees could lawfully hold over? It seems to be too plain a proposition to be disputed.

A corporation aggregate may be dissolved within the period prescribed by its charter, in certain modes, and upon certain events, none of which have occurred in this case. It may be dissolved, if it becomes incapable of continuing its corporate succession, or executing its corporate functions, as by the death of all its members, or the destruction of an integral part of it, or it may be dissolved by surrender of its franchises into the hands of the government, or by forfeiture of its charter through abuse or neglect of franchises. The last is the alleged ground of forfeiture in this case; but I apprehend, that the forfeiture in such case must be judicially ascertained and declared, and that the power, which may have been abused or abandoned, cannot be taken away but by regular process. The judgment in such cases is, that the parties be ousted, or that the liberty be seized into the hands of the government. *Rex v. Staverton*, Yel. 190. This subject underwent great and learned discussion in the case of *King v. Amery* (in the king's bench) 2 Term R. 515, and it was decided by that court, as the result of the investigation, that a corporation may be dissolved, and its franchise lost, by non-user or neglect; but it was assumed, as an undeniable proposition, that the default was to be judicially determined in a suit instituted for the purpose. If the parties, observed Ashhurst, J., in delivering the opinion of the court, being called upon in a court of justice, to state their right to the franchise, neglect or refuse to do it, or if the corporation surcease their time, they shall lose their franchise, and the judgment shall be, that the franchise be seized. One great point in that case was, whether a corporation could be dissolved at all; and the opinion of the ten judges in the house of lords, in 1689, was relied on to show that it could not be dissolved. But Lord Holt was of opinion that a corporation could be dissolved for a breach of trust; and that seemed to be the opinion of the king's bench in *Sir James Smith's Case*, (cited, also, as the case of *King v. Mayor of London*, 4 Mod. 33, 1 Show. 274), and it is no doubt the settled doctrine at this day. But that a corporation is to be adjudged dissolved for non-user or mis-user of its franchises, until it has been called up-

on to answer for the breach of trust, is nowhere assumed. The contrary doctrine is universally taught, and it is founded on very obvious principles of justice. In the case of *Rex v. Pasmore*, 3 Term R. 199, it was held that when the integral part of a corporation is gone, and the corporation had no power of restoring it, or of doing any corporate act, it was so far dissolved that the crown might act and grant a new charter. It was only for the crown to interfere, without a forfeiture judicially declared, and that, too, in a case where the corporation was reduced to such a state as to be incapable of acting or of continuing itself, the crown might then grant a new charter, said Mr. Justice Buller, without "weighing very nicely whether the corporation could be said to be actually dissolved or only in danger of being so." Lord Kenyon spoke in that case, with great caution, and with the admission of due limitations. He agreed to the validity of the new charter, but said, that as to particular purposes, which do not relate to the powers of government, but to personal privileges, the corporation is not dissolved until the crown interposes. A *scire facias* was proper when there was a legal existing body capable of acting, but who have been guilty of abuse of power, because when a delinquency was imputed, they ought not to be condemned unheard.

Assuming the charges in the bill in this case to be true, Lord Kenyon points out the proper remedy: It is by the judicial process of *scire facias*; and I believe there is no instance of calling in question the rights of a corporation, as a body, for the purpose of declaring its franchises forfeited and lost, but at the instance and on behalf of the government. In the case of *Com. v. Union Ins. Co.*, 5 Mass. 230, there was an application for leave to file an information, in the nature of a *quo warranto*, against the corporation, at the relation of an individual, on the charge that the corporation had been guilty of malfeasance, in not requiring from the members payment of fifty per cent. on their subscription stock, within the time limited by the statute of incorporation, and which charge implied a gross mis-user of the powers of the corporation, and one that would incur a forfeiture of the charter.

Chief Justice Parsons, in delivering the opinion of the court, observed, that the corporation might forfeit its franchises by non-feasance or malfeasance; but the information for the purpose, must be presented under the authority of the state, which must be a party to the suit, and a party to the judgment, for the seizure of the franchises. This is the more indispensable, as the state may waive the breach of any implied or express condition contained in the charter. The remedy for the non-user or mis-user of the privileges of the charter, so as to work a forfeiture, is at law, and not in this court; and so it was understood in the examination of

the case of Attorney General v. Utica Ins. Co., 2 Johns. Ch. 389.

I conclude, therefore, that the corporation is still subsisting, in judgment of law, and that this court is not authorized, from anything that appears in the case, to consider the corporation dissolved. It follows, then, that the bill against individual members for a corporate debt, cannot be sustained.

2. Nor do I think that the plaintiff's claim could be supported, to the extent of the shares of stock owned by the individual members, even if the corporation were now dissolved by lapse of time.* * *

SPENCER, C. J. (after stating the facts in the case). With the most profound and undissembled respect for THE CHANCELLOR, I am constrained to differ from the opinion held by him that this corporation is not dissolved.

The object and intention of the legislature in authorizing the association of individuals for manufacturing purposes, was, in effect, to facilitate the formation of partnerships, without the risks ordinarily attending them, and to encourage internal manufactures. There is nothing of an exclusive nature in the statute; but the benefits from associating and becoming incorporated, for the purposes held out in the act, are offered to all who will conform to its requisitions. There are no franchises or privileges which are not common to the whole community. In this respect, incorporations under the statute differ from corporations, to whom some exclusive or peculiar privileges are granted. The only advantages of an incorporation under the statute over partnerships, and the only substantial difference between them, consists in a capacity to manage the affairs of the institution, by a few and select agents, and by an exoneration from any responsibility beyond the amount of the individual subscriptions.

In coming to the conclusion, that the corporation, in this case, is dissolved, I lay out of the case everything of mis-user, or non-user, excepting the influence which the fact of non-user may have as evidence, connected with other facts, to show the renunciation of the corporate rights. Upon the authorities, and for the reasons given by THE CHANCELLOR, mis-user or non-user cannot be relied on as a substantial and specific ground of a dissolution.

The ground on which I place my opinion, that the corporation is dissolved, is, that they have done, and suffered to be done, acts equivalent to a direct surrender. THE CHANCELLOR concedes, and it does not, in my judgment, admit of a doubt, that a corporation may be dissolved by a surrender of all their corporate rights.

In 2 Kyd. Corp. 467, the rational and true

rule is laid down. He says: "The rule adopted in all the cases which have occurred on this question, seems to have been 'this, that where the effect of the surrender is to destroy the end for which the corporation, or the corporate capacity was instituted, the corporation, or the corporate capacity is itself destroyed;' and we have the high authority of Lord Coke to the same effect. He says, if there be a warden of a chapel, and the chapel and all the possessions be aliened, he ceases to be a corporation, because he cannot be warden of nothing; but if the body of a prebend be a manor and no more, and the manor be recovered from the prebendary, by title paramount, yet his corporate capacity remains, because he has stallum in choro, et vocem in capitulo, and he is prebendary, although he has no possessions. Thus, according to Lord Coke, a recovery by title paramount would have produced an extinction of the corporation, had it reached all the rights and powers of the corporation, but inasmuch as there were rights unaffected by the recovery, it did not work a dissolution. Suffering an act to be done which destroys the end and object for which the corporation was instituted, must be regarded as equivalent to the doing an act which produces the very same consequences. A surrender is an act in pais; it can, therefore, be no objection, in this case, that the acts which have dissolved the corporation are acts in pais.

This bill was not filed until the 24th of April, 1819. In February, 1818, all the estate, real and personal, of the corporation, was sold under an execution; and, as has already been stated, the corporation has totally ceased from acting since December, 1817. The bill charges, substantially, that the corporation is dissolved; and not one of the respondents asserts, that it does exist, or that there is the remotest idea of resuscitating it. Here is, then, a corporation possessed of nothing, abandoning the end and object of their institution, without pretending that they ever hope or expect to resume their functions; and, it may be added, all the corporators either admit the dissolution of the corporation, (I speak of those who have suffered the bill to be taken pro confesso,) or deny, that they are corporators. Thus, presenting the phenomenon of a corporation without corporators, a nominal, inert body, pretending to have life and existence. Such an anomaly cannot be recognized. The argument is, that being incorporated for twenty years, there exists a corporate capacity, during that period, and that although all the functions of the corporation have ceased, yet they may be resumed. The second section of the act provides, that as soon as the certificate shall be filed, the persons who shall have signed and acknowledged the same, and their successors, shall, for the term of twenty years next after, be a body politic and corporate, in fact, and in name, &c. The legislature never meant, nor

* The rest of the chancellor's opinion is omitted.

does the act authorize the conclusion, that the corporation should remain and continue during all that period, *volens volens*. It was implied, that during that time they should do nothing to forfeit their rights, nor surrender them back, or do any act tantamount thereto. The act prolongs the corporation for twenty years, subject to all the incidents attending corporations; and I have endeavored to show, that one of the incidents is an extinction of the corporation, if it does what is equivalent to a surrender. I doubt extremely, whether the capacity to resume the functions of the corporation does, in fact, exist, but it is not necessary to decide that point. I consider it merely as a matter of speculation, thrown out, without any practical reference to the cause, as a stumbling block to the attainment of justice between the parties. For all the substantial purposes of justice, and in effect, the corporation is dissolved. In the case of *Rex v. Pasmore*, 3 Term R. 244, Justice Ashhurst says, as to the contrariety of opinions in the books on this subject: "I shall not attempt to reconcile them, but we ought to lean to that side which is supported by reason. Possibly, the seeming contrariety may have been, in some degree, occasioned by the equivocal use of the term 'dissolved.' As far as concerns the power of the crown to grant a new charter, I think the corporation was dissolved. As to some particular purposes which do not relate to the powers of government, but to personal privileges which are annexed to the persons of the remaining individuals, such as rights of common, &c., it may be said not to be dissolved, at least till the crown interposes." Justice Grose, in the same case, said: "Now, in point of good sense, when the purposes for which a corporation was created can no longer be answered, there is no reason why it should not be considered to be so far dissolved, as that the crown may raise there a new corporation," &c.

The doctrine urged by the respondents' counsel is, that this corporation must endure for twenty years, unless it is judicially declared to be dissolved, for mis-user or non-user; and we perceive, by some of the cases cited by THE CHANCELLOR, that even where there had been an omission to elect burgesses, for 22 years, doubts were entertained whether there had been such a non-user as vacated the charter. It is observable, that the appellant has no control over the process or remedy to dissolve this corporation for non-user. The people of the state, through their law officer, can only institute such proceedings. Then, as regards the appellant, if we are to consider this corporation in existence, he must patiently await the lapse of twenty years, before he can have any rem-

edy. I say, in the words of Lord Mansfield (3 Burrows, 870): "Without an express authority, so strong as not to be gotten over, we ought not to determine a case so much against reason."

In point of good sense, this corporation was dissolved, within the meaning and intent of the act, as regards creditors, when it ceased to own any property, real or personal, and when it ceased, for such a space of time, from doing any one act manifesting an intention to resume their corporate functions. The end, being, and design of the corporation, were completely determined; and if even it had the capacity to re-organize and re-invigorate itself, the case has happened when, as relates to its creditors, it is dissolved.

If I am right thus far, then, by the 7th section of the statute, the persons composing the company, at the time of its dissolution, are individually responsible, to the extent of their respective shares, for the debts then due and owing by the company.

With respect to the period of the dissolution, it appears to me, that we may safely say, it happened on the 1st of February, 1818, when all the property of the company was sold; for since that time, no corporate act has been done.

The next question is, how far the resolution of the 3d of November, 1817, discharged those of the respondents who have complied with its terms, from any further liability to the appellant.* * *

The result of my opinion is, that the decree complained of be reversed; that the cause be remitted to the court of chancery, with directions to enter a decree, declaring all the respondents, except Martin Hoffman, James Reynolds, and John E. Pells, liable, individually, to the extent of their respective shares of stock in the said company, and no further, to pay the appellant's debt; but that the payments made by the respondents on their stock, shall be deemed so far to have diminished their liability; and as respects Martin Hoffman, James Reynolds, and John E. Pells, that the bill be dismissed, and that they be paid their costs incurred in the court below.

YATES and VAN NESS, JJ., concurred. PLATT, J., being related to one of the parties, declined giving any opinion. WOODWORTH, J., not having heard the argument, gave no opinion. The rest of the court (AUSTIN, Senator, dissenting) concurring in the opinion of THE CHIEF JUSTICE, it was thereupon, ordered, adjudged, and decreed accordingly.* * *

* The rest of the opinion relating to this and other points is omitted.

* The details of the decree are omitted.

NEW YORK & N. H. R. CO. v. SCHUYLER
et al.

(34 N. Y. 30. 1865.)

Appeal from the general term of the supreme court, in the first district, where a judgment rendered at special term, in a case tried before the court, without a jury, had been affirmed. (Reported, at special term, 38 Barb. 534.)

This was an equitable action by the New York and New Haven Railroad Company against Robert Schuyler, and 320 other defendants, to have certain alleged false and fraudulent certificates and transfers of pretended stock of the company, made by the defendant Schuyler, and held by the other defendants, adjudged to be spurious and void; to have the same brought into court and cancelled; and to enjoin the several defendants from further prosecuting certain actions then pending, and from bringing other suits against the company, to enforce such certificates and transfers, or to recover damages for any reason connected with the same. This court has decided, in *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599, that the spurious certificates of stock issued by Schuyler were void.

The complainant, after setting forth the facts upon which relief was claimed, and the various suits pending, averred, that the plaintiffs were informed and believed, that it was the intention of other holders of the said false and fraudulent transfers of stock, and certificates of stock, to commence other actions against the plaintiffs, for refusing to transfer the said stock so purporting to be represented by the said false and fraudulent certificates, as genuine stock; that such actions would be very numerous, and, as the plaintiffs believed, exceeding one hundred, and would subject the plaintiffs, and the parties to those actions, respectively, to great and unnecessary expense, trouble and litigation; and that such actions, if commenced, and, especially, if followed up by attachments, would greatly injure and damage the interests of the plaintiffs, and the interests of the genuine stockholders of the company and its creditors, and other persons interested in its stock, effects and earnings; that the plaintiffs were advised and believed, that the rights of all the said holders of the said false and fraudulent certificates, and of the said fraudulent transfers, might be determined and adjusted in one action, without prejudice to the rights of any of them, and so as greatly to promote the convenience, and advance the interests of all persons interested in said company, whether as holders of the genuine stock or of the illegal and fraudulent certificates and transfers; that the plaintiffs were not authorized or empowered, as they were advised and believed, to acknowledge or recognize any of the said false and fraudulent certificates of stock,

or any of the said transfers of stock, or as constituting any claim against the company, without an adjudication by some sort of competent jurisdiction requiring them so to do; and that, under the circumstances, they could not make any dividends to genuine stockholders, nor could they, with safety or accuracy, determine who were entitled to vote at the elections for directors of said company; nor could they open the transfer-books of said company, as they were desirous of doing; and that this action was commenced for the purpose of impleading all the said holders and claimants under the said illegal and fraudulent certificates and transfers, in order that the duties and obligations of the plaintiffs and the rights and claims of the holders of said certificates might be settled in one suit, and to the end that a multiplicity of actions, and the delay, expense and litigation attendant thereon, might be avoided. And it concluded with a prayer for judgment, that the alleged false and fraudulent certificates and transfers might be adjudged illegal and void, and be cancelled, as not representing any stock in the company, and as not constituting any claim or obligation upon the company; and that the holders thereof should be enjoined and restrained from bringing any suit, action or bill in equity against the plaintiffs, for or on account of the said certificates, or any of them, or of the stock purported to be represented thereby, or of the act of the said Robert Schuyler, in creating or issuing the same; and that the defendants who had commenced suits, be enjoined from prosecuting the same, and that those several actions be consolidated and tried with this action, &c.

One of the defendants, William Cross, demurred to the complaint; but the demurrer was overruled at the special term (*Railroad Co. v. Schuyler*, 1 Abb. Pr. 417), and the decision thereon (which had been reversed at general term) was sustained in this court (17 N. Y. 592); and another demurrer, subsequently interposed by two others of the defendants, Chappel and Carpenter, was likewise overruled, on the ground that the question of the sufficiency of the complaint was *res adjudicata* (8 Abb. Pr. 239). Injunctions were granted to restrain the pending actions (17 How. Pr. 464); but these were subsequently dissolved, the general term having sustained the demurrer to the complaint (23 How. Pr. 187).

The complaint having been sustained, many of the defendants put in answers, setting forth various facts and grounds upon which they claimed that the plaintiffs were not entitled to the relief sought, and that the certificates or transfers respectively held by them were, or ought to be, treated as valid and binding on the company; or damages awarded to them for injuries sustained by the alleged frauds of Schuyler; and many

asking for relief by way of judgments for damages against the company.

On the trial of the cause, before Ingraham, J., without a jury, it appeared, that the plaintiffs were duly incorporated by the legislature of the state of Connecticut, in 1844; and by an act of the legislature of this state, passed in 1846, were authorized to extend their road into this state, and clothed with necessary powers for concluding its business therein. The act of incorporation provided, that the capital stock of the company should be \$2,000,000, with the privilege of increasing the same to \$3,000,000, to be divided into shares of one hundred dollars each, which shares should be deemed personal property and be transferred in such manner and in such places, as the by-laws of said company should direct; and that the directors should have full power to make and prescribe such by-laws, rules and regulations, as they should deem needful and proper, touching the disposition and management of the stock, property, estate and effects of the said company, the transfer of the shares, the duties and conduct of its officers and servants, the election and meetings of the directors, and all matters whatsoever which might appertain to the concerns of said company.

That the original corporators failed to obtain subscriptions for stock sufficient to organize the company, until 1846. That on the 19th of May, 1846, a board of directors were elected, who organized, on the same day, by electing Robert Schuyler president, which office he continued to hold until his resignation thereof, on the 4th July, 1854. That on the 9th July, 1846, the board of directors established, by certain by-laws adopted by them, a system concerning the transfer of stock of the company, and the issuing of certificates thereof, according to which stocks were transferable only on the books of the company, by the shareholder or his attorney, duly appointed, and on the surrender of the certificate held by him, when any certificate had been issued. The same by-laws, prescribed the form of the transfer, as follows:

"New York and New Haven Railroad Company. No. 10,002. Capital, \$3,000,000. Shares, \$100 each. New York Office.

"For value received, ——— hereby assign and transfer unto ——— all right, title and interest in ——— shares in the capital stock of the New York and New Haven Railroad Company.

"New York, ———, 18—."

That transfer books were provided for the use of the agents, in which transfers of this form were printed in blank. And that the by-laws also directed that a form of stock certificate should be adopted; and one was adopted and invariably used, as averred by the complaint, for the purpose of facilitating transfers of stock by the holders thereof, with a blank assignment and power of attorney printed on the back of it as follows:

New York and New Haven Railroad Company.

"New York and New Haven Railroad Company. No. 5,294. Capital, \$3,000,000. Shares, \$100 each. New York Office.

"Be it known, that ——— entitled to ——— shares of the capital stock of the New York and New Haven Railroad Company, transferable on the books of the company, at its office, in the city of New York, by the said ——— or ——— attorney, on the surrender of this certificate.

"New York, ———, 18—."

"———, Transfer Agent.

"Know all men by these presents, that ———, for value received, ha— bargained, sold, assigned and transferred, and by these presents, do— bargain, sell, assign and transfer, unto ——— of ——— shares in the capital stock of the New York and New Haven Railroad Company, standing in ——— name on the books of the said company, and transferable only at its office in the city of New York. And ——— do— hereby constitute and appoint ——— true and lawful attorney irrevocable, for ——— and in ——— name and stead, but to ——— use, to sell, assign, transfer and set over all or any part of the said stock; and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute, with like full power; hereby ratifying and confirming all that ———, said attorney, or ———, substitute or substitutes, shall lawfully do by virtue hereof. In witness hereof, ——— hereunto set ——— hand and seal, the ——— day of ———, one thousand eight hundred and fifty ———. Sealed and delivered in the presence of ———."

That these certificates, with the blank assignment and power of attorney upon them, were printed and bound in books, with margins for entering the time of issuing the certificate, the number of shares, the number of the certificate, and to whom issued; which margins remained bound in the books, after the certificates were cut out and issued, and constituted a memorandum of all the certificates issued; these books were furnished by the company to the transfer-agents. A stock-ledger was also kept, in which each stockholder was credited with the shares transferred to him, and debited with those transferred by him, and in a separate column, in each stockholder's account, was entered the number of shares represented by each certificate issued to him and the number of the certificate, and when a certificate was surrendered, a line was drawn through this entry, so that the uncanceled charges in the certificate column indicated the amount of each stockholder's stock, represented by outstanding certificates, and by a comparison of the aggregate of such charges with the aggregate balances of every stockholder's account, any over issues of certificates would be made to appear. These books were not accessible to the public, and dealers in stock had no means of information as to the title of parties proposing to dispose of stock, except such as was furnished by the certificates above mentioned, or by the agents of the company.

That on the 3d day of February, 1847, Robert Schuyler was appointed transfer-agent of the company at the city of New York, and a transfer-office was established in that city; other offices and agencies were also estab-

New York and New Haven Railroad Company.

lished in the cities of Boston and New Haven. From that time forward, to and including July 3, 1854, the entire control and management of the transfer-office and agency at New York was left in the hands of said Schuyler, without any examination or interference on the part of said company, or its directors, he being also, during the whole period, the president of the company and one of its directors (and the meetings of the board of directors appeared from the minutes to have been held at his office in New York.)

That, in August, 1851, the board of directors resolved to fill up the capital stock to \$3,000,000, being 30,000 shares, and directed that the same be apportioned amongst the existing shareholders, as then standing on the stock-ledger; such distribution was made, and the stock (except sixty-eight shares not taken, which remained, in part, undisposed of until the 15th of October, 1849) was taken by such distributees. That the stock originally subscribed, and that afterwards distributed, was, in most cases, transferred on behalf of the company, by one of the transfer-agents to the person entitled, and certificates were issued by such agent, in the form above set forth. That during the time Schuyler was such agent, transfers of stock were made on the books to the transfer-agents on account of the company, and such stock afterwards disposed of by such agents. That Robert Schuyler was a member of the firm of R. & G. L. Schuyler. That said firm held large amounts of the stock of the company, and from its organization to the 3d July, 1864, were large and constant dealers therein, and Robert Schuyler, as transfer-agent, during this whole period, attended to transfers and issued certificates to them, in the same manner that he did of stock standing in the names of other persons, and no restriction appeared, at any time, to have been put by the company upon his official action towards, or with his said firm.

On the 1st February, 1848, Robert Schuyler, as such transfer-agent, commenced the over-issue of certificates to his said firm, and on that day, such over-issue was sixty shares; and such over-issue continued thenceforth, and at all times thereafter, there was an over-issue of certificates in the stock account of R. & G. L. Schuyler. On the 20th of March, 1848, the over-issue by transfer commenced, and on that day, the number of shares transferred by R. & G. L. Schuyler, exceeded the number transferred to them by sixty shares. Such excessive transfers continued until January, 1849, the amount thereof fluctuating from time to time, as transfers were made to and by R. & G. L. Schuyler, but the balance on the books of the company was against them, at all times during that period. The excessive issues of such stock, so transferred on the books of the company by R. & G. L. Schuyler, were credited to the transferees, in their respective

accounts, and, when transferred, were charged in such accounts and credited to the new transferee. These transfers were made, in great part, under the power of attorney executed in blank by R. & G. L. Schuyler, indorsed on the over-issued certificates, by the holders thereof, and such certificates were, on making such transfers, brought in, surrendered and cancelled. During this period, the amount of the over-issued certificates and over-issued transfers was not in excess of the 30,000 shares of the authorized capital of the company.

On the 10th of January, 1849, the excessive transfers amounted to 1,191 shares, but between that day and the 31st of January, shares were transferred to R. & G. L. Schuyler, by various persons, sufficient to turn the balance of transfers in their favor. In August, 1851, when the 5,000 additional stock was distributed, the firm of R. & G. L. Schuyler had standing to their credit 854 shares; and in making the distribution and dividend in that month, the stocks previously transferred to the various persons holding the over-issued certificates, were treated by the company as genuine stock; there were, at this time, outstanding certificates issued to that firm, beyond the amount of their credits, for 1,277 shares. The over-issued certificates continued to increase until the 17th October, 1853, at which time it had reached 7,042 shares, but the number of incoming certificates up to that time had not exceeded the credits of R. & G. L. Schuyler, by transfers made to them, so that, on the 17th of October, 1853, their account showed a balance by transfer to them of 4 shares. On that day, a transfer of 100 shares was charged to them, and thenceforward to, and including, the 3d July, 1854, the balance of transfers against them continued to increase, until it reached 17,497 shares; at the same date, the outstanding certificates against them amounted to 1,648 shares. All the certificates issued, including the false and over-issued certificates, were regularly entered in numerical order in the certificate books and stock-ledger, and an examination of such books would, at all times, have shown what certificates were outstanding, and a comparison between the footings of the several books would have shown whether R. & G. L. Schuyler were or were not entitled to receive certificates.

The over-issued certificates and transfers were, in all cases in which powers had been given to defendants, purchased or received by them in good faith, on the payment or advance of money. It was an established usage in the city of New York to make purchases of stock, and make loans thereon, on the faith of such certificates, with the assignment and power of attorney thereon executed in blank, by the party to whom originally issued, and they were transferred in the course of business, from hand to hand, by delivery. It was a usage, also, to take trans-

fers of stock, in the course of dealing, on the books of the corporation, without receiving a certificate; and, according to the ordinary mode of business, transfers were not allowed by corporations, without the surrender and cancellation of the outstanding certificate, when one had been issued; and, according to the usage among corporations in New York, dealers in their stock were not allowed access to their books, and it was not the custom for dealers to make examinations thereof. The stock of the New York & New Haven Railroad Company was largely dealt in, in the city of New York, by the delivery of certificates and assignments in blank, and large amounts of such certificates were constantly in circulation, and many of them purported to be issued to R. & G. L. Schuyler, and were signed by Robert Schuyler, as transfer-agent.

In many cases where valid certificates of stock had been issued to R. & G. L. Schuyler, for stock actually belonging to them, and outstanding to their credit on the books at the time, and while such certificates, with the usual assignments and powers of attorney executed in blank, were outstanding in the hands of bona fide holders, the stock was permitted to be transferred by R. Schuyler, in the firm name, to other persons, who took the same for value, in good faith, without the surrender of the outstanding certificates. The rule on this subject, as established by the by-laws, was generally observed, but in the case of R. & G. L. Schuyler, and a few other persons, it was disregarded by R. Schuyler and the clerks of his office.

The railroad company kept no bank-account for the deposit of moneys; money received on behalf of the company, on construction account, from time to time, by Robert Schuyler, as president or transfer-agent, was, from time to time, deposited by him in the bank accounts of the firm of R. & G. L. Schuyler, and when payments were made by Schuyler, on behalf of the company, the money was obtained by R. Schuyler. Large amounts were so obtained, from time to time, and frequently from the firm of R. & G. L. Schuyler; said moneys were drawn out from time to time as needed, on their checks; the money so obtained by R. Schuyler was raised by the said Robert Schuyler in the name of his said firm of R. & G. L. Schuyler, indiscriminately, on genuine and spurious certificates of the stock of said company; but it was not found to what time such moneys continued to be raised.

The firm of R. & G. L. Schuyler failed on the 3d July, 1854, and R. Schuyler, on the morning of the 4th of July, by letter, resigned the offices of president, director and transfer-agent, and called the attention of the board of directors to the over-issues appearing in the books. It was also found by the court, that up to that time, "there was no evidence of any actual knowledge of any of the other directors, of any fraudulent acts on the part

of Schuyler, in the performance of his duties as transfer-agent," and the evidence tended to establish, that he stood high in the confidence of the community, as a man of integrity and business capacity. But the court further found, "that a proper examination of the books by the directors, would have enabled them to discover the frauds which were perpetrated by Schuyler, and that the board of directors was guilty of negligence, in not making such examination, and in leaving the entire charge and control of the transfer of shares and giving of certificates with Schuyler, without making such examinations;" and that the plaintiffs, by their transfer-agent or clerks, carelessly, negligently and improperly conducted themselves, in relation to the transfer of the stock on the books of the company, and the issuing of certificates therefor, in the allowance of transfers of shares of stock on the books of the company, and in issuing certificates therefor, when no such shares existed, or when such certificates were not true, and in permitting transfers of spurious stock to be made on the books of the company, and certificates of spurious stock to be issued to persons who, in good faith, advanced money or other property thereon, and in permitting shares of stock to be transferred to other persons than those holding the certificates thereof, without requiring a surrender of such certificates.

That the defendants received their transfers of stock, through the acts and neglect of the transfer-agent, or of the officers of said company, or certificates, issued by the acts and neglect of the transfer-agent and officers of the company, or certificates of stock, valid when issued, but rendered valueless by the fraudulent or negligent pursuance of transfers of such stock to subsequent bona fide purchasers, without the surrender of the outstanding certificates, and had been misled by the acts and neglect of the transfer-agent or officers of said company, in relation to such transfers and certificates, and had, in good faith, and without any violation on their part, or in their knowledge, of the by-laws and rules of the company, advanced money and other considerations on the faith of such transfers and certificates. The particular facts on which the several defendants individually relied are stated in the opinion of the court.

The learned judge decided as matter of law, that the plaintiffs were entitled to the relief sought, as to the most of the defendants; and as to others of the defendants, that the plaintiffs were liable to them, respectively, for the damages sustained in consequence of their certificates or transfers turning out to be false and fraudulent, and that they were entitled, separately, to maintain actions against the plaintiffs, for such damages, but that such damages could not be, appropriately, under the pleadings in the case, adjudged to them in this action.

And he directed judgment to be entered accordingly, as of the 18th September, 1860.

The plaintiffs appealed to the general term from all that portion of the judgment relating to the rights of the defendants to recover damages for the injuries to them, and to maintain actions against the plaintiffs therefor; and some of the defendants appealed from so much of the decision as adjudged their certificates and transfers invalid, and annulled the same, and some from such decision, and from the decision that relief by cross-judgments for damages could not be awarded in this suit. The general term affirmed the judgment (with some unimportant modifications); but decided, that, as to those defendants who were entitled to damages against the plaintiffs, the court ought to have proceeded and assessed the amount of their damages, respectively, and awarded judgments in this action against the plaintiffs therefor; and they ordered the case to be sent back to the special term for that purpose, and directed that court to proceed and assess such damages in favor of the said several defendants, who should establish the amounts of their respective claims, and give judgment therefor, so that final judgments might be entered in the action, both for and against the plaintiffs and the several defendants entitled thereto.

The case having been sent back to the special term, the same learned judge proceeded to make the assessments; and upon the further proofs and allegations of the parties, as well as upon the proofs and findings before given and found in the case, he found further facts touching the amount of damages, &c., upon which judgments were ordered in favor of said defendants, respectively, to be entered as part of the original judgment, and as an amendment thereof. And judgment was entered, accordingly, on the 30th June, 1864. The plaintiffs took exceptions to the proceedings to assess, in respect to every defendant in whose favor an assessment was made, and numerous exceptions to the judgments as ordered and entered. And the same having been affirmed at general term, the plaintiffs took a further appeal to this court.

Separate appeals were also taken by Jacob Surget, Morris Ketchum and Edward Bement, surviving members of the firm of Ketchum, Rogers & Bement, Henry Chauncey and Emily, his wife, Clara P. Alsop, and Cornelius Vanderbilt, defendants.

Jacob Surget and Ketchum & Bement appealed from orders of the general term, dismissing their respective appeals, on the ground, that they were taken too late; but it was stipulated that this court, in case it should be of opinion, that the general term ought to have entertained the appeals, should be at liberty to consider their cases upon the merits. Surget took no appeal from the decision of the special term in 1860;

damages were assessed in his favor, when the case was sent back for that purpose, and from the final judgment entered in June, 1864, he appealed to the general term, claiming the right to review the questions affecting him, both in the original and the final judgments.

Ketchum & Bement, as surviving partners, were found to be the holders of certificates for 740 shares of the spurious stock. But it was also found, that Morris Ketchum, one of the firm, was, during all the periods in which Schuyler was perpetrating his frauds, one of the directors of the company; and it was held, that the firm were not entitled to damages. They did not appeal from the judgment of the special term, in 1860, but they took an appeal from the final judgment in 1864, claiming to review the decision touching the validity of their stock, and their right to recover for the injuries sustained by the frauds.

The other appellants had taken appeals from the original judgment; their damages had been assessed, and judgment had been entered therefor; and they now appealed from the final judgment, claiming to have reviewed the questions as to the validity of their stock and their title to be recognized by the company as stockholders, in case their right to recover the damages assessed to them should be adjudicated against them.

DAVIS, J. The practice in this case has been anomalous, and, to some degree, without precedent. There is little danger, however, that any rule will be extracted from its complications likely hereafter to embarrass the courts. Unless, therefore, substantial rights have been violated by the course of procedure, I am opposed to remitting the case, or any of the parties to it, to another decade of litigation, on any ground of mere irregularity.

The plaintiffs, after the discovery of the frauds of Robert Schuyler, found some three hundred persons in possession of supposed titles to portions of their capital stock, each of whom was clamorous that his title should be recognized as genuine, or that he should be compensated for injuries sustained from its falsity. Many of these persons had commenced suits at law, to recover damages because of the refusal of the plaintiffs to recognize their alleged rights; and the rest, it was presumed, were about to commence such suits.

In this exigency, the plaintiffs invoked the equity powers of the court to shelter them from the impending storm, by gathering all these persons and their claims into a single suit, in order, as they averred, that the duties and obligations of the plaintiffs, and the rights and claims of such persons, might be settled in one suit, and thereby a multiplicity of actions and the delay, expense and litigation attendant thereon be avoided. They

called upon the court to investigate the question of the validity of the certificates and transfers of stock held by the defendants; to separate the good from the bad, and cancel the latter; to stop all actions then pending, and consolidate and try the issues joined in them, in this action, and to restrain all other parties from commencing actions upon claims growing out of such certificates and transfers; and to accomplish these ends, they asked and obtained process by injunction, under which the defendants have been restrained from prosecuting elsewhere any claims while this action was pending. It comes, therefore, with an ill grace from plaintiffs, if the defendants have rightly shown themselves entitled to recover damages in any forum, to insist that they can have no remedy in this suit. Having recovered judgment, declaring these certificates and transfers spurious, upon a state of facts on which the court held, that the defendants were also entitled to be compensated for their injuries, it would seem a hard measure of justice to turn these parties out, to seek redress in the very multiplicity of actions which this suit was brought, in part, to avert.

It is a mistake to suppose that this action addressed itself to any single head of equity jurisdiction. It sought, it is true, the cancellation of illegal certificates and transfers, which were *prima facie* evidences of title to stock, on the ground, that they were clouds on the title of the holders of genuine shares; and chiefly in this aspect, it was sustained, on demurrer, by this court (17 N. Y. 592); but it was also a "bill of peace," to quiet titles, settle rights, and prevent a multiplicity of actions; and, as was said by Comstock, J., in the decision referred to, "the number of parties and the multiplicity of actual or threatened suits, will sometimes justify a resort to a court of equity, when the subject is not at all of an equitable character and there is no other element of equity jurisdiction;" to which he might have added, that wherever those facts did justify such resort, a court of equity would fully dispose of all the rights and questions springing out of the subject-matter of the suit, as to every party, however multitudinous or complicated they might be. The action sought also to have the pending suits, in which portions of the defendants were plaintiffs, consolidated in this suit, and their issues tried with it, and to prevent all of the defendants from prosecuting any claim growing out of the subject-matter of this suit, in any court of this state or elsewhere, for the reasons already quoted, and because the plaintiffs, as they said, "could not acknowledge or recognize any of the said false and fraudulent certificates of stock, or any of the said transfers of stock; or, as constituting any claim against the company, without an adjudication by some court of competent jurisdiction, requiring them to do so."

While, therefore, it was, in one aspect, a suit to remove a cloud upon a title, and cancel the instruments creating such cloud, it had a far-reaching and broader scope under which the plaintiffs hoped and intended to secure a judgment that would put at rest for ever all possible claims against them, growing out of the Schuyler frauds. If it could be maintained to extinguish such claims, surely it can be to uphold them. The court did not err in so adjudging if, while investigating the facts upon which the plaintiffs sought relief, it found, that the same facts that entitled them to a part of what they sought also entitled the defendants to relief against them; and it was no undue stretch of equity jurisdiction to award the relief to both, in the same action. The objection that, by such a course, the plaintiffs have been deprived of trial by jury, is without any sound foundation. The very nature of the action forbade such a trial. It is a primary consequence of a resort to a court of equity, that trial by jury is no matter of right, and wherever the equity of the complainant's bill gives such a court jurisdiction, it draws to the same forum and mode of trial every question, whether its nature be legal or equitable, that can be legitimately considered within its scope. Under the Code, legal and equitable jurisdictions are combined in the same tribunal, but the principles of each remain distinctive and undisturbed. Whenever a plaintiff calls upon the court to exercise its jurisdiction, upon principles of equity, he elects thereby his mode of trial, and waives any constitutional right of trial by jury that he might at law have demanded, both as to the remedy he seeks and the defence that may be interposed.¹

Under the peculiar circumstances of this case, the court should not scrutinize, with critical care, the pleadings of the respondents, to see whether there be not some defectiveness in setting forth the nature and grounds of their claims to relief, or in demanding the same. The objections were not raised at the stage of the trial when it was most important to have the defects, if any existed, distinctly pointed out, and when amendments could have been readily allowed; hence, on this appeal, the plaintiffs should be regarded as having waived such objections, or the pleadings be considered as properly amended.

In my opinion, the action of the general term on the appeal from the judgment entered on the decision of the special term, in 1860, is not here to be reviewed, nor is it material to the case, if it were. Since that time, the case has gone back to the special term, and the trial of the case has been completed, by a disposition of all its issues, and another or amended judgment has been entered, from which an appeal was taken to the general term, and the judgment affirm-

¹ See *Cogswell v. Railroad Co.*, 105 N. Y. 321, 11 N. E. 518.

ed; from this last judgment, the appeal properly lies to this court. In its practical effect, the decision of the general term, on the first appeal, when considered in the light of subsequent proceedings, amounts to nothing more than a ruling that the case had not been fully tried, and a final judgment rendered therein as to all the parties, and under that ruling, it ordered the case back, with directions to the judge at special term to do what was, in its opinion, requisite to render the judgment complete. The action of the special term, in so far as it had gone, was, in substance, held correct, and pro forma affirmed; but it was instructed, that its ruling, that defendants could not recover cross-judgments in this suit was erroneous, and, therefore, the case was remitted to the original court, with directions to proceed in the necessary assessment, to entitle the defendants to judgments for damages, under the facts already found. If that judgment of the general term was a final one, it should have been appealed from, within the prescribed time, to this court, by any party seeking to review it. If it was not final, and not appealable, for that reason, then it has ceased to be of any moment, since the special term has continued the action, completed the trial, amended the judgment, or entered a new one, from which an appeal has been taken to the general term, and thence to this court. It is the judgment awarding the damages that is under review on plaintiffs' appeal, and not the judgment refusing them. The judgment of the special term giving such damages is none the less the judgment of that court because an appellate tribunal had instructed it, that such ought or must be its judgment. It is not uncommon, when cases are sent back for new trial, for the appellate court to indicate the disposition that should be made of them, and for the original court to follow such disposition. And the practice in such case requires a new formal appeal to the general term, and a new judgment by that court, before an appeal lies to this court.

We can only look at the action of the general term on the first appeal, as an irregular proceeding, by which the cause was got back to the original tribunal for complete judgment. Its effect has been an amended or complete judgment as to all the parties and all the issues, and that has become the final judgment in the case, and is now here for review. The practice of the court, on the first appeal, was *sui generis*, and is not to be recommended for general imitation; but if this court should hold it not only to be irregular but wholly erroneous, we should still have the final judgment of the special term and the affirmance of that by the general term, before us for review; because the merits of neither of those judgments can be said to have been affected by the intermediate irregularity, but only the mode of getting at them. In short, I think,

the last judgment of the special term is now to be considered the judgment in the action; and any party whose rights were affected by it, was at liberty, within the prescribed time, to appeal from it; and the appeal would bring up any question properly arising in the progress of the trial; for, in legal contemplation, there has been but one trial and one judgment. It follows, therefore, that the general term erred in dismissing the appeals of Surget, and of Ketchum and Bement; and that this case is here for review on all its meritorious questions, unprejudiced by mere matters of form or practice.

This somewhat summary disposition of the preliminary points of the case leaves an open path to its meritorious questions, some of which, however, may be disposed of even more summarily. One of these is the question, whether the stock purporting to be created by the false certificates and fraudulent transfers of Schuyler, can be valid stock of the corporation, and become part of its capital. In the nature of things, this is impossible. A corporation, with a fixed capital, divided into a fixed number of shares, can have no power, of its own volition, or by any act of its officers and agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the state can alone confer that authority, and remove or consent to the removal of restrictions which are part of the fundamental law of the corporate being; and hence, every attempt of the corporation to exert such a power, before it is conferred, by any direct and express action of its officers, is void; and hence, every indirect and fraudulent attempt to do so, is void; for, if such a result cannot be accomplished directly, by the whole machinery of the corporate powers, it is absurd to suppose, that it can be produced by the covert or fraudulent efforts of one or more of the agents of the corporation. The special term was, therefore, right in holding that the spurious stock, attempted to be created by Schuyler, in excess of the capital, formed no part of the capital stock of the company, but was utterly invalid; and it necessarily followed from the decision of this court, when the case was before it on demurrer, that the plaintiffs were entitled to have all certificates and transfers which represented such spurious stock declared void and ordered to be cancelled.

Another important legal proposition in the case is so clear upon principle, and so distinctly settled by authority, that nothing but confusion can flow from its discussion. It will bear no more than plain enunciation. A corporation is liable to the same extent, and under the same circumstances, as a natural person, for the consequences of its wrongful acts, and will be held to respond in a civil action, at the suit of an injured party, for every grade and description of forcible, mali-

clous or negligent tort or wrong which it commits, however foreign to its nature, or beyond its granted powers, the wrongful transaction or act may be.² *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 31; *Ang. & A. Corp.* §§ 382, 388, 391; *Albert v. Bank*, 2 Md. 169; *Goodspeed v. Bank*, 22 Conn. 541; *Bissell v. Railroad Co.*, 22 N. Y. 305-309 (per Selden, J.); 1 Wend. Bl. note 476; *Green v. Omnibus Co.*, 7 C. B. (N. S.) 290; *Bank v. Johnson*, 24 Me. 490; *Railroad Co. v. Quigley*, 21 How. 209, and cases cited by Campbell, J. It follows, from this proposition, that if it were established in this case, that the corporation itself issued the false certificates of stock, and permitted the fraudulent transfers of spurious stock, it would be liable to the party directly deceived and injured by that transaction. The incapacity to create the spurious stock would be no defence to an action for damages for the injury. On the contrary, that very incapacity, since it would render the certificate or transfer a fraud and deceit, would itself be the cause of the injury and the basis of recovery. No court would hear the corporation assert, that its wrongful act was beyond its chartered powers, and, therefore, ineffective to charge it with the injurious consequences of the fraud.

But in this case the false certificates were issued and the spurious stock transferred by an officer of the corporation. A corporation aggregate, being an artificial body,—an imaginary person of the law, so to speak,—is, from its nature, incapable of doing any act, except through agents, to whom is given, by its fundamental law, or in pursuance of it, every power of action it is capable of possessing or exercising. Hence, the rule has been established, and may now also be stated as an indisputable principle, that a corporation is responsible for the acts of negligence of its agents, while engaged in the business of the agency, to the same extent and under the same circumstances, that a natural person is chargeable with the acts or negligence of his agent; and "there can be no doubt," says Lord Chancellor Cranworth, in *Ranger v. Railroad Co.*, "that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation." 5 H. L. Cas. 86, 87; *Thayer v. City of Boston*, 19 Pick. 511; *Turnpike Co. v. Rutter*, 4 Serg. & R. 16; *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 31; *Bank v. Johnson*, 24 Me. 490; *Story*, Ag. § 308; *Ang. & A. Corp.* §§ 382, 388.

This brings us to consider the propositions on which the liability of the company to respond in damages to the defendants must de-

pend. They are either general, as applicable to all of the defendants, or special, as growing out of the particular facts of some one or more of the defendants; and it is impracticable, without danger of injustice, to group the cases of all the defendants together, and consider them in mass, however desirable that course might be, in order to avoid prolixity. In one general proposition, an inquiry is primarily involved into the duties concerning its stock, which the corporation owed to the public, and especially, to all who might become dealers therein. The charter of the company was voluntarily sought and accepted; it created a private trading body, having in view pecuniary gains and advantages. The legislature limited the capital, and fixed the number of shares into which it might be divided, and declared them to be personal property, to be transferred in such manner, and at such times and places, as the by-laws of the company should direct, and then handed over to the directors a discretion restrained only by the laws of the state and the United States, to enact by-laws touching the disposition and management of the stock, the transfer of shares, the duties and conduct of officers, "and all other matters that might appertain to the concerns of the company." These powers were sought and granted, with a view to well-known and established commercial usages. It was, doubtless, a matter of choice, to what extent the company would exercise them, but the directors chose to use them in their broadest significance. They proceeded to enact by-laws to regulate the transfer of stock and the issuing of certificates on such transfers; they adopted a form of transfer, of certificate and of assignment, and power of attorney indorsed thereon, and gave them every characteristic of negotiability in their power to confer. They sought the commercial centre of this continent, and there established a transfer-office and agency, and thus gave and secured the most unbounded facilities for dealing in the stock. Their purposes, obviously, were, to lay hold of the advantages which such facilities were sure to bring to the stock, by enhancing its monetary and convertible value. This course was legitimate; but it brought with it corresponding duties and obligations. I cannot doubt but that upon general and long established principles of law, the corporation became bound to the exercise, in this branch of its business, of such ordinary care and skill as should afford to dealers a safe and reliable mode of acquiring title to its shares, in the form of transfers and certificates as provided by its by-laws. "The law always imposes upon every one who attempts to do anything, even gratuitously, for another, some degree of care and skill in the performance of what he has undertaken. * * * Mere negligence, where there is no obligation to use care, as where a man digs a pit upon his own land and leaves it open, affords no ground of action.

² See *Wilkinson v. Dodd*, 42 N. J. Eq. 246, 7 Atl. 327.

but where there is anything in the circumstances, to create a duty to an individual or to the public, any neglect to perform that duty from which injury arises, is actionable." Per Selden, J., in *Nolton v. Railroad Co.*, 15 N. Y. 444; *Coggs v. Bernard*, 2 Ld. Raym. 909.

It is upon this duty that the courts have established the rights which dealers acquire through the certificates of corporations, who thus enter their stock upon the market, and the liabilities that flow from a refusal to permit the enjoyment of those rights. *Denny v. Manhattan Co.*, 2 Denio, 118; *Kortright v. Bank*, 20 Wend. 94, 22 Wend. 368; *Pollock v. Bank*, 7 N. Y. 276; *Davis v. Bank*, 2 Bing. 393; *Iron Co. v. Hooper*, 7 Cush. 183; *Sargent v. Insurance Co.*, 8 Pick. 90. I cannot, therefore, subscribe to the idea, that the duties of the plaintiffs in respect to their stock were limited to themselves and existing shareholders. They extended also to the commercial community, whose confidence and trade the plaintiffs invited, and who, in turn, were entitled to good faith and fair dealing at the hands of the company; and they sprang into full vigor in behalf of every party who entered upon such dealing.

The next important general inquiry is into the manner in which the plaintiffs discharged those duties at their New York agency, with a view to determine, whether their conduct has been of such a character, that the law, in behalf of innocent parties, and to prevent injustice, will imply authority in the agent to do the acts that have occasioned the injury, on the principle of estoppel in pais. This inquiry was not involved in the case of the *Mechanics' Bank* against these plaintiffs (13 N. Y. 599), for the facts upon which it arises were not then before the court, and the questions discussed did not embrace them. The only question of estoppel considered in that case, was the one arising on the face of the certificate itself, and the learned judge who pronounced the opinion was very careful to define the limits of the authority, as they appeared in that case, and to declare, that the appointment, by its terms, did not include the acts, and that there was "no pretence that the authority conferred was ever enlarged by any holding out or recognition of such acts." 13 N. Y. 636. The doctrine of implied agency, when it arises out of negligence, I think, has its true basis in the principle of estoppel in pais. That principle, as said by Wilde, B., in *Swan v. Australasian Co.*, 7 Hurl. & N. 603, is based on the injustice of allowing a party to be the author of his own misfortune, and then charging the consequences upon others, and "it all along implies an act in itself invalid, and a person who is forbidden, for equitable reasons, to set up that invalidity."

The facts on which this question arises are, in part, the same as those upon which the extent of Schuyler's actual agency is to be determined, and a condensation of them

will now be made, with a view to answer both purposes. Schuyler was president of the company and a director. In February, 1847, and after the by-laws were adopted, he was appointed transfer-agent at New York. His appointment was entirely general in its terms, but, by necessary implication, was subject, as to the mode of executing his duties, to the provisions of the by-laws, in cases coming within their scope and meaning. The substance of the by-laws was, that all transfers of stock should be made by the shareholder, on the transfer-book, in the form prescribed, at the office where the stock stood to his credit; that certificates for stock, with blank assignment and power of attorney thereon, in the form prescribed, might be issued; and when issued, no duplicate should be given, and no stock be transferred, without the surrender of the outstanding certificate, (except in case of lost certificates, where special action of the board should be had); and that the stock might be transferred by the holder of a certificate under the power of attorney duly executed. Subject only to these by-laws, the board handed over to Schuyler all the power the directors themselves possessed, in respect to the transfer of stock at the New York agency. They furnished him with blank transfers, certificates, assignments and powers, bound in books, the stock-ledger and other account-books, and gave into his absolute control the keeping and management of such books, and the employment and control of the clerical force necessary to that purpose. For more than seven years, they left to him the unchecked and unquestioned management of the enormous business of this transfer-office; and it was by no means limited to the mere duty of permitting transfers and issuing certificates upon transfers. It is found by the court, that the stock originally subscribed for was, in most, if not all, cases, transferred by one of the agents, in behalf of the company; and the complaint avers, that certificates signed by a transfer-agent, in the form above mentioned, were issued in such cases; that the stock subscribed for "was not all taken by or issued to parties subscribing therefor, but much of it was sold by Robert Schuyler, as transfer agent, on behalf of the company, and it was not all sold or issued, until the 15th of October, 1849, when the last twenty-eight shares were issued to Bishop & Miller;" "that there were, during the time while the said Robert Schuyler was transfer-agent, transfers of stock made to the transfer-agent, on the books of the company, by holders of stock, for the account of the company, and the stock so transferred was afterwards disposed of by such agents;" that the increase of 5,000 shares, made in 1851, was transferred by the agent to the parties entitled; that Schuyler was authorized by the board to sell, and did sell and transfer, certain small amounts of forfeited stock and fractional amounts not

taken by subscribers, on behalf of the company; "that the company kept no bank-account for the deposit of moneys; that the money received on behalf of said company on construction account, from time to time, by Robert Schuyler, as president or transfer-agent, was deposited by him in the bank-accounts of R. & G. L. Schuyler; that when any payments were made by Schuyler, on behalf of the company, the money was obtained by Robert Schuyler; that large amounts were so obtained, from time to time, and frequently from his firm of R. & G. L. Schuyler; that said moneys were drawn out from time to time, by their checks, as the same might be needed; that the money so obtained by R. Schuyler was raised by the said Robert Schuyler, in the name of his said firm, indiscriminately, on genuine and spurious certificates of the stock of the company;" that many of the transfers of stock were made by R. & G. L. Schuyler, by way of hypothecation, as security for loans to them.

From the outset, the firm of R. & G. L. Schuyler were large dealers in the stock of the company; so large, that apparently, on the face of the books, more than the entire capital stock of the company passed through their account by transfer. That the by-law requiring the surrender of certificates, on transfer of stock, was generally observed, but in case of the Schuylers, and some other parties, they were not adhered to.

It appears also, that the frauds of Schuyler commenced at an early day. On the 1st day of February, 1848, the first false certificate was issued to this firm, and at all times thereafter, there was an over-issue of certificates, greater or less in amount, in the stock-account of R. & G. L. Schuyler, as set forth in the stock-ledger. In March, 1848, transfers in excess of stock transferred to them, were first made on the books; these excessive transfers continued until January, 1849, fluctuating from time to time in amount, as transfers were made to and by them, but the books, at all times during that period, showed a balance against them. On the 10th of January, 1849, these excessive transfers amounted to 1,191 shares. This excess was occasioned, in part, by the bringing in and surrender of the excessive certificates, by holders thereof, who thereupon transferred, under the power of attorney, to themselves or others, the stock represented by such certificates. Between that date and the 31st of January, Schuyler obtained of the company and others, shares of stock sufficient to turn the balance of transfers on the books in his favor, although there were then outstanding fraudulent certificates issued in favor of the firm, in excess of their balance. In August, 1851, when the increased capital was issued, the books showed a balance of transfers in favor of the Schuylers of 854 shares; but there were then outstanding certificates in excess of this credit, to the amount of 1,277 shares.

The balance of transfers was, therefore, kept in their favor, during this whole interval, by the fact, that the holders of certificates had omitted to bring them in and have them cancelled and the stock transferred, as rapidly as that firm had received transfers on the books to themselves. But so fast as these certificates did come in, and transfers were made under them, the stock was credited on the books to the transferees, and has ever since been recognized as valid stock. The whole amount thereof did not exceed the subsequently extended capital of \$3,000,000 or 30,000 shares, but I am not able to see why it did not, at most, if not at all times, exceed the then authorized capital of \$2,500,000, or 25,000 shares. In some manner, not disclosed, all these excessive issues were remedied, and made good stock; and so was all the stock purporting to be represented by the false certificates, that came in and were canceled on transfers, prior to the 17th day of October, 1853. On that day R. & G. L. Schuyler had a balance of transfers in their favor of four shares, but there were outstanding certificates to the amount of 7,042 shares, upon which no transfer had been made. From that date, the excessive transfers again appear, and continue till July 3, 1854, at which time they had reached 17,497 shares, while the certificates had run down to 1,684 shares; making together an aggregate of 19,145 shares of spurious stock, in excess of the enlarged capital.

But from 1848 down to 1854, all these frauds were written down in the books of the company. A proper comparison between the certificate-books and the stock-ledger and transfer-books, would, at any time, have shown whether the Schuylers were entitled to receive certificates and when they were not entitled to transfer stock, without surrendering certificates; and an examination of the account of R. & G. L. Schuyler in the stock-ledger, was sufficient, according to the testimony of experts, by computation, to have shown, at any time, the over-issue of certificates. The certificates were numbered consecutively, and so entered on the books, and there seems to have been no effort at falsification of the accounts. From 1849 to 1854, the clerks in the office knew of the over-issue of certificates. By the usage of corporations in New York, the books were not open to the examination of dealers, and by the orders of the agent, they were kept shut against inspection. The court has found, that it does not appear that any other director than Schuyler had personal knowledge of his fraudulent acts; but it has also found, that the directors were guilty of negligence in not making any examination of the books, or of the conduct of the transfer-office.

It is apparent, that the use of ordinary care and diligence, at any time after March, 1848, would have disclosed that Schuyler's management was fraudulent, both as to the com-

pany and the public, and likely to lead to the disasters that have followed upon it. It is a mistake to suppose that his frauds commenced in October, 1853. They were equally gross in turpitude, though not in amount, for a period of five years before that date; and nothing but the ability of the company to increase the capital from two and a half to three millions, has prevented all excesses beyond the first named sum from falling under the same ban of utter spuriousness. The arrangement by virtue of which the transfers made on false certificates, before the increase of the capital, became genuine stock, may have been made in ignorance; but it was an ignorance based on a negligence so gross, that the fact becomes as potent as though the truth had been known. It may have been in ignorance, that the company received the benefit of "large sums" raised by Schuyler, indiscriminately, on genuine and spurious certificates. Charity may grant that, but equity cannot disregard the fact, for it was a duty to be wise. It is transparent, throughout the case, that the board of directors, by passive submission or active surrender, handed over to Schuyler the substance of all their authority relating to their business in New York, and then, for nearly seven years, laid down to sleep, in supine indifference, at his feet. Aroused by the shock of the calamity which their folly has induced, are they now to look calmly over the wreck, with no answer to its innocent victims but that of Macbeth to the ghost of Banquo?

"If the managers faithfully perform their duty," said Strong, J., in *Beers v. Glass Co.*, 14 Barb. 360, "they exercise a constant and vigilant supervision over the acts of their officers, and where such acts are unauthorized or in opposition to their will, they should, and probably do, direct their discontinuance, and in case of wilful and palpable violation of duty, dismiss the agent. If the directors of a company, no matter whether through inattention or otherwise, suffer its subordinate officers to pursue a particular line of conduct, for a considerable period, without objection, they are as much bound to those who are not aware of any want of authority as if the requisite power had been directly conferred." I cannot file my mind to the belief, that equity attaches no consequences to such negligence, upon the idea that it is not sufficiently proximate as a cause of the injury. The company placed in Schuyler's hands the very instrumentalities by which the injury was wrought. They imposed restrictions upon their use, but they omitted the safeguards that ordinary prudence would dictate, to discover or prevent their abuse. A wrong which ordinary care will prevent, is, in a legal sense, caused by the omission of that care, where it is a duty to use it. At any stage, a discovery of Schuyler's past frauds would have arrested his career of crime. A discovery would

have followed the examination of the books of the office, which were the only records of the vast stock transactions of the company at New York. An examination was a duty, because it was the obvious dictate of good sense, as the easiest and safest check upon the agent's conduct. The long-continued and reckless omission was, therefore, a culpable negligence, without the concurrence of which Schuyler could not have committed the frauds by which the defendants have suffered; for it was this omission of duty, that left him with power to wield the weapons with which the company had armed him, and, therefore, it may be said to have led directly to the injurious acts.

In cases where the authority of an agent has been wholly withdrawn, the neglect of the duty to notify parties who have dealt with him, estops the principal from denying the continuance of the agency, although no power in fact exists. And so, a retiring partner is bound by the acts of his former firm, if he omit the duty of notice. In these cases, for omitting an act which would have prevented the injury, the truth, to wit, the actual want of authority, is shut out by the negligence; but the neglect does not cause the assumed agent to do the act which occasions the injury; it only suffers an opportunity to do it to exist, which, in law, is equivalent. If ordinary care was due from the corporation toward its dealers, so to manage its affairs that its agents should have no opportunity to commit fraud, which such care would prevent, then, the same principle is applicable here, to establish the proxima causa which the law demands. It is not, in such cases, one of two, innocent parties who is to suffer; the question is between an innocent and a culpable party; and, as was said by Denio, J., in the *Bank of Genesee v. Patchin Bank*: "I see no objection in applying the principle, that where a party has, by his declaration or conduct, induced another to act in a particular manner, he will not afterwards be permitted to deny the truth of his admission, if the consequence would be to work an injury to such other person." 13 N. Y. 316. The question of estoppel is one of ethics (per Bronson, J., in *Dezell v. Odell*, 3 Hill, 225), and is to be enforced where, in good conscience and honest dealing, it ought to be (*Canal Co. v. Hathaway*, 8 Wend. 483). "The principle," says Chancellor Kent (2 Comm. p. 620, note c), "that pervades the distinction on this subject, rests on sound and elevated morality. There must be no deception anywhere. The principal is bound by the acts of his agent, if he clothe him with powers calculated to induce innocent third persons to believe the agent had due authority to act in the given case." "He who created the trust, and not the purchaser, ought to suffer." Note d.

On the question of privity, in any view of this case, I have no difficulty. If the act of the agent can be charged home, upon any

principle, upon the corporation, then, as was said in the *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. Cas. 180, "the bona fide holder of any certificate issued by the transfer-agents has a primary and direct claim, either to be admitted as a corporator, or if that is impracticable, from the excessive issue of stock, to be compensated for the fraud practised upon him." To entitle the aggrieved party to sue, in such case, no privity is necessary, except such as is created by the unlawful act and the consequential injury, because the injured party is not seeking redress upon contract, but purely for the tortious act, in the commission of which the contract is an accidental incident. *Allen v. Addington*, 11 Wend. 374; *Thomas v. Winchester*, 6 N. Y. 397; *Scott v. Shepherd*, 3 Wils. 403; *Gerhard v. Bates*, 2 El. & Bl. 489, 20 Eng. Law & Eq. 129; *Redf. R. R. 61*; *Bank v. Kortright*, 22 Wend., ubi supra.

That the Mechanics' Bank against these plaintiffs was not decided on any question of want of privity, we have the authority of the judge who pronounced the opinion: "We certainly," he says, "did not put our judgment upon the ground, that the plaintiffs were not in privity of dealing with the defendants, by reason of the non-negotiable character of the certificates, and, therefore, could not sue for fraud." *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 151. I am, therefore, of opinion, that the plaintiffs are estopped by the facts and circumstances of this case to deny the authority of Schuyler to do the acts from which the injury to the defendants has arisen.

But, conceding that the whole question of this case is governed by the law of principal and agent, it becomes of grave significance, to ascertain the scope and extent of the powers conferred on the agent. Herein, I think, the case essentially differs from that of the Mechanics' Bank (13 N. Y. 599). The question of that case is stated by Comstock, J., in 16 N. Y. 154, 155, with succinctness and accuracy. He says: "In that case, the transfer-agent of the defendants' corporation was authorized to sign and issue certificates of stock, on a transfer from one shareholder to another, upon the books, and on the surrender of the previous certificates. The agent, for his own purposes, signed and issued certificates to a large amount, where there had been no such transfer or surrender. These unauthorized and spurious instruments were, in form, precisely like those that were genuine and authorized. Trusting to their false appearance, the plaintiffs took one of them by transfer, and advanced money upon it, which they recovered in the New York superior court. We held, they could not recover, and reversed the judgment, placing our decision prominently upon the ground, that the acts of the agent were not within the real

or apparent scope of the power delegated to him."

It now appears, that the agent, in addition to the power thus stated, had authority also to issue certificates, in precisely the same form, to the original subscribers for the stock, and to some extent did do so; that he had authority to dispose of the stock of the company, not taken by the original subscribers (of which there was a large amount), and issue certificates, in the same form, to the purchasers; that he had authority to dispose of certain forfeited shares, and in such case, issue like certificates; that he had authority to receive transfers to himself of stocks, on behalf of the company, and transfer the same to purchasers, and issue like certificates to them; that before the increase of the capital to 30,000 shares, he did issue to his own firm, a large number of false certificates, which became the basis of transfer on the books to third parties, and, by some arrangement, were absorbed into the enlarged capital as genuine stock; that he acted to some extent as financial agent of the company, and through his firm raised large amounts, "indiscriminately, on genuine and spurious certificates of stock," which were paid out on the check of the firm, on behalf of the company, and on its construction account; that to him was intrusted the keeping of all the stock-accounts of the company and its dealers at the New York office, and in those accounts he entered all his transactions, both false and genuine; that the books were kept closed to dealers; that his management of the affairs of the office, and of all these various matters, was never investigated or questioned.

It is in all these facts that we are now to seek for "the real or apparent scope of the power delegated to him." As we descend from the sharp promontory of the Mechanics' Bank Case, to this broad plane of powers, and their mode of use, we stand amongst new and far different lights and shadows. We find ourselves quite unable to say, with the able jurist in that case: "He [Schuyler] had no power to sell stock at all, and none to issue certificates, except as incidental to a sale between existing stockholders, and then it depended on the condition precedent of a transfer on the books, and a surrender of a previous certificate for the same stock." Nor to say: "His appointment, in its very terms, which all dealers are supposed to have been acquainted with, did not include his acts, and there is no pretence that it was ever enlarged by any holding out, or recognition of his acts."

When his certificate, regular in form, in all respects, is offered to the market, the buyer is not able to refer it to the narrow restrictions of the by-law, for how does it appear that it is not one issued to an original

subscriber, where there was no transfer to be made, and no prior certificate to be surrendered; or that it is not one issued to a purchaser of the original stock, which Schuyler was empowered to sell and certify in this manner; or that it is not of stock that has been transferred to the agent, on account of the company, and which he was likewise authorized to sell; or that it was not some of the forfeited shares, which he was directed to sell and certify; or that it was not of the kind which, by "some arrangement," is absorbable into the capital as genuine, even if it be in fact spurious; or that it is not issued to raise money for the benefit of the construction fund of the company; or that it is not of the spurious kind which the company have heretofore allowed to be cured by a subsequent acquisition of stock by the Schuylers, and a transfer thereafter under the power?

Whether it does not belong to some one of these classes, there are no earthly means of ascertaining, save by the representation of the agent. The books are sealed; but, if open and most thoroughly investigated, they would not necessarily negative the power to issue for some of the purposes for which authority had been given, directly or by recognition; for even if run down to absolute spuriousness, it is still open to say, this is of the kind of spurious certificates upon which the company raise money for their construction accounts or the kind which they legitimize by subsequent arrangements of the capital, or the kind which, by the custom of dealing, becomes good, if a transfer be made under it, at a moment when the Schuyler firm happens to have so much stock to its credit on the books. And the accounts for seven years show that all these kinds are treated on the same footing as genuine shares.

It is a well-recognized branch of the law of principal and agent, that without any express or special appointment, an implied agency may arise from the conduct of a party. Story, Ag. § 54. "Where a person has recognized a course of dealing for him, by another, or a series of acts of a particular kind, an implied agency is thereby constituted, to carry on the same dealing, or to do acts of the same character. * * * There may be seeming contradictions of the fundamental doctrine, that a principal is bound only by such acts of his agent as he has duly authorized. This presumption of implied agency is one of these, because a man may have accepted supposed acts which he never authorized, and so bound as to third persons by similar acts." Per Comstock, J., 16 N. Y. 145, 146.

There is nothing gained to the plaintiffs by the fact, that the certificates are made to the firm of R. & G. L. Schuyler; for so were all those which prior to October, 1853, became good by a transfer, when that firm

happened to be in credit on the books of the company; so were those used to raise money for construction; and so of those which went in under the increased capital. It is a general rule, that an officer or agent is not to be permitted, under a general power, to certify in his own favor. *Clafin v. Bank*, 25 N. Y. 293. But in this case, that rule is not applicable, for it clearly appears that, from the outset, this firm were very heavy dealers in the stocks of the company, that its business was all conducted at this agency, and that Robert Schuyler at all times, certified to it, as to other dealers. The long acquiescence of the company in this practice, and its actual ratification in some of the cases above mentioned, disarm this objection of all force. *Ang. & A. Corp.* 216; and see *Bradley v. Richardson*, 2 Blatchf. 343, Fed. Cas. No. 1,786; *Id.*, 23 Vt. 720; *Story*, Ag. § 54.

In this view of the extent of the authority with which Schuyler was clothed by the company, either by direct appointment, or by recognition and ratification, or by actual enjoyments of the fruits of his acts, or by long acquiescence therein, from which a presumption or implied agency arises, I have come to the conclusion, that the issuing of the certificates by him must be held to be within the scope of the real and apparent authority which he possessed; and the remedy of the defendants is not prejudiced by the fact, that he used and intended to use the avails for his own purpose. In short, they stand precisely in respect to the remedy, where they would, if the board of directors had issued the same certificates, in fraud of their powers under the law, and obtained the defendants' moneys thereon.

But these views do not dispose of a question that has been argued in this case, with an elaboration and power seldom equalled in a court of justice. From the manner in which the decision of the judges is stated in the *Mechanics' Bank Case*, it is difficult to tell what precise points were designed to be passed upon by the court. It is open to conjecture, that the case may have passed off, on the ground of want of privity between the plaintiffs and defendants, as was intimated by Selden, J., in *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 142, or on the ground, as suggested by H. R. Selden, J., in *Griswold v. Haven*, 25 N. Y. 598, "that Kyle, to whom the certificate issued, being privy to the fraud, had, of course, no claim against the company, and that his assignees could have no greater rights than himself;" or upon the mistaken idea, that the court of errors in reversing *North River Bank v. Aymar*, has settled the law adversely to the opinion of the supreme court in that case.

But whatever may have been the views of other members of the court, there is no mistaking the ground on which the judge who pronounced the opinion intended to put the

ability of a principal for the acts of an agent. It is, in brief, that a principal is bound only by the authorized acts of his agent. The proposition involved was fairly put by the learned judge in this form: "Suppose, an agent is authorized, by the terms of his appointment, to enter into an engagement, or series of engagements, on behalf of his principal, and while the appointment is in force, he fraudulently makes one in his own or a stranger's business, but in the form contemplated by the power, and which he asserts to be in the business of his employer, by using his name in the contract, can the dealer rely upon that assertion, or is he bound to inquire and to ascertain, at his peril, whether the transaction is not only in appearance but in fact within the authority? According to the decision of the supreme court of this state, in the case of *North River Bank v. Aymar*, 3 Hill, 262, he can." The judge then proceeds to show, that the case cited had been reversed by the court of errors; and then to discuss the question, with his own clearness and vigor, reaching a conclusion which he expresses in these words: "The appearance of the power is one thing, and for that the principal is responsible. The appearance of the act is another, and for that, if false, I think, the remedy is against the agent only. The fundamental proposition, I repeat, is, that one man can be bound only by the authorized act of another; he cannot be charged, because another holds a commission from him, and falsely asserts that his acts are within it."

The counter-proposition was again stated by Selden, J., in the *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, in this form: "It is, I think, a sound rule, that when a party dealing with an agent has ascertained that the act of the agent corresponds, in every particular, in regard to which such party has, or is presumed to have any knowledge with the terms of the power, he may take the representation of the agent as to any extrinsic fact, which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of his power with the acts done under it."

Manifestly, here is an "irrepressible conflict" between these propositions, and we are called upon to determine which expresses the settled law of this state. I think, the problem is solved whenever the question whether the decision of the supreme court in the *North River Bank v. Aymar*, 3 Hill, 262, is authoritative as law, is answered; and for this I have the emphatic assent of Comstock, J., as above quoted. That case stands altogether upon the doctrine of agency; the bank held the power of attorney under which the agent acted; the paper, on its face, notified the bank that it was made by the agent; the power, by express words, limited the authority to notes made in the business of the principal. The character of the paper was, therefore, of no moment on this point, for its

negotiability could not shut out a question which arose on the face of the instrument. See per Selden, J., in *Griswold v. Haven*, 25 N. Y. 601, and per Comstock, J., 16 N. Y. 153-155. The paper, in fact, was not made in the business of the principal. The question was, where the peril of that fact rested; and its solution altogether depended upon the question, was the bank "bound to inquire and to ascertain, at its peril, whether the transaction was, not only in appearance, but in fact, within the authority?" The court appreciated the point, and therefore discussed and decided the question, distinctively, on the law of principal and agent.

The further history of that case is shown by Judge Comstock, in his opinion in the *Mechanics' Bank Case*, 13 N. Y. 633, and more fully in the dissenting opinion in the *Butchers' & Drovers' Bank Case*, 16 N. Y. 153, 154. As the *Mechanics' Bank Case* left the *North River Bank Case*, the latter would be deemed not law; but the same question arose in the *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, and it became essential to determine, whether the reversal by the court of errors of the *North River Bank Case* had settled the law adversely to the decision of the supreme court. Judge Comstock earnestly insisted that it had (16 N. Y. 154), but in this he stood alone; Selden, J., at page 138, assigned reasons for holding the question still open for examination, and after a very full examination, declared that the case was properly decided by the supreme court; Denio, C. J., and Brown, J., delivered opinions, both agreeing with Selden, J., in approving the decision of the supreme court. "I am clearly of opinion," said Denio, C. J., "that the case of the *North River Bank v. Aymar*, was correctly adjudged in the supreme court; if the court of errors laid down a different rule, in reversing that judgment, they ran counter, as, I think, I have shown, to a strong course of adjudication in that court and in the supreme court, and overturned a legal position which was then well established in this state, and has since been repeatedly acted upon."

In *Griswold v. Haven*, 25 N. Y. 595, the same question arose; and upon the precise point now under consideration—whether the decision of the supreme court in the *North River Bank v. Aymar* is sound law. I understand there was no dissent from the opinion of H. R. Selden, J., which held it to be so. In the *Bank v. Monteath*, 26 N. Y. 505, the question of its authority again very sharply arose. When that case was first at the bar of the general term, that court followed the *North River Bank v. Aymar*, as reported in 3 Hill, regarding it as a decisive authority. After a new trial, the case came again to the general term, but in the meantime the opinion of Comstock, J., in the *Mechanics' Bank Case* had been published. The court regarded that as establishing a different doctrine, and as showing also that the *North River*

Bank Case had been overruled by the court of errors. It, therefore, reluctantly followed what it regarded as the later authority. But this court reversed the general term, and declared that the doctrine of the case of the North River Bank v. Aymar must now be regarded as established on an impregnable basis. "It is," said Davies, J., "well sustained by authority, sound reasoning and well-established principles, and it should be firmly adhered to by the courts." If ever a case, discredited by reversal, was lifted to its feet and restored to authority by adjudication, North River Bank v. Aymar has been; and its vindication is all the more signal, because of the ability with which its chief antagonist has conducted the remarkable warfare against it.

We have already seen, what principle was involved in that case, and it is impossible to escape the conclusion, that the law of this state, as settled by adjudication at this day, is, as put by H. R. Selden, J., in *Griswold v. Haven*, "that where the authority of an agent depends upon some fact, outside the terms of his power, and which, from its nature, rests particularly within his knowledge, the principal is bound by the representation of the agent, although false, as to the existence of such fact." The contrary rule, though asserted with confidence and vindicated with great force in the Case of the Mechanics' Bank, was not necessarily adopted by the court, and that case does not so determine. It may, with confidence, be asserted that all the cases in this state, both before and since, lay down a different rule from that supposed in the Mechanics' Bank Case, to have been established by the court of errors; and so do the elementary writers upon whom we are accustomed to rely. Story, Ag. § 452; Paley, Ag. (By Lloyd,) pp. 294, 301, 307; Bac. Abr., tit. "Master and Servant," K; 2 Kent, Comm. 620, notes; 1 Bl. Comm. 432.

It were long, by quotation, to show that the cases just noticed necessarily rest on this doctrine; a short allusion to their facts must suffice. The condition of the authority in North River Bank v. Aymar, was, that the paper should be made in the business of the principal; in the Butchers' & Drovers' Bank Case, that the drawee should have funds in deposit, enough to pay the check; in *Griswold v. Haven*, that the grain for which the receipt was given, should actually have been received; in *Bank v. Monteath* (so far as it rested on a question of agency), that the drafts should be for the use and benefit of the defendant's line of boats. In each of these cases, the extrinsic fact which constituted the condition of the authority, was peculiarly within the agent's knowledge, and was necessarily represented to exist, by the execution of the agent's powers. It might, or it might not, be discovered by inquiry. So, in this case, in the narrow view in which we are now considering it, the condition upon

which the agent could issue the certificate was a transfer in the books and the surrender of a previous certificate, if any had before been issued. These facts are wholly extrinsic, and peculiarly within the knowledge of the agent, as part of the special duties to be attended to by him, and were represented by him to exist, by the certificate itself. I can see no shade of difference between the question in this case and in those cited, and which seem to me to settle the law.

The rule which governs this class of cases, in my judgment, rests upon a sound principle. As was said by Selden, J., in *Griswold v. Haven*: "The mode in which the liability is enforced, in all these cases, is by estoppel in pais. The agent or partner has, in each case, made a representation as to a fact essential to his power, upon the faith of which the other party has acted, and the principal or firm is precluded from controverting the fact so represented." It goes back to the celebrated aphorism of Lord Holt in *Hern v. Nichols*, 1 Salk. 289: "For, seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger;" or as more tersely expressed by Ashurst, J., in *Lickbarrow v. Mason*, 2 Term R. 70: "Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it." Story, Partn. § 108, and authorities there cited.⁵ In truth, the power conferred in these cases is of such a nature, that the agent cannot do an act, appearing to be within its scope and authority, without, as a part of the act itself, representing expressly, or by necessary implication, that the condition exists upon which he has the right to act. Of necessity, the principal knows this fact when he confers the power. He knows, that the person he authorizes to act for him, on condition of an extrinsic fact, which in its nature must be peculiarly within the knowledge of that person, cannot execute the power, without, as *res gestae*, making the representation that the fact exists. With this knowledge, he trusts him to do the act, and, consequently, to make the representation, which, if true, is, of course, binding on the principal.

But the doctrine claimed is, that he reserves the right to repudiate the act, if the representation be false. So he does, as between himself and the agent, but not as to an innocent third party who is deceived by it. The latter may answer, "You intrusted your agent with means effectually to deceive me, by doing an act which in all respects compared with the authority you gave, and which act represented that an extrinsic fact, known to your agent or yourself, but unknown to me, existed, and you have thus enabled your agent, by falsehood, to deceive

⁵ See *Preston v. Witherspoon*, 109 Ind. 465, 9 N. E. 585.

re, and must bear the consequences. The very power you gave, since it could not be secured, without a representation, has led me into this position, and, therefore, you are stopped, in justice to deny his authority in his case." By this, I do not mean to argue, that the principal authorizes the false representation. He only, in fact authorizes the act which involves a representation, which, from his confidence in the agent, he assumes will be true, but it may be false, and the risk that it may, he takes, because he gives him confidence and credit which enables it to alight to prove injurious to an innocent party. I have already shown, how this principle, in many cases, sustains liability, after all actual authority has been withdrawn, as between the principal and parties who have a right to infer that the authority continues.

The contrary doctrine would be singularly inconvenient, if not absurd, in practice. For instance, under a general power to draw bills, which means, of course, only in the business of the principal, no party could safely take a bill drawn by the agent, without pursuing the inquiry, whether it was drawn in such business, to extremes. If the peril is on the party to whom the bill is given, nothing short of personal application to the principal himself can relieve it, for nowhere short of that, is absolute certainty. Every intermediate appearance or representation may be false or deceptive, and the rigid rule of actual authority will be satisfied, with nothing less than absolute verity. So, then, the general power carries no safety whatever, since each bill made under it must be verified as to extrinsic facts, by resort, for perfect security, to the principal himself. Or, to bring the illustration nearer to this case: It is claimed, that every receiver of a stock certificate, executed by an agent, must verify, at his peril, the extrinsic facts that a transfer of the stock has been made and the former certificate surrendered. But how? If he go to the board of directors, they can only refer him to the transfer-agent, or the books kept by him, for these are alone their sources of information. If he resort to the books, they are, at best, but other representations of the agent, which, if they, in form, show a transfer, may still be deceptive, and nothing but a transfer of actual stock will answer the condition. He must, therefore, trace the lineage of the stock represented by the certificate, to some point behind which no "strain upon the pedigree" will enable the corporation to bastardize the issue. Such a rule would be vastly detrimental to the business interests, both of corporations and of the public. It would be far better to establish a rule, that no man shall take an instrument made by an agent, without first having the principal's certificate, that it is genuine and authorized; and even this would be impracticable in corporations, for every new certificate, being another act of an agent, would only open a new circuit of

inquiry. But such is neither the policy nor good sense of the law.

It is a mistake, to suppose that the conventional rule of commercial negotiability has anything to do with this question, except in cases where the paper carries no notice on its face, that it is made by somebody assuming to be an agent. That rule stands upon an arbitrary doctrine of the law-merchant, and not at all upon any principle of estoppel. It extends only to instruments which usage or legislation has brought within it; and its substance is, that by force of the arbitrary rule, the possessor of such negotiable instrument has power to give, by delivery to a bona fide purchaser for value, a good title, notwithstanding any defectiveness in his own. Hence, under it, a finder, or a thief may confer such title, with none in himself, not because the loser is estopped by his misfortune, from asserting his rights, but because, from real or supposed commercial necessities, "*ita lex est scripta*." But it is a fixed requisite of the rule, that the buyer shall be for value without notice, and, therefore, nothing that gives notice on its face, is, in that particular, within the rule. So, an instrument that shows, on its face, that it is made by one man for another, at once warns the taker to inquire, if the assumed agent be authorized, and that question becomes one independent of the arbitrary rule of the law-merchant and dependent on the doctrines that govern the law of principal and agent. *Atwood v. Munnings*, 7 Barn. & C. 273; *Fearn v. Filica*; 8 Scott, N. R. 241.

I concur, therefore, with Judge Selden, when he asserts that, in no respect, except as it touched the question of privity of contract, was the negotiability of the paper of any importance in the case of the North River Bank v. Aymar, 3 Hill, 262. In that case, it appeared on the face of the paper, that it purported to be made by an agent. A different rule as to the effect of negotiability may well obtain, where the paper is negotiable within the law-merchant, and bears on its face no notice whatever, that it is made by some party other than the one it purports to charge, as, where it is made in a firm name, or in the form and by the officers, through and by which a corporation can by law issue its authorized evidences of debt.

We have already seen how far privity is essential, in actions of tort. *Redf. R. R.* 61, and note; *Gerhard v. Bates*, 20 Eng. Law & Eq. 129, etc. I shall not inquire how far the English cases, and especially the leading case of *Grant v. Norway*, 10 C. B. 665, so much relied upon, may be in conflict with the law of this state. Both the Judges Selden have sought to show that *Grant v. Norway* is distinguishable from the cases under their consideration, and I will only add, that if they did not succeed in pointing out the distinction, and the case really stands in conflict, so much the worse for that case.

We may come back, therefore, to the solid ground of *North River Bank v. Aymar*, regarding it only as shaken down to greater firmness by the severe ordeal of the *Farmers' & Mechanics' Bank Case*, and with confidence declare the true doctrine of this branch of the law of agency to be, that where the principal has clothed his agent with power to do an act, upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent, in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth, to his prejudice. In *Griswold v. Haven*, this rule was distinctly settled. The dissenting opinion touched only the right to maintain the form of action brought in that case, but a majority of the court held, that the representation of the agent not only charged the principals, but estopped them from denying the actual possession of the wheat asserted to be in store, so as to defeat an action of trover or replevin to recover the property.

In this view, I see no ground upon which the plaintiffs can, in this case, be permitted to deny, that Schuyler was acting within the scope of his authority in issuing the false certificates; and they are, therefore, to be treated as though issued by the board of directors. Considering them of that character, the question of estoppel, as it arises upon their face, that is, whether the corporation is estopped from saying that they were not genuine representatives or muniments of title to stock, was rightly disposed of by the opinion of Comstock, J., in the *Mechanics' Bank Case*. And it was in that view, that is, regarding them as instruments, capable, upon some notion of estoppel, of being specifically enforced, that he alluded to the supposed want of privity in the estoppel itself, between the holder in that case and the corporation; but he quite distinctly declined to pass upon the question of the liability of the corporation, if the certificate was to be treated as the act of the board.

But the liability of the corporation for a wrongful injury, growing out of an act of the directors, in excess of the chartered powers, was afterwards vindicated and settled in *Bissell v. Railroad Co.*, 22 N. Y. 258, and it stands well upon the grounds of either of the learned opinions in that case. It was established by the court of chancery in England, a century ago, in *Ashby v. Blackwell*, 2 Eden, 299. In that case, one question was, whether a party to whom the secretary of a bank company had permitted a transfer of shares, on a forged power of attorney, was entitled to recover of the company the sum he paid on such transfer. The secretary, in that case, in violation of the rules of the company, had permitted the transfer, under a

letter of attorney which did not comply with the rules. It was contended, that the purchaser ought to have inquired into the reality of the authority. Lord Chancellor Northington declared the conduct of the secretary to have been gross negligence, chargeable upon the company, and he held, that the company "must and ought to answer for their and their servants' negligence." "It will be of no public detriment," said he, "if my decree tends to make the directors of public companies to attend to the business of those companies and teaches them not to leave the important transactions of millions to undirected clerks and bookkeepers." He accordingly adjudged the company to pay the vendee the amount he had paid for the stock; which is the judgment rendered in this case. I am, therefore, for a general affirmance of the judgments in this case, on the plaintiffs' appeal.

I shall proceed, as briefly as possible, to consider the cases of defendants, who are parties to this appeal, in the light of the different facts found in them; and for that purpose, shall classify the defendants so far as practicable.

1. There is a class of defendants who were purchasers of stocks in good faith and for value, of persons to whose credit such stock stood on the books of the company, at the transfer-office, at the time of such purchase, and who held certificates in due form therefor. On such purchases, the outstanding certificates were surrendered, transfers made on the books, in due form, and new certificates issued to the purchaser, who thereupon paid the purchase-price to his vendor. These certificates are adjudged spurious, because their origin is found to have been, more or less remotely, in over-issues by Robert Schuyler to his firm.

2. Another class are defendants who made purchases of parties who had credit on the books of the company for the stock sold, but no certificates, and who, on the sale, transferred the stock on the books, in due form, to the purchasers, who, in some instances, took certificates, and in others not. In some cases in this class, it is proved, that the money for the stock was not paid, till after inquiry at the office showed that the transfer had, in fact, been made.

3. Another class is of parties who loaned money upon certificates held by the borrowers, to whose credit the stock stood on the books of the company, and who, at the time of making such loan, or subsequently, surrendered the certificate, and transferred the stock on the books and took out new certificates in due form. The stock held by these two classes has been also adjudged spurious, because it originated in some like over-issue of the transfer-agent.

It will be seen, that in these cases where new certificates have been issued by the transfer-agent, the letter of his authority, in its most limited sense, has been pursued.

the extrinsic facts upon which the power of the agent depended, apparently existed. The books stood on the books to the credit of the party making the transfer; the transfer was made in due form; the outstanding certificate was surrendered and cancelled, and, thereupon, the new one issued. To all appearance, the act was within the real and apparent scope of the authority, and every condition of the power fully complied with. But a judicial investigation has shown, that the stock credited on the books, was not real; that at some remote period, it had its origin in a fraudulent over-issue. The question is, does the peril of that fact rest on the buyer? I think, it does not; but I am constrained to admit, that if the position of the appellants' counsel be sound, I do not see, why it must not. The question is only carried back a step farther; that is, to the right of a dealer to buy stock, relying on the books of the company as evidence of his ownership of his vendor. But the books are themselves only representations made by agents, and by no means conclusive in every sense; the credit is a deceptive one, because the stock has no real existence, and if the condition of the power be, that there must be an actual transfer of stock, an unreal transfer, however complete its resemblance to reality, does not answer the condition. No matter to what disastrous consequences the rule may lead, it cannot be satisfied, without holding that the peril that all appearances of genuineness shall be founded in absolute fact, constantly rests upon the dealer.

The same thing is true of the transfers upon the surrender of certificates, where no certificate had issued. Unless we are to hold the company to the duty of keeping correct books, so that those who refer to and rely upon them shall be protected, there is no remedy. The corporation may mislead the community, until thousands are ruined, and be itself entirely protected, by being able to say, "Our agents had no authority to give credits for stock, where none existed." The evidence to a corporation of its stockholders is its stock-ledger, or the books kept for the express purpose of determining its stockholders. *Gray v. Bank*, 3 Mass. 385 per Sewall, J.). Dealers are entitled to rely upon that evidence. As was said by Best, J. J., in *Davis v. Bank*, 2 Bing. 393: "If his be not law, who will purchase stock, or who can be certain that the stock he holds belongs to him? It has ever been an object of the legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed, if a purchaser should be required to look to the regularity of the transfer, to all the various persons through whom such stock had passed. Indeed, from the manner in which stock passes from man to man, from the union of

stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred, from what was not, it is impossible to trace the title of stock as you can that of an estate. You cannot look further, nor is it the practice even to attempt to look further, than the bank-books, for the title of the person who proposes to transfer to you."

I take it to be sound law, that if A., who is about to sell property to B., and take his check on a bank, applies at the counter of the bank, to the proper officer, who informs him that B. has the funds in deposit, and his check will be good, the bank will not be permitted to deny the truth of the assertion, after A. has acted upon it, on the ground, that its officer had no authority to keep any but correct books. But these parties stand upon a still better footing, for they have relied, not merely upon a certificate issued by the agent, but upon the records of title to stock kept by the company, which were the only other existing sources of information. They have there found the stock they proposed to purchase credited to the party offering it for sale, in the stock-ledger of the corporation, which is the best evidence of the existence of all genuine stock transferable at this office. Is it to be tolerated, that the responsibility for the correctness of these books rests altogether upon dealers who have no control over them?

The defendants who have been led into loaning their money upon certificates and transfers, held and made by parties who had like credits on the books, and who apparently complied with every condition, stand on the same footing with those just noticed. Public policy and the true interests of all parties concerned, as well as plain principles of equity and justice, require that the corporation make good the losses they have sustained.

There is still another class whose claims arise upon other facts, and rest on different principles. It is composed of those defendants who have received certificates, representing actual and genuine stock of the company, but whose certificates were rendered valueless, by a subsequent transfer to bona fide purchasers of the same stock, by the party to whose credit it stood on the books. To this class belong a part of the certificates held by the defendant Vanderbilt; the certificates of Jacob Surget, those of Ketchum & Bement, a part of Schuchard & Gebhard's, and perhaps some others. These certificates have been held to be spurious, by which I understand the court to mean nothing more than that they became invalid as representatives of stock, after the same stock had got into the hands of other bona fide holders.

The case of Jacob Surget presents the question arising in this class, with distinctness. On the 11th of December, 1832, he loaned to R. & G. L. Schuyler the sum of \$11,000, to secure which they delivered to him a certifi-

cate for 110 shares of the capital stock of the New York and New Haven Railroad Company; issued to them with the ordinary assignment and blank power of attorney indorsed thereon, and duly executed by them. On the 2d of September, 1853, Surget loaned to that firm the further sum of \$9,500, on the security of 110 other shares of such stock, the certificate for which was delivered to him, with the proper assignment and power of attorney executed in blank by said firm. These certificates were genuine, and represented actual stock of the company, then owned by the Schuylers, and standing to their credit on its books.

On the 3d of November, 1853, Surget was, and had been from September, 1850, the owner of 200 shares of the stock of the company, for which he held its certificate. On that day, he agreed with the Schuylers to sell to them this stock, and to loan them some \$7,000, in security for which he was to hold 75 shares of the stock thus sold to them. He made the loan, and, to carry out the arrangement, transferred to them the 200 shares, and delivered up his certificate, and at the same time, received back a certificate for 75 shares issued to them at that time, with the proper and duly executed power of attorney. The stock represented by these several certificates was genuine, and no question is or can be made affecting the propriety or authority of the act of the officer in issuing the certificates.

Surget did not transfer the stock on the books, but retained the certificates in his possession, and his loans to the Schuylers remain for the most part unpaid. Afterwards, Schuyler & Co. transferred, on the books, all their stock, to other parties, who were purchasers in good faith, and the outstanding certificates held by Surget were not surrendered nor accounted for. In November, 1854, Surget presented his certificates at the transfer-office of the company, and offered to surrender them, and requested permission to transfer the stock represented by them; but the company refused to receive the surrender or permit the transfer, on the allegation that the certificates did not represent genuine stock. The plaintiffs have demanded and obtained a judgment declaring the certificates held by Surget to be void, and directing their cancellation. By his answer, Surget insisted that his stock was, and should be declared to be, genuine, or that he should be awarded damages for the refusal of the company to recognize it as such. The principal questions that present themselves in this case are: (1) Whether the subsequent purchasers in good faith of the stock acquired, by the transfers on the books of the company, a title superior to Surget's under the certificates held by him? and, (2) If they did, whether the company are liable to him for permitting the transfers to be made, without the production and surrender of the outstanding certificates?

The law, as settled by authority, touching the first of these questions, is this: Where the stock of a corporation is, by the terms of its charter or by-laws, transferable only on its books, the purchaser who receives a certificate, with power of attorney, gets the entire title, legal and equitable, as between himself and his seller, with all the rights the latter possessed; but as between himself and corporation, he acquires only an equitable title, which they are bound to recognize and permit to be ripened into a legal title, when he presents himself, before any effective transfer on the books has been made, to do the acts required by the charter or by-laws in order to make a transfer. Until those acts be done, he is not a stockholder, and has no claim to act as such;^{*} but possesses, as between himself and the corporation, by virtue of the certificate and power, the right to make himself, or whomsoever he chooses, a stockholder, by the prescribed transfer. The stock not having passed by the delivery of the certificate and power of attorney, the legal title remains in the seller, so far as affects the company and subsequent bona fide purchasers who take by transfer duly made on the books. And, hence, a buyer in good faith, of the person in whose name the stock stands on the books, who takes a transfer in conformity to the charter or by-laws, permitted to be made by the authorized officer of the corporation, becomes vested with a complete title to the stock, and cuts off all the rights and equities of the holder of the certificate to the stock itself. What other rights and equities he may possess, is another question; but if the transferee has taken, in good faith and for value, the stock is gone beyond his reach, and beyond recall by the corporation. *Stebbins v. Insurance Co.*, 3 Paige, 350; *Bank v. Laird*, 2 Wheat. 390; *Ang. & A. Corp.* (3d Ed.) 352, 353; *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 621 et seq. (per Comstock, J.); *Bank v. Smalley*, 2 Cow. 770; *Gilbert v. Manufacturing Co.*, 11 Wend. 627; *Bargate v. Shortridge*, 31 Eng. Law & Eq. 58; *Wilson v. Little*, 2 N. Y. 447 (per Ruggles, J.).

The non-production and surrender of the certificate at the time of the transfer, is not fatal to the title of the transferee. It is only essential to the safety of the corporation, and may be waived by it, at its own peril. The company has the means of knowing whether a certificate of particular stock is outstanding, or not, and the power to compel its return and cancellation, before any transfer is made; and a buyer, where the transfer is permitted by the corporation to be made on its books, by one to whose credit the stock is standing, has a right to presume that no certificate has issued, or if one has, that his vendor has duly surrendered it for cancellation.

It follows, therefore, that the stock repre-

^{*} See *People v. Robinson*, 64 Cal. 376, 1 Pac. 156.

sented by the certificates in Surget's hands, passed to the subsequent bona fide transferees; and the company had neither the power nor right to permit it to be transferred to Surget, on his subsequent demand. In my judgment, no action would lie against them for that refusal. It was, in effect, asking them to do what the law prohibited them from doing—to duplicate the shares represented by the certificates, with a knowledge that they had long before passed into other hands, where they were still in actual and potential existence. The rights of Surget, if he have any, must stand on other grounds than the refusal, in November, 1854, to permit him to transfer stock, which then legally belonged to others.

The second question is, whether the company are liable for permitting the transfers to be made, without the production and cancellation of the outstanding certificates, whereby Surget's equitable rights to the stock were cut off and lost? The question is first to be considered, on the assumption that the company permitted the transfer. It has been seen, that Surget's rights, as between himself and the corporation, were those of an equitable, and not legal, owner of the stock. It may be stated, as a clear proposition, that where notice of the rights of an equitable owner are brought home to a party to be affected by such rights, the remedies for a subsequent injury to those rights are complete and perfect, and so it cannot be doubted, that if Surget had given the company actual and plain notice that he was the holder and owner of the certificates in his hands, the permitting of a subsequent transfer to another, under circumstances that caused the title of the stock to be lost to him, would have subjected the corporation to respond to him for the injury.

But the company had not actual notice; and hence, it is essential, in this view of the question, to show that its relations to the holder of the certificates were equivalent to those of a party with notice. By its charter, the corporation was authorized to make by-laws to regulate the transfer of its stock. It had done this, by the adoption of by-laws, which, as we have seen, *ex proprio vigore*, prevented the legal title of stock from passing, otherwise than by the prescribed mode of transfer; and as a part of these by-laws, it had provided for the issuing of certificates to stockholders, in a form to be "appointed and directed" by the directors; had authorized transfers by power of attorney, and had expressly declared, that when a certificate of stock had been issued to a stockholder, no transfer of the stock should thereafter be permitted, without the surrender of said certificate. The board of directors had also prescribed a form of certificate, which was thereafter invariably used, which declared, that the stockholder was entitled to the number of shares named, and that they were transferable on the books of the company, at

the office named, "on the surrender of this certificate." They prepared and caused to be printed on the back of this form of certificate, an assignment thereof, with a power of attorney, to be executed in blank by the stockholder, for the purpose of facility of transfer. That this was a customary and long-established mode of making stock readily and profitably marketable, was well known to the company, for its by-laws speak of it as "the usual form."

Now, while the corporation could not give to a certificate of this kind, "negotiability," in its legal commercial sense, it could and did approximate to that characteristic, as nearly as legally possible, for the purpose of making its stock more valuable, by the ease with which its certificates could pass from hand to hand by simple delivery. It was never intended to lock up those instruments in the hands of the stockholders named in them—but to give to them every practicable facility as the basis of commercial transactions. And this was legitimate and proper, since it tended to enhance the value of the corporate franchise, by making its stock a subject of easy investment and ready convertibility. But it was essential to make these certificates in a form to secure public confidence, and this could only be done by making them solemn assurances of rights. Hence, by its by-laws, the corporation declared, that the stock represented by them should never be transferred, except upon the delivery and cancellation of the certificate; and this provision, in effect, it embodies in the certificate itself. Armed with such instruments, it sent its stockholders into the commercial world, with knowledge of the established usage of dealing on the faith of such certificates; and it addressed them, not to the stockholder himself, who had no need of the notice, but to all men who should desire to participate in the advantages or profits of its franchise. It was to all such persons that it assured safety, in purchasing the certificate, by declaring that the stock should only be transferred upon its surrender and cancellation. In this manner, it courted and established privacy between itself and every holder of the certificate, by asserting, that his equitable title was safe, because nobody but he could transfer the legal title.

It should be constantly borne in mind, that the certificate now spoken of is a valid one, representing actual stock; and upon the transfer of such an one, a privacy at once springs up, upon the title he acquires from his vendor, and his equities as against the corporation, through which every assurance of the instrument is addressed to him; and it is upon this principle, that *Bank v. Kortright*, 22 Wend. 348, properly stands. When, therefore, the original stockholder to whom such a certificate has been issued, comes to the corporation to transfer the stock, its books are notice to it that the certificate has been issued. The by-laws and the

certificate are notice that it must be surrendered, before the stock can be transferred, and its non-production is notice, that it is not in possession of the party claiming to transfer. These facts operate as notice that some other party is its owner; and they put the corporation upon the inquiry that would lead ordinary sagacity to the truth, and this is equivalent in equity to actual notice of all the rights that inquiry might develop.

Again, the transfer-agent had actual notice of the previous transfer of the certificates to the defendant, for he made the assignment to him. The effect of this fact was very fully discussed by the supreme court of Connecticut in the Bridgeport Bank v. New York & N. H. R. Co., 39 Conn. 270. "Now, their transfer-agent knew," said the court in that case, "when he allowed these transfers to other parties, that the stock had already been sold to a prior purchaser, who held a legal certificate for it, and that it was a fraud on that party, to allow the stock to be transferred to other parties, so long as the certificate was not surrendered. The transfer-agent, on allowing these transfers, was acting precisely within the scope of his official power, and his knowledge and fraud are, therefore, the knowledge and fraud of the defendants themselves. * * * The plaintiffs, it is said, should have given notice of their equitable title. But how should they have given such notice? Why, only to that officer of the company whose duties related to the transfer of their stock; that is, to their transfer-agent, Robert Schuyler, himself. But Robert Schuyler already had full knowledge of the fact, for he was the very party who sold the stock to the plaintiffs; and though a distinction may be made between the knowledge which he had as an individual, in which capacity he was acting, in selling the stock, and the official knowledge which he would have acquired by a formal notice given to him as transfer-agent of the company, yet, practically, this distinction is very unimportant. * * * Notice of such an equitable title is never required to be formally given. Actual knowledge, however acquired, is enough to affect an individual, and we entertain no doubt, that this knowledge of Robert Schuyler is to be regarded as the knowledge of the defendants. It is to be observed too, that Robert Schuyler was not merely the transfer-agent of the defendants, but was, at the same time, the president of the company, and one of its directors." If this reasoning be sound, the corporation in this case must be held chargeable with actual notice of Surget's equitable rights. Hence, in either view of this question of notice, on the assumption that the corporation consented to the transfer of the stock for which Surget held the certificates and power of attorney, it is chargeable with

notice of his rights, and liable to respond for the injury its disregard of them has produced.

In *Pollock v. Bank*, 7 N. Y. 274, it was held, that where a bank had permitted the transfer of stock, under a forged power of attorney, and cancelled the original and issued a new certificate, the bank was liable to the real owner to replace his stock or pay him the value thereof. In that case, there was undoubted good faith in the bank, the officers of which had been deceived by a forgery into doing the act which had produced the injury. In this case, the assent could not have been in good faith, for it was in violation of an inherent law of the company's stock regulations, and no milder rule of liability could flow from it. *Davis v. Bank*, 2 Bing. 393; *Ashby v. Blackwell*, 2 Eden, 299.

But there is another and well-settled principle upon which a corporation that permits a transfer of stock, under such circumstances, should be held liable. It is this: that "all duties imposed upon a corporation by law raise an implied promise of performance." * Per Nelson, J., *Kortright v. Bank*, 20 Wend. 91-94. It was upon this principle, that assumpsit was maintained in the case just referred to, and that Lord Mansfield denied a mandamus in *The King v. Bank of England*, 2 Doug. 523, to compel the bank to enter a transfer of stock on its books, on the ground, that an action would lie for a complete satisfaction, equivalent to specific relief. "The law supposes that the corporation promises or undertakes to do its duty, and subjects it to answer in a proper action for its defaults, whether of nonfeasance, or misfeasance." 3 Dane, Abr. 109; 5 Dane, Abr. 160. In *Bank v. Patterson*, 7 Cranch, 299, 305, 306, Mr. Justice Story, in an able, learned and concise statement of the powers, duties and liabilities of corporations, observed, that "all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie." Per Putnam, J., in *Sargent v. Insurance Co.*, 8 Pick. 98.

The action of assumpsit was brought in *Kortright v. Bank*, for a refusal to permit a party, holding a certificate and power of attorney, to transfer the stock on the books of the bank. It was held, for the purpose of sustaining that form of action, that the law imposed the duty to permit the transfer, and raised an implied promise in favor of the party holding the certificate, that that duty should be performed. In this case, it was a duty enjoined upon the corporation by its by-laws, not to permit a transfer of the stock, without the surrender and cancellation of the certificate which it had issued. That duty raises a promise in favor of the

* See *Thomas v. Railroad Company*, 97 N. Y. 248.

holder of the certificate that it shall not be done. On the face of the certificate, is a notice to all parties that the instrument must be surrendered, upon making a transfer, and I think, it would be straining no principle of law, to say, that the contents of the certificate are an assurance, amounting to a promise, that this rule shall be adhered to, for the benefit of the equitable owner of the stock. The court went much farther in the Bridgeport Bank Case, above referred to, and held that "the bona fide holders of such certificates had a right to rely on the certificates, under the circumstances, as securing to them the stock which they represented, against all transfers to other parties." 30 Conn. 270. If the corporation, therefore, permitted the transfer of the stock, of which Surget was the equitable owner, in violation of its undertaking to protect his rights, the law gives him a remedy, to the extent of the injury, upon the implied promise to do no such act to his prejudice.

But it is claimed, as an answer to this alleged liability, that the transfer was made or permitted by an agent of the company, who acted in excess of his powers. Clearly, it was the duty of the transfer-agent to have required the surrender and cancellation of the outstanding certificates; that was one of the very duties he was put there to perform. He failed to do it, to the injury of Surget; and it is the very ground of the company's liability, that its agent failed to do the duty enjoined upon him. The parties were dealing all the while in the actual and legitimate stock of the company, and the agent was called upon to do an act within the exact scope of his authority. An engineer is strictly prohibited to cross a draw-bridge without seeing that signals of safety are given; he drives heedlessly on, when no signals are given; this is a plain breach of duty and excess of power, but on that exact ground, the corporation are liable to every party injured. So, here, the agent disobeyed the rule and made the transfer; but he made it effectual, to the injury of Surget. Who shall suffer, the innocent holder of the certificates, or the employer of the faithless servant, whose breach of duty has caused the loss? In *Pollock v. Bank*, *ubi supra*, the officer who permitted the transfer clearly had no authority to do so, on a forged power of attorney. But the bank was held chargeable with the consequences of his act, when it refused to recognize the plaintiffs as the owners of the stock. Certainly, this must have been, on the principle, that the bank was chargeable with its officers' negligence in permitting the transfer on the forged power. "For, where a trust," says Lord Holt (12 Mod. 472, 490), "is put in one person, and another, whose interest is intrusted to him, is damaged by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damaged." Nor does it matter, that the agent

fraudulently neglected his duty for his own private gain; for then arises the exact case for the application of Lord Holt's rule, that when one of two innocent persons must suffer from the fraud or misconduct of a third, he who has reposed a trust or confidence in the fraudulent agent ought to bear the loss.

But there is another answer to this position. The plaintiffs insist, and have procured the court to adjudge, that the transfer permitted or made by their officers, has cut off Surget's equitable title to the stock, and on that ground, to declare his certificates to be nullities. For this purpose, and to this extent, they ratify the act of the agent, and the record of transfer; but the corporation must take the act with all its consequences, or reject it utterly. They cannot affirm in part and disaffirm as to the residue. *Bennett v. Judson*, 21 N. Y. 238; *Story*, Ag. § 250; *Hov. Frauds*, 144, 145; *Sandford v. Halsey*, 2 Denio, 261. And so, when the plaintiff seeks to annul valid certificates of stock, on the ground, that an effective transfer of the title to a bona fide purchase had been made on their books, they affirm the validity of that transfer, as to all of its consequences, and are not to be heard to say, that the agent who permitted it, gave it validity so far as it injured the holder of a genuine certificate, but no effect in so far as it would have given a remedy for the injury. On these grounds, it seems to me, the plaintiffs were clearly liable to Surget; and the court very properly may apply the rule, that he who seeks equity must do equity. It is through a particular and gross wrong of their agent, that the plaintiff's equity is sought, and the same wrong entitles the defendant to relief.

It is objected, that an improper measure of damages was adopted upon the assessment in Surget's case. Evidence was given of the amount of the loans remaining unpaid; no objection was made to this evidence; the amount was nearly equal to the par value of the stock. It is clear, that his measure of damages was the amount of his loans, if they did not exceed the value of the stock, at the time of the transfer, for that is the date of his injury. The referee did not find this exact date, but the proofs show that it must have occurred when the stock was at or above par. The only exception is a general one to the judgment in his favor, that is, to any judgment, and does not reach the question as to the rule of damages. It follows from these views, that the judgment in favor of Jacob Surget should be affirmed, with costs, and the order dismissing his appeal be reversed, and the appeal heard under the stipulations, and the judgment, on his appeal, affirmed, with costs against him.

The case of the defendants Morris Ketchum and Edward Bement, survivors, &c., upon the merits, presents substantially the same question as that of Jacob Surget. The certificates upon which they claim are adjudged to be spurious and void. They were

issued on the 1st of July, 1854; but it appears, that they were made upon the surrender and cancellation of several other certificates, long previously issued to R. & G. L. Schuyler, and by them signed, with the power of attorney duly executed in blank. The court has found that these last-named certificates, when issued, were genuine, and represented actual stock of the corporation, standing to the credit of the Schuylers on its books; and that afterward, and before the transfer and issuing of the new certificates of July 1st, the stock represented by those certificates was transferred on the books by the Schuylers, to bona fide purchasers.

If the views suggested in Surget's case be sound, the certificates of July 1st, 1854, were properly set aside and ordered to be cancelled by the court, for the stock represented or called for by them had become the property of other and innocent parties. But this fact did not affect the right of these defendants to insist upon compensation for the injury sustained by permitting the transfer, without the surrender of the certificates in their possession. They were entitled to recover, on the same grounds indicated in Surget's case, and should have been awarded their damages.

But, it seems, that the court below denied all remedy to this firm (consisting of Ketchum, Rogers & Bement), on the ground, that Ketchum, one of the firm, was a director of the corporation, during the entire period of the frauds committed by the transfer-agent, and was, therefore, in some sense, chargeable with the consequences, because of the neglect of the board of directors. No actual fraud—no participation in the acts of Schuyler—and no personal knowledge on the part of Ketchum, is found; but, on the contrary, it is expressly found, that there was no evidence of any actual knowledge by any of the directors, except Schuyler, of any of his fraudulent acts in the performance of his duties as transfer-agent; and there is no proof whatever in the case connecting Ketchum with any of these transactions, beyond the simple fact that he was one of the directors. Indeed, no issue seems to have been made, either in the pleadings or on the trial, on this question, so far as it particularly affects the defendant Ketchum, and, therefore, no opportunity was given for explanation or proof in exculpation of his real or imaginary connection with these frauds. But upon what principle his firm are deprived of their legal rights by his omission of duty as a director of the company is not apparent. Perhaps, as an individual, there would be no lack of equity in holding him to this rigid measure of justice; but why his neglect of duty should bring so heavy a penalty upon the firm of which he happens to be a member, has not been satisfactorily shown. Besides, the frauds of Schuyler, for which the directors are found to be censurable for neglect, are in the transferring of spurious stock and

the issuing of false certificates therefor. The wrong for which these defendants have a claim upon the company is for the transfer of genuine stock to a bona fide purchaser, without requiring the surrender of their outstanding certificates. No necessary connection exists between these acts, and upon none of the facts found, is any to be perceived. The company owed the same duty to his firm, in respect to the protection of its equitable title to stock, as to any other holder of a valid certificate; and the wrong consists in the neglect of the officer it appointed to discharge that particular duty. A railroad corporation would be liable for injuries sustained through the neglect of its employees, by a director, not riding on a free pass, notwithstanding the neglect is, legally speaking, that of the company, whose powers are exercised through the board of which he is a member. They would certainly be so, for the property of his firm, which they were transporting, and it seems to me, it should be no defence, to show that the board of directors had appointed a careless superintendent who had sent out an unfit engine and thereby occasioned the injury. In my opinion, it was error to refuse relief to this firm, on the grounds above indicated.

A question of jurisdiction was presented on the appeal of these parties, and plausibly argued; but I conceive there can be no doubt of the jurisdiction of the court of this state to entertain a suit brought by a foreign corporation against parties residing in this state, to cancel fraudulent certificates of its stock, or set aside fictitious transfers that may be used to its prejudice, and the injury of the community; and especially, to prevent innumerable litigations in the courts of this state, in actions sounding in damages, for alleged injuries to the rights of such parties as stockholders.

If the appeal of Ketchum and Bement was properly taken, and ought not to have been dismissed by the court below, then the judgment as to them should be reversed, and a new trial ordered, with costs to abide the event.

So far as the claim of Vanderbilt grows out of the certificates which were genuine when issued, but have become invalid by reason of the subsequent transfers, it stands on the same grounds as Surget's, and for the same reasons, the judgment in the plaintiffs' favor, on his appeal, should be affirmed, with costs.

The judgments against the plaintiffs, I think, ought to be affirmed, on the general grounds above discussed; and the judgment in favor of the plaintiffs affirmed, except as to Ketchum and Bement, in whose favor there should be a reversal, and a new trial ordered, with costs to abide event.

DENIO, C. J., and WRIGHT, POTTER, and BROWN, JJ., concurred with DAVIS, J. Judgment affirmed.

MERCHANTS' BANK OF CANADA v. LIVINGSTON et al.

(74 N. Y. 223. 1878.)

Appeal from judgment of the general term of the supreme court, in the first judicial department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial at special term.

The nature of the action and the facts appear sufficiently in the opinion.

EARL, J. This is an action to foreclose a pledge of certain shares of stock in the Adams Express Company.

Some time prior to January, 1875, the defendant, Livingston, being the owner of 100 shares of such stock, delivered the certificate thereof to the defendant, Barrett, to secure a loan from him of about \$3,000. In January, 1875, Barrett took the certificate of stock to one Watson, the resident manager of the plaintiff, in the city of New York, and told him that he wanted to get a loan of \$8,000, from the plaintiff, upon the stock represented by the certificate, for one of his clients, who did not wish to sell the stock, but would rather hold it. The certificate was then in the name of Livingston, but there was no indorsement upon it, nor power of attorney attached to it. Watson informed Barrett that if he would bring a proper power of attorney attached to the certificate, he would make the loan. Thereafter Barrett, by representing that he ought to have the instrument to secure his loan of the \$3,000, procured Livingston to sign a printed blank transfer and irrevocable power of attorney to make a transfer of such certificate. Barrett then again took the certificate of stock and the power of attorney signed by Livingston, filled up, except the name of the transferee and attorney, to Watson, and delivered them to him, and received a check for \$8,000, payable to his order, upon which he drew the money. He subsequently, in the same way, borrowed, upon the security of the stock, as he represented for his client, \$1,000 more. He afterwards absconded, and never paid any of the money to Livingston; and he was not authorized by Livingston to borrow it or pledge the stock. It has thus far been decided in this case that the plaintiff is entitled to the stock for the security of the loan made by it, and the decisions have been based upon the authority of *McNeil v. Bank*, 46 N. Y. 325, and other similar cases.

It was held in those cases that a blank transfer of a certificate of stock, with irrevocable power of attorney to transfer, signed by the person who appears by the certificate to be the owner, like that used in this case, confers upon the holder of the certificate and power of attorney the apparent legal and equitable title to the stock, and that a bona fide purchaser of such stock from

such holder can hold the stock against the real owner, who is estopped from asserting his title. The principles upon which those cases rest are fully set forth in the case of *McNeil v. Bank*, and need no further elucidation here. In such cases the apparent owner, in his dealings with persons, relying in good faith upon the appearances, is the real owner, and may sell or pledge the stock and deal with it in all respects just as the real owner could. But in that case and the other similar cases the holder claimed to be just what the appearance indicated—the real owner—and to deal with the stock as such.

But this case is distinguishable from those. Barrett did not claim to be the owner of the stock. He represented that it belonged to his client, and by that must have been understood to mean Livingston, whose name appeared in the certificate as the owner of the stock; and he represented that he wanted a loan for his client. He had no authority, in fact, to make the loan for him, and he had nothing to show that he had such authority. He was clothed with no apparent authority to make such loan. The power of attorney gave no such apparent authority. There was nothing in that showing any connection with a loan, and that added nothing to his apparent authority. All the plaintiff had then, when it made the loan, was the naked assertion of Barrett that he was acting for Livingston; and upon that assertion it relied at its own risk. It could not hold Livingston for the loan; and this being so, what right had it to take and hold Livingston's stock? Knowing that the stock did not belong to Barrett, it could not take it as security for a loan to him. It, at most, had information that Barrett could only pledge the stock for a loan to Livingston; and if he was not authorized to make the loan, he was not authorized to make the pledge. At the very most, the appearances indicated that Barrett was authorized to pledge the stock for an authorized loan, but not for a loan which he was not authorized to make.

In such a case, the doctrine of estoppel does not apply. Livingston did not hold Barrett out as authorized to borrow money for him; and hence he is not estopped from denying such authority. He did not hold him out as authorized to pledge his stock for such a loan; and hence he is not estopped from disputing the pledge.

If Barrett had gone to the plaintiff with the certificate and power of attorney, claiming to own the stock, he could have pledged it for a loan to himself or any other person. If he had been authorized by Livingston to borrow the money, he could probably have pledged the stock in his possession to secure it. And he could have taken the certificate and power of attorney and gone into the market, claiming to act as the agent of the plaintiff, and have sold the stock and given

a good title. The possession of the certificate and full power of attorney would have given him the apparent authority to sell. But a power to sell is not a power to pledge to secure money borrowed. An agent to sell is not agent to pledge. Story, Ag. § 78; Henry v. Marvin, 3 E. D. Smith, 71; Bonito v. Mosquera, 2 Bosw. 401.

It may be that Barrett transferred to the plaintiff all the interest he had in the stock as pledgee of Livingston; and whatever that was may be protected upon another trial.

The judgment must be reversed, and there must be a new trial, costs to abide event.

All concur, except ANDREWS, J., not voting; MILLER, J., concurring in result.

MOORES v. CITIZENS' NAT. BANK OF PIQUA.

(4 Sup. Ct. 345, 111 U. S. 156. 1883.)

This is an action against a national bank to recover the value of a certificate of stock therein, which the bank had refused to recognize as valid.

The amended petition and other pleadings are stated in the report of the case at a former stage, at which this court, for an erroneous ruling of the circuit court on a question of the statute of limitations, reversed a judgment for the defendant, and ordered a new trial. 104 U. S. 625. A recital of the pleadings is unnecessary to the understanding of the case as now presented.

The undisputed facts, as appearing by the admissions in the petition, by the evidence introduced by the plaintiff before the jury at the new trial, and by the defendant's admissions at that trial, were as follows:

The defendant was organized in 1864, under the act of congress of June 3, 1864, c. 106, the twelfth section of which provides that the capital stock shall be "transferable on the books of the association in such manner as may be prescribed by the by-laws or articles of association." 13 Stat. 99, 102. The defendant's by-laws relating to transfers of the stock were as follows:

"Sect. 15. The stock of this bank shall be assignable only on the books of the bank, subject to the restrictions and provisions of the act, and a transfer book shall be kept in which all assignments and transfers of stock shall be made. No transfer of the stock of this association shall be made, without the consent of the board of directors, by any stockholder who shall be liable to the association, either as principal debtor or otherwise; and certificates of stock shall contain upon them notice of this provision. Transfers of stock shall not be suspended preparatory to a declaration of dividends; and, except in cases of agreement to the contrary expressed in the assignment, dividends shall be paid to the stockholder in whose name the stock shall stand on the day on which the dividends are declared.

"Sect. 16. Certificates of stock signed by the president and cashier may be issued to stockholders, and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank; and when stock is transferred, the certificates thereof shall be returned to the bank and cancelled, and new certificates issued."

The defendant's capital stock was one thousand shares of one hundred dollars each, the whole of which was in fact, and was alleged in the petition to have been, taken and paid for, and certificates therefor issued to the stockholders, at the time of its organization in 1864. The president and cashier of the bank were charged with the keeping of its transfer books and the issuing of certi-

icates of stock, and the books of the bank were always open to the inspection of the directors. On July 15, 1867, G. Volney Dorsey was president and Robert B. Moores was cashier of the bank, and said Moores, who had previously owned two hundred and seventy-five shares of the stock, appeared on the books of the bank to be still the owner thereof. He and John B. C. Moores, the plaintiff's husband, were sons of William B. Moores.

On that day, the plaintiff agreed to lend \$9,100 of her own money to Robert and William for use in their private business; they agreed to give her, as security for its repayment, a certificate of ninety-one shares, which Robert represented to her that he owned, and also the contract of guaranty herein-after set forth; and Robert sent to the plaintiff's husband, as her agent, the following letter and certificate:

"Citizens' National Bank of Piqua. Piqua, O., July 15th, 1867. John: Herewith I hand you the stock transferred to Carrie. I don't know what day I will be down, and you can keep the contract there, and I will sign it the first time I am down. I will have to take a receipt for the stock from father, to file with my papers, to show where the stock is gone to. All well; may be down any day. Y^rs, R. B. Moores."

"The Citizens' National Bank of Piqua. No. 56. State of Ohio. 91 Shares. This is to certify that Mrs. Carrie A. Moores is entitled to ninety-one shares of one hundred dollars each of the capital stock of the Citizens' National Bank of Piqua, transferable only on the books of the bank, in person or by attorney, on the surrender of this certificate. Piqua, O., July 15th, 1867. (Seal.) G. Volney Dorsey, President. Rob't B. Moores, Cashier."

This certificate was in the usual form of printed certificates used by the bank, and bore the genuine seal of the corporation, and the genuine signatures of the president and cashier; and the whole certificate, except the printed part and the president's signature, was in the cashier's handwriting, filled up by him in one of two or three blanks signed by the president and left with him to be used if needed in the president's absence. Upon receiving the letter and certificate, the plaintiff paid the money to Robert B. Moores; and on July 18th, he and William signed and sent to her the following contract:

"For value received, namely, the sum of ninety-one hundred dollars, Robert B. Moores has assigned and transferred to Caroline A. Moores ninety-one shares of stock of the Citizens' National Bank of Piqua, Ohio. Now it is agreed that the said Caroline A. Moores shall, upon demand by Robert B. Moores, or his assigns, reassign to said R. B. Moores the said stock for the same amount. And it is also agreed that, whenever the said Caroline A. Moores shall

require it, the said Robert B. Moores shall purchase said stock at the amount aforesaid, and pay the same to her in cash. And in the meantime it is agreed, and the said Robert B. Moores and William B. Moores do hereby guarantee and assure to said Caroline A. Moores an annual dividend upon said stock of not less than ten per cent. upon the par value of said stock, namely, ninety-one hundred dollars, which guaranty shall be performed and fulfilled at the end of each year herefrom, or at the time of each dividend declared, if such dividend shall be declared oftener than once a year, and all deficiencies in said dividends shall be made good at the time of such repurchase or transfer to R. B. Moores. In witness whereof the said Caroline A. Moores and J. B. C. Moores, her husband, and Robert B. Moores and William B. Moores, hereunto set their hands, on this 15th day of July, 1867. Caroline A. Moores. J. B. C. Moores. Robert B. Moores. W. B. Moores."

Robert B. Moores surrendered no certificate to the bank, and made no transfer to the plaintiff on its books. The plaintiff had no other knowledge of the rule requiring the surrender of an old certificate of stock before the issue of a new one, or of any fraud on the part of Robert, than was obtained by her reading and possession of the certificate. The value of the stock of the bank at that time was ninety per cent. of its par value. Robert B. Moores was insolvent, and the money lent to him by the plaintiff was never repaid.

The plaintiff put in evidence two letters to her husband from Dorsey, the president of the bank; one dated June 25th, 1872, stating that the writer had just learned that he held a certificate of stock purporting to be issued by the bank, and asking for its number, date and amount; and the other dated July 5th, 1872, the body of which was as follows:

"There is no such certificate as mentioned in yours of June 27th on our books. No. 56 is marked on the stub in our certificate book 'Destroyed' in R. B. Moores' handwriting. Your wife's name was never entered among our stockholders and the certificate is a fraud. We never heard of this certificate until you mentioned it to Dr. Parker, who first informed me of it."

Robert B. Moores and Dorsey, being called as witnesses for the defendant, testified that it had no interest in the transaction of July 15th, 1867. Moores testified that at that date he had pledged to Jason Evans and other persons all the stock he had previously owned, and did not own any stock; and that he issued the certificate to the plaintiff without any authority from the bank, or any knowledge of the other officers. Dorsey testified that he had no knowledge of the issue of the certificate until June 25th, 1872, and that the bank never paid any dividends

upon it; and he produced the certificate book of the bank, which showed the stub of a certificate, in its regular order, corresponding in number with that produced by the plaintiff, and having the word "Destroyed" upon it, in the handwriting of Robert B. Moores.

The plaintiff offered in evidence, and the court declined to admit, the record of a meeting of the board of directors of the bank, on August 9th, 1869, containing the following entry:

"On motion, the following resolution was adopted and ordered to be placed upon the minutes: Whereas Robt. B. Moores, who was the owner of 275 shares of the capital stock of this bank (evidenced by certificate No. forty-seven (47) for fifty shares, dated May 2d, 1867; certificate No. forty-eight (48) for fifty shares, dated May 2d, 1867; certificate No. forty-nine (49) for sixty-five shares, dated May 2d, 1867; certificate No. fifty-three (53) for seventy shares, dated June 11th, 1867; and certificate No. fifty-four (54) for forty shares, dated June 11th, 1867), became indebted to this bank in the sum of thirty-seven thousand two hundred and forty-seven 29-100 dollars, (\$37,247.29), and did on the 16th day of January, 1868, transfer one hundred and eighty-five shares of said stock, and on the 15th day of May, 1869, did transfer ten shares of said stock, on the books of this bank, to G. Volney Dorsey, in consideration that said G. Volney Dorsey pay to this bank the sum of nineteen thousand five hundred dollars of said indebtedness; and whereas Jason Evans, who became the holder of seventy shares of said stock, issued as aforesaid and transferred to him by the said R. B. Moores on the books of this bank September 4th, 1867, as per certificate No. 59, did, on the 20th day of February, 1869, transfer to G. Volney Dorsey, on the books of this bank, by his power of attorney, all his right, title and interest in the same: Therefore said transfers, as hereinbefore stated, are approved and affirmed by the directors of this bank."

The plaintiff also offered evidence that there were one or two other instances in which stock was issued by the cashier without any certificate being surrendered. But, as she offered no evidence, other than the directors' record of August 9th, 1869, that the other officers of the bank had any knowledge at the time of such transactions, or subsequently recognized them, the court excluded the evidence.

The plaintiff offered to prove that there was an arrangement between Robert and her husband, by which interest, equal to ten per cent. on \$9,100, on a debt due from the latter to his father, was to be treated as dividends upon this stock. But the court excluded the evidence as immaterial.

The court instructed the jury that the plaintiff having knowledge of the fact that

Robert B. Moores, upon whom she relied to have the stock transferred to her, was acting for himself as well as in his capacity of cashier, in reference to the matter of issuing this certificate, she was not an innocent holder of the stock, and as the certificate was issued without authority, in fraud of the rights of the bank, they should return a verdict for the defendant. A verdict was returned accordingly, and judgment rendered thereon, and the plaintiff excepted to the exclusion of evidence and to this instruction, and sued out this writ of error.

Mr. Justice GRAY delivered the opinion of the court. He stated the facts in the foregoing language, and continued:

The petition alleges that the false and fraudulent representations made by Robert B. Moores, and relied on by the plaintiff, that he had assigned and transferred the stock in question to her on the books of the bank, were made by him both as cashier and as stockholder; that the bank afterwards fraudulently permitted and procured him to transfer all the stock owned by him, or standing in his name, to its president, for its benefit; that the bank, through its cashier, fraudulently concealed from her the facts that no transfer had been made to her on its books at the time of the issue and delivery of the certificate to her, that the certificate was not authorized or recognized as valid by the bank, and that the stock standing in his name had been transferred on its books to its president; and concludes by alleging that by reason of such fraudulent conduct and acts of the bank, the certificate was invalid and worthless in her hands. But the evidence offered at the trial does not support the allegations of fraudulent conduct on the part of the bank.

The petition alleges "that the plaintiff relied upon the representations of said Robert B. Moores, as cashier and officer of the defendant, that the said certificate was duly issued, and that the stock had been duly transferred by said Robert B. Moores to the plaintiff on the books of said bank; and said plaintiff relied upon said certificate of stock which she received as genuine and valid for what it purported to be." And at the trial the plaintiff relied upon the representations made to her by Robert B. Moores orally and in the letter enclosing the certificate and in his contract of guaranty, as well as upon those arising out of the certificate itself. The two may be conveniently considered separately.

His representations outside of the certificate may be first disposed of. The plaintiff dealt with Robert B. Moores, and not with the bank. Her agreement was with him personally, and she lent her money to him for his private use. His representations to her that he owned stock in the bank, and that such stock had been transferred to her, were representations made by him personally,

and not as cashier; and there is no evidence that the plaintiff understood, or had any reason to understand, that those representations were made by him in behalf of the bank. The duty of transferring his stock to the plaintiff before taking out a new certificate in her name was a duty that he, and not the bank, owed to the plaintiff. The making of such a transfer was an act to be done by him in his own behalf as between him and the plaintiff, and in the plaintiff's behalf as between her and the bank. There is nothing, therefore, in his extrinsic representations, for which the bank is responsible.

The certificate which he delivered to the plaintiff was not in his name, but in hers, stating that she was entitled to so much stock, and showed, upon its face, that no certificate could be lawfully issued without the surrender of a former certificate and a transfer thereof upon the books of the bank. The by-laws, passed under the authority expressly conferred by the act of congress under which the bank was organized, contained a corresponding provision, designed for the security of the bank as well as of persons taking legal transfers of stock without notice of any prior equitable title therein. *Bank v. Laird*, 2 Wheat. 390; *Black v. Zacharie*, 3 How. 483, 513. The very form of the certificate was such as to put her upon her guard. She was not applying to the bank to take stock, as an original subscriber or otherwise; but she was bargaining with Robert B. Moores for stock which she supposed him to hold as his own. She knew that she had not held or surrendered any certificate, and she never asked to see his certificate or a transfer thereof to her; and he in fact made no surrender to the bank or transfer on its books. She relied on his personal representation, as the party with whom she was dealing, that he had such stock; and she trusted him as her agent to see the proper transfer thereof made on the books of the bank. Having distinct notice that the surrender and transfer of a former certificate were prerequisites to the lawful issue of a new one, and having accepted a certificate that she owned stock, without taking any steps to assure herself that the legal prerequisites to the validity of her certificate, which were to be fulfilled by the former owner and not by the bank, had been complied with, she does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity.

Of the great number of cases referred to in the thorough and elaborate arguments at the bar, we shall notice only some of the most important. None of those cited by the learned counsel for the plaintiff affirm a broader proposition than this: A certificate of stock in a corporation, under the corporate seal, and signed by the officers authorized to

issue certificates, estops the corporation to deny its validity, as against one who takes it for value and with no knowledge or notice of any fact tending to show that it has been irregularly issued.

When a corporation, upon the delivery to it of a certificate of stock with a forged power of attorney purporting to be executed by the rightful owner, issues a new certificate to the present holder, who sells it in the market to one who pays value for it, with no knowledge or notice of the forgery, the corporation is doubtless not relieved from its obligation to the original owner, but must still recognize him as a stockholder, because he cannot be deprived of his property without any consent or negligence of his. *Railway Co. v. Taylor*, 8 H. L. Cas. 751; *Bank v. Lanier*, 11 Wall. 369; *Telegraph Co. v. Davenport*, 97 U. S. 369; *Pratt v. Copper Co.*, 123 Mass. 110; *Pratt v. Railroad Co.*, 126 Mass. 443. And the corporation is obliged, if not to recognize the last purchaser as a stockholder also, at least to respond to him in damages for the value of the stock, because he has taken it for value without notice of any defect, and on the faith of the new certificate issued by the corporation. *In re Bahia & S. F. Ry.*, L. R. 3 Q. B. 584. Whether, before the last sale has taken place, the corporation is liable to the holder of the new certificate, is a question upon which there appears to have been a difference of opinion in England. According to the decision of Lord Northington in *Ashby v. Blackwell*, 2 Eden, 299, Amb. 503, it would seem that the corporation would be liable. According to the decisions of Sir Joseph Jekyll in *Hildyard v. South-Sea Co.*, 2 P. Wms. 76, and of the court of appeal in *Simm v. Telegraph Co.*, 5 Q. B. Div. 188, it would seem that it would not, because the holder of the new certificate takes it, not on the faith of that or any other certificate of the corporation, but on the faith of the forged power of attorney. However that may be, it is clear that the corporation is not liable to any one taking with notice of the forgery in the transfer, or of any other fact tending to show that the new certificate has been irregularly issued, unless the corporation has ratified, or received some benefit from, the transaction.

In *Hart v. Mining Co.*, L. R. 5 Exch. 111, the plaintiff, a bona fide purchaser of the shares, had paid assessments thereon to the company upon the faith of the certificate issued by it to him after his purchase. In *Barwick v. Bank*, L. R. 2 Exch. 259, and in *Mackay v. Bank*, L. R. 5 P. C. 394, the bank had derived a benefit from the fraud of its agent, and was held liable upon that ground. The decision in *Swift v. Winterbotham*, L. R. 8 Q. B. 244, that a bank was liable upon its official manager's representation to one of its customers that the credit of a certain person was good, was reversed in the exchequer chamber. *Swift v. Jewsbury*, L. R.

9 Q. B. 301. The decision in the exchequer chamber in *Queen v. Shropshire Union Railways & Canal Co.*, L. R. 8 Q. B. 420, that a railway company, owning shares of its own stock, the legal title of which was registered in the name of one of its directors as trustee for the corporation, should transfer them to a person who, believing the director to be the absolute owner of the shares, had lent him money on the deposit of the certificate as security, was contrary to the judgment of the court of queen's bench, and was reversed in the house of lords. L. R. 7 H. L. 496.

The American cases on which the plaintiff principally relies are decisions in the courts of Connecticut, New York, Pennsylvania and Maryland, the soundness of some of which we are not prepared to affirm, but all of which are distinguishable from the case at bar.

The leading cases in Connecticut and New York arose out of what have been known as the Schuyler frauds. Robert Schuyler, the president and general transfer agent of the New York and New Haven Railroad Company, issued, beyond the capital limited by its charter, but in the form prescribed by its by-laws, purporting to be transferable on its books on surrender of the certificates, a large amount of certificates of stock, annexed to which were printed forms of assignment and power of attorney. In *Bridgeport Bank v. New York & N. H. R. R.*, 30 Conn. 231, a bank which had received, as collateral security for money lent to a firm of which Schuyler was a member, certificates of stock so issued by him, was held entitled to maintain an action against the corporation for the value of these certificates, upon the single ground that it was admitted that when the plaintiff took these certificates, the firm held more than an equal amount of genuine certificates. In *Railroad Co. v. Schuyler*, 34 N. Y. 30, it appeared that Schuyler had issued, in one and the same form, large numbers of genuine as well as of false certificates, and had raised on both indiscriminately large amounts of money which had been applied for the benefit of the corporation, that all his transactions appeared on its books, and that the directors had for years been guilty of negligence in not making any examination of the books or of the conduct of the transfer office; and none of the purchasers of the false certificates, for the value of which the corporation was held to be liable, had any notice, or means of knowing, that they were not such as Schuyler was authorized to issue.

In *Titus v. Turnpike Road*, 61 N. Y. 237, the certificates upon which the corporation was held liable stated the stock to be owned by the person who as officer of the corporation issued them, not by the person to whom they were issued, and the latter had no notice of any fraud or irregularity in the

issue. In the other New York cases cited for the plaintiff, the certificates had been purchased in good faith, in the market. *Bruff v. Mali*, 36 N. Y. 200; *McNeil v. Bank*, 46 N. Y. 325; *Moore v. Bank*, 55 N. Y. 41; *Holbrook v. Zinc Co.*, 57 N. Y. 616. See *Bank v. Livingston*, 74 N. Y. 223.

In *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. 180, the certificates upon which the corporation was held to be liable were in the hands of innocent purchasers without notice. The opinion in *Bank v. Kurtz*, 99 Pa. St. 344, 349, goes no farther. On the other hand, in *Wright's Appeal*, Id. 425, where the president of a bank, having no authority to borrow money in its behalf, induced his aunt, a stockholder therein, to surrender to him her certificates of shares with blank powers of attorney, by means of false and fraudulent representations that they were needed to aid the bank; gave her his own note therefor, sold the stock, and applied the proceeds to his own use; and afterwards, by a fraudulent combination with the other officers of the bank, issued stock in excess of the lawful limit, and gave her new certificates for those that he had obtained from her; it was held that he was her agent in the original transaction, and that, as she gave no value to the bank for the new certificates, the loss must fall upon her, and not upon the bank.

In *Tome v. Railroad Co.*, 39 Md. 36, there was no by-law requiring a surrender and transfer of old certificates before the issue of new ones, and no limit of the amount of stock to be issued; and it was not contended that there had been any over-issue, or that the plaintiff had any notice of fraud or want of authority in the officers of the corporation. In *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36, the certificates were not issued to the plaintiff, but bought in the market, without any notice of their having been fraudulently or illegally issued.

In *Water Co. v. De Kay*, to which the plaintiff has referred us, the court of errors of New Jersey said: "Indeed, as is apparent from all the cases cited, the doctrine which validates securities within the apparent powers of the corporation, but improperly and therefore illegally issued, applies only in favor of bona fide holders for value. A person, who takes such a security with knowledge that the conditions on which alone the security was authorized were not fulfilled, is not protected, and in his hands the security is invalid, though the imperfec-

tion is in some matter relating to the internal affairs of the corporation, which would be unavailable against a bona fide holder of the same security." 36 N. J. Eq. 548, 563.

The general doctrine was stated with like limitations by this court in the case of *Merchants' Bank v. State Bank*: "Where a party deals with a corporation in good faith—the transaction is not ultra vires—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists." 10 Wall. 604, 644.

This review of the cases shows that there is no precedent for holding that the plaintiff, having dealt with the cashier individually, and lent money to him for his private use, and received from him a certificate in her own name, which stated that shares were transferable only on the books of the bank and on surrender of former certificates, and no certificate having been surrendered by him or by her, and there being no evidence of the bank having ratified or received any benefit from the transaction, can recover from the bank the value of the certificate delivered to her by its cashier.

The exceptions to the exclusion of evidence cannot be sustained. The evidence that in one or two other instances stock was issued by the cashier without the surrender of old certificates, and that the directors of the bank approved certain transfers to its president of shares once belonging to the cashier, was quite insufficient to prove that the bank ratified or received any benefit from the issue of the certificate to the plaintiff, or was guilty of any fraud towards her. The action of the directors was adapted to the single purpose of securing payment of a debt due from the cashier to the bank.

The evidence introduced and offered being insufficient to support a verdict for the plaintiff, the circuit court rightly directed the jury to return a verdict for the defendant. *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322.

Judgment affirmed.

Mr. Justice BRADLEY dissented. Mr. Justice MATTHEWS, having been of counsel, did not sit in this case, or take any part in its decision.

FIFTH AVE. BANK OF NEW YORK v. FORTY-SECOND ST. & GRAND ST. FERRY R. CO.

(33 N. E. 378, 137 N. Y. 231.)

Court of Appeals of New York. Feb. 28, 1893.

Appeal from supreme court, general term, first department.

Action by the Fifth Avenue Bank of New York against the Forty-Second Street & Grand Street Ferry Railroad Company for damages caused by defendant's refusal to transfer on its books certain stock to plaintiff, or to recognize plaintiff as a stockholder. From a judgment of the general term (17 N. Y. Supp. 826) overruling defendant's exceptions, denying its motion for a new trial, and directing judgment for plaintiff, defendant appeals. Affirmed.

MAYNARD, J. In September, 1885, the plaintiff, a domestic banking corporation, loaned one Hofele \$15,000 upon his individual note, payable in three months, and secured by the pledge of an instrument which upon its face purported to be a certificate for 160 shares of stock of the defendant, a domestic railroad corporation having its office and principal place of business in the same city, with the plaintiff. It was subsequently discovered that this certificate was spurious, and that the signature thereto of the defendant's president had been forged by one Eben S. Allen, its secretary, who was also its treasurer and transfer agent, and who had in these capacities signed and countersigned the certificate, and delivered it to Hofele, who was his partner in business, for the purpose of raising money upon it, to be used in the firm undertaking. We are required upon this appeal to determine how far the defendant company is liable for the loss sustained by the plaintiff in consequence of this fraudulent and criminal act of one of its principal officers.

The good faith of the plaintiff in the transaction by means of which he became possessed of the forged certificate seems to be satisfactorily established. Hofele was a stranger to the officers of the bank, and they had no knowledge of his business relations with Allen, or that the latter was in any way interested in the proposed loan. Before acting upon Hofele's application for a discount, the plaintiff's president sent its confidential clerk to the office of the defendant with the certificate, who, pursuant to instructions, showed it to the person in charge of the office, who was then unknown to the clerk, but who proved to be Allen, its secretary and treasurer, and who was asked if it was genuine, and all right, and if Hofele was a stockholder of the company, to which an affirmative reply was given, and a description of Hofele, from which the bank might identify him as the person who had presented the certificate, and sought the loan upon the strength of it. The clerk reported the result of the interview to the plaintiff's officers, who thereupon discounted Hofele's note for the sum named, payable in three months, and accepted the certificate as collateral security, in the usual form, for its payment, and for all other present or future demands of the

bank against him. The note was renewed from time to time, and increased in amount, and some smaller notes given, until his indebtedness amounted to \$35,000 and upwards. Meanwhile the plaintiff had taken as additional security a like certificate for 50 shares, to which the signature of the defendant's president had also been forged, and which was first received as security for a loan of \$5,000. This loan was afterwards consolidated with the other loans, and became a part of the total indebtedness, for which both certificates were held as security. Upon the pledge of the 50-share certificate the plaintiff made no inquiries of the defendant, or of any of its officers, with reference to its genuineness. In July, 1889, Hofele ordered the plaintiff to sell the two certificates, and signed the usual blank transfer or power of attorney for that purpose upon the back of them. When they were first hypothecated, he had executed a separate power of attorney, authorizing plaintiff to sell and transfer them in case of default in the payment of the loans. The certificates were sold by plaintiff's brokers, and the net sum of \$43,890 received, and placed to Hofele's credit, and his indebtedness charged to his account, leaving an apparent balance due him of \$8,479. When the certificates were presented by the purchasers at the office of defendant for transfer, it was refused upon the ground that they were forged and spurious, and the treasurer and transfer agent wrote across their face, in red ink, the words "No good," and added their official signatures to the statement. The plaintiff then refunded to the purchasers the amount paid upon the sale of the certificates, and took an assignment from them of all rights of action which they had against the defendant; and, upon the refusal of the defendant to recognize the certificates as valid evidences of title to its shares of stock, this action was brought, in which the plaintiff has recovered for its loss on account of the invalidity of the 160-share certificate, and the defendant alone has appealed.

With respect to this certificate, we fail to discover any omission on the part of the plaintiff which would impeach its character as a bona fide holder. It made inquiry at the office of the defendant, where its books and records were kept, and of the officer in charge, whose duty it was to furnish correct information upon the subject; and it had no reason to suspect that the assurances it received were misleading, or false, or that the officers of the defendant had entered into a conspiracy with Hofele to defraud the public. It resorted to the only source of verification of the truth of Hofele's statements which was readily accessible, and it exercised all the care and vigilance which a prudent man would be expected to exhibit in the ordinary course of the business in which it was engaged. There was no circumstance proven which required a display of greater diligence. Nor were the rights of the plaintiff affected by the sale of the certificates, and their redelivery to the plaintiff upon a refund of the proceeds of the sale to the purchasers. Though nominally sold on the account of

Hofele, the plaintiff was the real party in interest in the transaction. There was an implied guaranty of the genuineness of the certificates, which the vendor might be required to make good; and as the plaintiff had received the fruits of the transaction, the consideration of which had failed, it could not lawfully withhold them from the purchasers when restoration was demanded. The purchasers were also bona fide holders of the certificates, and the plaintiff, by their assignment, acquired the right to the enforcement of whatever remedies they might have in that capacity against the defendant, although it was then aware of their fraudulent issue. While certificates of stock in railroad and other business corporations do not possess the qualities of commercial paper, in the full sense of the term, yet, as evidences of title, when the transfer indorsed thereon is signed in blank by the shareholder, they become, in effect, so far as the public is concerned, as if they had been issued to bearer. They are then readily transferable by delivery, and have an element of negotiability which renders them an important factor in the financial and commercial transactions of the country. They may be, and are frequently, listed upon the stock exchanges, and their sales represent a large proportion of the daily business of these bodies. The plaintiff must therefore be accorded whatever advantage belongs to a holder in good faith of a chose in action of this character, and we have only to consider how far the defendant is responsible for the acts and representations of its officers, by means of which Hofele was enabled to obtain the plaintiff's money upon the faith of paper apparently valid, but in fact worthless.

The defendant was incorporated under the general railroad law, originally with a capital of \$600,000, afterwards increased to \$750,000, all of which had been issued, excepting 20 shares, before 1870. Its books relating to the issue and transfer of stock consisted of a certificate book, a transfer book, and a stock ledger, which were all kept by the secretary, and were in his immediate custody; but, in his official capacity and work, he was subject to the supervision of the president, and all the officers were under the general control and management of a board of directors. It is apparent from the evidence that the secretary was, ex officio, the transfer agent of the company. At least, from 1868 to the present time, the secretary had acted as such agent; and there is no provision in the by-laws for the separate appointment of a transfer agent, and the only reference to such an officer is in a single paragraph in section 15, where it is provided that "all certificates shall be issued and signed by the president and treasurer, and countersigned by the transfer agent, under such other regulations as the board of directors or finance committee may from time to time prescribe." Whether the secretary was, by virtue of his office, transfer agent, is not material; but the fact remains that, so far as the evidence discloses anything upon the subject, he always discharged the duties of that office, and in the performance of the work was

fitly characterized as the transfer agent of the company. When stock was issued, either in payment of an original subscription, or upon its transfer from one person to another, the engraved certificate was taken from the certificate book, and filled up by the secretary, presented to the president and treasurer, who signed it, and it was then countersigned by the secretary, as transfer agent, and sealed by him with the seal of the corporation, and delivered to the stockholder or transferee named in it. The secretary at the same time inserted the proper data in the stub remaining in the certificate book, and made the necessary entries in the transfer book and the stock ledger. The certificate received by plaintiff from Hofele had been taken from the certificate book. It appeared upon its face to be perfect and regular in every respect. It had the name of the president and treasurer signed to it, was countersigned by the transfer agent, and bore the impress of the corporate seal. It recited that Hofele was the owner of 160 shares, of \$100 each, of the capital stock of the company, contained the usual provisions in regard to the mode of transfer, and declared that no certificate should bind the company unless signed by the president, and countersigned by its treasurer and transfer agent. The in testimonium clause asserted that the defendant had caused that particular certificate to be signed by its president, and countersigned by its treasurer and transfer agent, and sealed with its corporate seal, February 6, 1885. It is very clear that under the regulations adopted by the defendant, and pursuing the mode of procedure which it had prescribed, the final act in the issue of a certificate of stock was performed by its secretary and transfer agent, and that when he countersigned it, and affixed the corporate seal, and delivered it, with the intent that it might be negotiated, it must be regarded, so long as it remained outstanding, as a continuing affirmation by the defendant that it had been lawfully issued, and that all the conditions precedent upon which the right to issue it depended had been duly observed. Such is the effect necessarily implied in the act of countersigning. This word has a well-defined meaning, both in the law and in the lexicon. To countersign an instrument is to sign what has already been signed by a superior, to authenticate by an additional signature, and usually has reference to the signature of a subordinate, in addition to that of his superior, by way of authentication of the execution of the writing to which it is affixed; and it denotes the complete execution of the paper. Worcester. Dict. When, therefore, the defendant's secretary and transfer agent countersigned and sealed this certificate, and put it in circulation, he declared, in the most formal manner, that it had been properly executed by the defendant, and that every essential requirement of law and of the by-laws had been performed to make it the binding act of the company. The defendant's by-laws elsewhere illustrate the application of the term, when used with reference to the signatures of its officers. In section 10 it is provided that all moneys received by the treasurer should

be deposited in bank to the joint credit of the president and treasurer, to be drawn out only by the check of the treasurer, countersigned by the president. If the president should forge the name of the treasurer to a check, and countersign it, and put it in circulation, and use the proceeds for his individual benefit, we apprehend it would not be doubted that this would be regarded as a certificate of the due execution of the check, so far as to render the company responsible to any person who innocently, and in good faith, became the holder of it. This result follows from the application of the fundamental rules which determine the obligations of a principal for the acts of his agent. They are embraced in the comprehensive statement of Story in his work on Agency, (9th Ed., § 452,) that the principal is to be "held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or participate in, or, indeed, know of, such misconduct, or even if he forbade the acts, or disapproved of them. In all such cases the rule applies, respondeat superior, and is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."

It is true that the secretary and transfer agent had no authority to issue a certificate of stock except upon the surrender and cancellation of a previously existing valid certificate, and the signature of the president and treasurer first obtained to the certificate to be issued; but these were facts necessarily and peculiarly within the knowledge of the secretary, and the issue of the certificate in due form was a representation by the secretary and transfer agent that these conditions had been complied with, and that the facts existed upon which his right to act depended. It was a certificate apparently made in the course of his employment, as the agent of the company, and within the scope of the general authority conferred upon him; and the defendant is under an implied obligation to make indemnity to the plaintiff for the loss sustained by the negligent or wrongful exercise by its officers of the general powers conferred upon them. Gris-

wold v. Haven, 25 N. Y. 599; Railroad Co. v. Schuyler, 34 N. Y. 30; Titus v. President, etc., of Turnpike Road, 61 N. Y. 237; Bank of Batavia v. New York, L. E. & W. R. Co., 106 N. Y. 199, 12 N. E. Rep. 433.

The learned counsel for the defendant seeks to distinguish this case from the authorities cited because the signature of the president to the certificate was not genuine. But we cannot see how the forgery of the name of the president can relieve the defendant from liability for the fraudulent acts of its secretary, treasurer, and transfer agent. They were officers to whom it had intrusted the authority to make the final declaration as to the validity of the shares of stock it might issue; and where their acts, in the apparent exercise of this power, are accompanied with all the indicia of genuineness, it is essential to the public welfare that the principal should be responsible to all persons who receive the certificates in good faith, and for a valuable consideration, and in the ordinary course of business, whether the indicia are true or not. 2 Beach, Priv. Corp. p. 790; Bank v. Aymar, 3 Hill, 262; Jarvis v. Beach Co., 53 Hun, 362, 6 N. Y. Supp. 703; Tome v. Railroad Co., 39 Md. 36; Railroad Co. v. Wilkens, 44 Md. 28; Western M. R. Co. v. Franklin Bank, 60 Md. 36; Com. v. Bank, 137 Mass. 431; Holden v. Phelps, 141 Mass. 456, 5 N. E. Rep. 815; Beach Co. v. Harnad, 27 Fed. Rep. 486; Shaw v. Port Phillip, etc., Co., 13 Q. B. Div. 103. The rule is, we think, correctly stated in Beach on Private Corporations, (volume 2, § 488, p. 791:) "When certificates of stock contain apparently all the essentials of genuineness, a bona fide holder thereof has a claim to recognition as a stockholder, if such stock can legally be issued, or to indemnity, if this cannot be done. The fact of forgery does not extinguish his right, when it has been perpetrated by or at the instance of an officer placed in authority by the corporation, and intrusted with the custody of its stock books, and held out by the company as the source of information upon the subject."

Having reached the conclusion that the defendant is liable for the representations of its officers, appearing upon the face of its certificate, over their official signature, and under the seal of the corporation, we do not deem it necessary to consider the effect of the oral representations made at the office of the company to the plaintiff's clerk, except so far as they bear upon the question of the good faith of the plaintiff in the acquisition of the certificate. The judgment and order must be affirmed, with costs. All concur.

Judgment affirmed.

HOLBROOK v. NEW JERSEY ZINC CO.

(57 N. Y. 616. 1874.)

Appeal from judgment of the general term of the supreme court in the first judicial department, in favor of the plaintiff, entered upon an order denying motion for a new trial and directing judgment upon verdict.

This action was brought to recover damages for a refusal of the defendant to transfer, on its books, fifty shares of its stock, of which the plaintiff held the certificates.

The facts disclosed were, that one William T. Riggs, on the 16th day of June, 1859, held two certificates of the stock of the defendant, a foreign corporation, of twenty-five shares each. These were a part of a large amount of stock standing in his name on the same day, viz. 546 shares. Some of these shares had been transferred to him from the name of Riggs, Hitchcock & Co., of which firm he, as well as his father, Samuel Riggs, was a member. Samuel Riggs died in the year 1852. By his will, he appointed William T. Riggs and others his executors; William alone acted. In the will of Samuel Riggs there was the following clause: Item 9. "The rest and residue of my estate, etc., I give to my children, his or her representatives, etc., the portions of my daughters or their representatives to be invested in such securities as are specified in item number 2, and to be held by my executors, the survivor of them and his heirs, in trust for the sole and separate use of my said daughters, respectively, their executors and administrators." The daughters also had power to dispose of their respective shares by last will and testament. The mode of investment was provided for in "item number 2" of the will. The testator left two daughters: Margaretta (who subsequently married Jacob H. Pleasants) and Anna. William T. Riggs continued to manage the trust estate until 1863. In that year, Pleasants and his wife and Miss Anna Riggs filed a bill against him and the defendant in the circuit court of Baltimore, Maryland, alleging that he had misapplied trust funds, including 440 shares of the stock, and praying for an accounting, appointment of a new trustee, and an injunction. A temporary injunction was granted accordingly. While that suit was pending, Riggs removed from Baltimore to New York. A decree was made 10th May, 1865, whereby he was required to transfer to Pleasants, as a substituted trustee, all the stock of the Zinc Company then standing in his name, viz., 125 shares. In May, 1865, the same plaintiffs brought an action in this state in the supreme court of the first judicial district against W. T. Riggs, the present defendant, and others. Its object was to compel Riggs to transfer to Pleasants, as trustee, the shares above referred to, and to enjoin him from transferring them, or from prosecuting any suit in respect to them. The defendant did not appear in that action, though Riggs

did. The judgment at special term was for damages only, and was rendered July 9th, 1866. On an appeal by the plaintiffs, a judgment was entered, by consent, at general term, November 25th, 1866, reversing that of the special term. This judgment declared, that the shares of the defendant's stock standing in the name of W. T. Riggs belonged to the trust estate, and directed the defendant to issue new certificates to Pleasants; as trustee, and that the certificates outstanding in the name of Riggs should be surrendered for cancellation. The defendant signed this consent, acting under the advice and suggestion of the attorney of the plaintiff. The defendant issued new certificates of stock to Pleasants, and canceled the entries of stock standing in the name of Riggs, without any surrender of the outstanding certificates.

The plaintiff in the present action claims under the outstanding certificates. He maintained, at the trial, that while the Baltimore action was pending, Riggs executed blank powers of attorney annexed to the certificates, which came into the possession of one Goodall, and that he took them for value as collateral security on the 29th October, 1867, from Goodall, for a loan of \$2,000, and that he was a purchaser without notice. After the maturity of this loan, the shares so hypothecated were advertised for sale. The defendant's president attended the sale, and announced that there was no stock on the company's books such as that represented by the certificates. The shares could not be sold, and were bid in by the plaintiff at a nominal sum. A demand made for a transfer on the company's books was refused; whereupon the present action was brought. The answer set up the proceedings before the court already detailed, and averred that the plaintiff was not a purchaser in good faith.

At the close of the evidence, a motion to dismiss the complaint was made and denied, and the defendant duly excepted. The court directed a verdict for the plaintiff, the exceptions to be heard in the first instance at general term.

DWIGHT, C. The principal inquiry in the present case is, whether the plaintiff is a holder of the stock of the New Jersey Zinc Company in good faith and for value.

It cannot now be denied, that if a corporation having power to issue stock certificates does in fact issue such a certificate, in which it affirms that a designated person is entitled to a certain number of shares of stock, it thereby holds out to persons who may deal in good faith with the person named in the certificate, that he is an owner and has capacity to transfer the shares. This proposition, does not rest on any view of the negotiability of stock but on general principles appertaining to the law of estoppel.

The rules of estoppel are of comparatively recent origin, and their applicability to this

subject has only been lately perceived. They are now fully recognized in England and in this country as governing the present subject. In order to constitute a case of estoppel under principles now established, it is necessary to show that a representation has been made, with a view or expectation that it will be acted upon by another, that it has been so acted upon, and that a person relying upon the representation would sustain an injury or damage if it were withdrawn. All of these elements combine in the case at bar. When the defendant issued its certificates to William T. Riggs, it affirmed to all persons who might deal with him, that he owned a certain portion of its capital stock and had full power to transfer it. Any purchaser has a right to rely upon this statement, and to claim the benefit of an estoppel in its favor. The correctness of this view can be readily perceived, by supposing that an inquiry had been made at the office of the company as to the ownership of Riggs, and an answer had been given containing the same expressions as are found in the certificate—could not a purchaser have acted with safety upon such a statement? The certificate itself must be regarded as a continuing affirmation of the ownership of Riggs and his power over the stock until it is withdrawn in some manner recognized by law. These views are fully sustained by *Railroad Co. v. Schuyler*, 34 N. Y. 30, 49, 53; *Leitch v. Wells*, 48 N. Y. 585; *McNeil v. Bank*, 46 N. Y. 325.

It will be observed that the present action is against the corporation itself issuing the certificate and making the representations on which the plaintiff claims to have relied. The whole controversy in the present case becomes narrowed down to this: Did the plaintiff take the stock in such a way as to bring himself within the rules applicable to estoppel, or has the representation made by the certificate been, as to him, legally withdrawn?

It is urged by the defendant that there was no evidence in the present case that Riggs ever delivered the shares to Goodall, from whom the plaintiff derived title, and that delivery must be proved by the plaintiff affirmatively. He cites, in support of this proposition, *Ledwick v. McKim*, 53 N. Y. 307, and other cases. *Ledwick v. McKim* does not raise the question. In that case it appeared affirmatively that certain bonds, the title to which was in litigation, were stolen, and the instruments were in such an imperfect condition that they were not negotiable in the sense that a holder could transfer a legal title to them. It is well settled, on the other hand, that one who takes an assignment of a stock certificate, as between him and the transferor, takes the whole title, both legal and equitable. *McNeil v. Bank*, supra; *Leitch v. Wells*, supra. The case of *Ledwick v. McKim* is plainly not an authority upon the question whether a

purchaser for value of stock is bound to show affirmatively that the certificates were delivered by a former owner to his own grantor. Such a rule would extend to any number of intermediate transfers, and he would be obliged to fortify his chain of title by showing the completeness of every link. The presumption is, that the stock was transferred in the course of business, unless there is some evidence to the contrary. There is no force in the suggestion that the power of attorney in the present case was incomplete, because there were blanks for the number of shares and for the name of the attorney. Any holder might fill up the blanks and constitute himself the attorney. These points are too well settled to need discussion. *Railroad Co. v. Schuyler*, supra; *McNeil v. Bank*, 46 N. Y. 330, 331; *Kortright v. Bank*, 20 Wend. 91, 22 Wend. 348.

If it be assumed that Riggs was a trustee, there was no notice of that fact on the face of the certificate, and the purchaser acting in good faith would, according to elementary rules, take the complete title to the stock. Same cases, and *Weaver v. Barden*, 49 N. Y. 300.

The counsel for the defendant, however, strongly insists that the rule in the *Schuyler* Case does not cover the present controversy, because in that case there was some evidence of delivery of the certificates, while in the present instance there is none. Delivery is, however, to be presumed from the fact that the certificates of stock, with the proper indorsements, were in the possession of the holder. In what other rational way can that possession be accounted for? It would be contrary to all reason to presume that the holder came by the certificates unfairly. It must be supposed that the ordinary course of business was followed. 1 Greenl. Ev. § 38. So, if a deed is found in the hands of a grantee, having on its face the evidence of its regular execution, it will be presumed to have been delivered by the grantor. *Ward v. Lewis*, 4 Pick. 518.

The defendant also claimed that it was irregular to prove the transfer of the stock by Riggs by means of an acknowledgment made by the subscribing witness before a notary, such acknowledgment being made long after the power of attorney is assumed to have been executed by Riggs, and shortly before it was offered in evidence. There is nothing in this objection. The Laws of 1833 (chapter 271, § 9) provide that, "every written instrument, except promissory notes, bills of exchange and the last wills of deceased persons, may be proved or acknowledged in the manner now provided by law for taking the proof or acknowledgment of conveyances of real estate. The certificate thus taken is to be used in evidence in the same manner and with the same effect as if the instrument were a conveyance of real estate." There can be no doubt that the power of attorney is a "written instrument," and falls within

the statute, and the acknowledgment may be made at any time before the paper is offered in evidence. The only serious question in the case is, whether the pendency of the actions in Baltimore, Maryland, and in New York, can be regarded as constructive notice to the plaintiff of the fact that Riggs held the stock in trust. This question divides itself into two branches: (1) Was the pendency of the action in Baltimore constructive notice to a person residing here? (2) If not, was the pendency of the action in the supreme court of this state, notice?

1. The first branch of this inquiry should be answered unhesitatingly in the negative. *Shelton v. Johnson*, 4 Sneed, 672; *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. (3d Am. Ed.) 175, note; *McLaurine v. Monroe*, 30 Mo. 462.

The facts in *Shelton v. Johnson* were substantially these: While an action involving the title to certain slaves was pending in another state, they were brought into Tennessee and bought by an innocent purchaser for a valuable consideration, who held them adversely for a time sufficient to protect his title under the statute of limitations. It was held on this state of facts, that his title so acquired was not affected by the pendency of a suit in another state, and that the doctrine that *lis pendens* is notice to all the world has no extra territorial application, and must be restricted to parties living within the jurisdiction where the action is pending. This view is plainly correct from the very nature of equitable jurisdiction, which binds only the person within the power of the court. It was further decided in this case, that the clause in the United States constitution providing that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state" (article 4, § 1), does not interfere with this construction of the doctrine of *lis pendens*.

2. There is a preliminary question to be disposed of, whether the sale of the stock did not precede the commencement of the action in this state. If this could be established, it would be a complete answer to the theory of the defendant. If the stock was issued to a holder for value before the commencement of the action, and in the course of business, no subsequent action brought against Riggs would affect the title. This proposition is so manifest that it does not need the support of authorities. It is not contested by the defendant.

To sustain such a transfer, the plaintiff urges that the cancellation of the revenue stamp on the power of attorney of the date of February 11, 1864, leads to the presumption that the power itself was executed as of that date, and in the course of business, for the purposes of transfer. This view seems to be in accordance with the usual presumptions prevailing in the law of evidence. As the ordinary course of business is to cancel a revenue stamp on the day that an instrument is executed, and, moreover, as the rev-

enue law then requires it to be done, the date of cancellation is presumptively at the time of execution. 1 Greenl. Ev. § 38. It would be unreasonable to assume that the stamp has been affixed without the authority of Riggs, or for any other purpose than to make complete a transaction with which it is apparently connected. The reasonable view is, that the power of attorney was executed on the day represented by the marks of cancellation.

The case, however, may be considered on a still broader ground and in connection with the doctrines of *lis pendens*. A defence such as this is in its own nature harsh, and peculiarly so in a case like the present. It is in direct opposition to the assertions made by the defendant in its certificate of stock. Suppose that, on an inquiry made of one of its officers, the defendant had stated to the plaintiff or his predecessor in ownership that Riggs was owner, would it have been permitted to contend that the plaintiff had constructive notice to the contrary by the pendency of an action? This would be to destroy the effect of express words by implication. The certificate, however, is substantially equivalent to an express affirmation. So long as that is outstanding, the defendant continues to affirm the power of Riggs to make a transfer. It is a severe rule, that would permit, under such circumstances, the defendant to belie its own representations by showing that there was pending in a competent court an action concerning the title of the holder of the certificate, and that a constructive theoretical notice should overcome the positive statements in the defendant's certificate. If the defendant, on the other hand, is precluded from denying their purport, it sustains no hardship, since the very decree of the court behind which it takes shelter, provides that Riggs should surrender the outstanding certificates, in connection with the direction to issue new certificates to Pleasants. If the defendant did not see that this surrender was made before the new certificates were issued, it has only itself to blame.

The doctrine of *lis pendens*, so harsh in its effect, is not applicable to the present case. It may be considered under two aspects: one that the stock was transferred by Riggs after the decree of November 25, 1866, and the other before. On the first hypothesis it is clear that the decree was not, by the general rules of equity jurisprudence, notice. The theory of the rule under discussion is, that while a suit is pending there is to be no change in the existing state of things "*pendente lite, nihil innovetur*." It is a rule of public policy and applicable only while the action is pending. As soon as a decree is rendered it ceases to have operation. The true theory of the rule is expounded in *Bellamy v. Sabine*, 1 De Gex & J. 566. This case, which was considered as involving a question of the highest importance, was dis-

cussed before the lord chancellor and the lord justices of appeal. It was held that the true view of the doctrine of *lis pendens* is not that it is notice, but that it is necessary to the administration of justice that a decision of the court in a suit should be binding not only on the litigating parties but also on those who derive title from them, *pendente lite*, whether with notice of the suit or not. The object of the rule is to bring litigation to an end, to prevent new suits, the introduction of new parties and to lead the existing controversy to a close. Page 578. So in *Newman v. Chapman*, 2 Rand. (Va.) 93, it was held that the doctrine does not rest upon the presumption of notice, but upon grounds of public policy. Accordingly, after judgment rendered, the peculiar doctrines of this branch of the law cannot be invoked. The leading case directly deciding this point (which is involved in *Bellamy v. Sabine*, supra) is *Worsley v. Earl of Scarborough*, 3 Atk. 392. Lord Chancellor Hardwicke there said: "There is no such rule in this court that a decree made here shall be an implied notice to a purchaser after the cause is ended, but it is the pendency of the suit that creates the notice, for, as it is a transaction in a sovereign court of justice, it is supposed all people are attentive to what passes there, and it is to prevent a greater mischief that would arise by people's purchasing a right under litigation and then in contest." This course of reasoning must be understood as applying to a final decree. When it is not such a one as puts a conclusion to the matter in question, that is still such a suit as does affect people with notice of what is doing. In *Rivers v. Steele* (cited by Mr. Cox in manuscript notes to 1 Vern. 286) it is stated that Lord Hardwicke held, most distinctly, that decrees are not notice. So in *Kinsman v. Kinsman*, 1 Russ. & M. 617, Lord Lyndhurst said: It is not pretended that after decree and before execution a *lis pendens* could any longer exist. See, also, *Gore v. Stacpoole*, 1 Dow. 30. These decisions are followed in *Price v. White*, 1 Bailey, Eq. 244; *Blake v. Heyward*, Id. 208; *Turner v. Crebill*, 1 Ohio, 372.

There is a dictum in *Monell v. Lawrence*, 12 Johns. 534, that all persons may be bound to take notice of decrees in chancery. This remark rests on a dictum in *Sorrell v. Carpenter*, 2 P. Wms. 483, which has been discarded by recent decisions and text writers. The whole matter is discussed in 2 Sugd. Vend. (7th Am. Ed.) 546. The dictum in *Monell v. Lawrence* is directly opposed to the theory of the subject so satisfactorily expounded in *Bellamy v. Sabine*, supra.

The other hypothesis may now be considered. Assume that Riggs parted with the stock while the New York action against him was pending, and that the result of it would have been binding on him if real estate had been in controversy. It may then be affirmed that the whole subject is inap-

plicable to such property as is now in litigation. The origin of this branch of the law it is now difficult to determine. It was in full recognition in the time of Lord Bacon, as shown by the twelfth of his ordinances for the administration of justice in the court of chancery. The rule is there expressed in this form: "No decree bindeth any that cometh in bona fide by conveyance from the defendant before the bill exhibited, and is made no party neither by bill nor order, but where he comes in *pendente lite* and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth." The language here used would seem to indicate that this was an established doctrine to which Lord Bacon simply gave expression. The word "conveyance" would seem to show that it was a rule applied only to real estate. It has been supposed by some to have been derived from the practice in real actions at common law, closely resembling Lord Bacon's proposition.

An examination of the English Reports will show that the law of *lis pendens* has only been used in England in cases involving the title to real estate or interests therein. It is said by an accurate writer, Mr. Powell, in his work on Mortgages, that "there is no case in which equity has held the property of goods to be affected by reason of a *lis pendens*, where possession is the principal evidence of ownership, as of personal chattels." 2 Pow. Mortg. (Rand. Notes, Ed. 1828) 618. Lord Eldon doubted the application of the doctrine to personal property, in *Jervis v. White*, 7 Ves. 413, and twenty years later, in *Hood v. Aston*, 1 Russ. 412. There are, however, cases in the courts of this country, where the doctrines of *lis pendens* have been applied to personal property, and some even to personal chattels. Some of these cases are cited. *Murray v. Lylburn*, 2 Johns. Ch. 441; *Scudder v. Van Amburgh*, 4 Edw. Ch. 29; *Bolling v. Carter*, 9 Ala. 921; *Thoms v. Southard*, 2 Dana, 480; *Watlington v. Howley*, 1 De-saus. Eq. 167; *Diamond v. Lawrence Co.*, 37 Pa. St. 353.

In *Murray v. Lylburn*, Chancellor Kent applied the doctrine to the case of a contested title to a mortgage; he carefully distinguishes, in his opinion, between mortgages and other securities in trust and other personalty. He says: "If he [the defaulting trustee] possessed cash, as the proceeds of the trust estate, or negotiable paper not due, or perhaps movable property, such as horses, cattle and grain, I am not prepared to say the rule is to be carried so far as to affect such sales. The safety of commercial dealing would require a limitation of the rule. But bonds and mortgages are not the subject of ordinary commerce; the party was dealing with a subject out of the ordinary course of traffic, and always understood to be subject to equities, and there can be very little

ground for complaint of hardship, in the application of the general doctrine to it."

In *Scudder v. Van Amburgh* the vice-chancellor expresses himself as "inclined to the view" that the doctrine extends to the property then in litigation—furniture; there is however no discussion of the subject. The case of *Bolling v. Carter* concerned the title to slaves. It was disposed of without discussion. The result is disapproved in the later case in the same court (*Winston v. Westfeldt*), to be hereafter considered. In *Thoms v. Southard* there was a foreclosure of a mortgage on a steamboat. It was held that the pendency of the action created an equitable lien in favor of the mortgagee, which could not be divested by a subsequent levy of an execution in favor of a creditor. *Watlington v. Howley* was rested on the untenable ground already considered, that a decree is notice to all persons. It involved the title to certificates of public debt. In *Diamond v. Lawrence Co.* it was held that this doctrine extended to a litigation concerning the title to county bonds. This was expressly placed on the ground that, by the law of Pennsylvania, county bonds are choses in action and not commercial paper. Being choses in action, the rule of Chancellor Kent, in *Murray v. Lylburn*, was followed, and the pendency of the suit was declared to be notice to all mankind.

There are other authorities, on the other hand, casting doubt upon the whole subject, and particularly denying or doubting that the doctrine of *lis pendens* can be extended to commercial paper not due. *Winston v. Westfeldt*, 22 Ala. 770; *Stone v. Elliott*, 11 Ohio St. 252; *Howe v. Hartness*, Id. 449; *Lindsley v. Diefendorf*, 43 How. Pr. 377; *McLaurine v. Monroe*, 30 Mo. (9 Jones) 462. *Winston v. Westfeldt* is an early and leading case in reference to this distinction, and expressly decides that the rules of *lis pendens* cannot be extended to negotiable paper not due. The views of Goldthwaite, J., who pronounced the opinion of the court, are very satisfactory. He said: "Negotiable paper, representing as it does in almost all civilized nations a very large proportion of their commercial operations, and serving to a great extent as the representative of money, is justly a favorite of the law, and enjoys immunities and privileges which are extended to no other contract. The tendency of courts has been to uphold this description of paper in the hands of bona fide holders, against every species of defence which might exist as between the original parties. The credit and confidence due to it must be impaired if the buyer were required to examine the courts of every county in the state before he could be sure of his purchase, and such would necessarily be the case if the doctrine

of *lis pendens* applied to it. There are no adjudications to force us to this extremity. The strongest considerations of public policy seem to forbid the extension of the rule to money or bank bills, and we think that commercial paper, as the representative of money, stands on the same footing." The case of *Jeffres v. Cochrane*, 48 N. Y. 671, is not opposed to these views. The note that was transferred in the case *pendente lite* was sold to an attorney, with actual notice of the pendency of an action concerning its ownership. He was properly held bound by the judgment.

The question is now presented, whether, in the case of stocks, we shall follow the rule in *Murray v. Lylburn*, or, whether we shall adopt Chancellor Kent's own distinction, and declare the rule as inapplicable to this case. All the considerations so forcibly stated in *Winston v. Westfeldt* apply with nearly equal strength in the case of stocks. The purchaser of these, as has already been shown, does not merely obtain an equitable title, as in the case of a bond and mortgage, but the complete legal ownership. They are dealt with in the same way as commercial paper. It would be in the highest degree inconvenient to force the purchaser to examine a clerk's office in every county of the state before he could safely purchase. Commerce requires a free and unrestricted sale of such property, unburdened with the shackles imposed by a *lis pendens*. That, as has been seen, has its whole foundation in public policy. It may be met and modified by a countervailing public policy. The expressions of Earl, C., in *Leitch v. Wells*, 48 N. Y. 585, are approved and sanctioned; and we hold that the doctrine of *lis pendens*, so far as it maintains that the mere pending of an action concerning the title to stocks, is constructive notice to all mankind, and that a purchaser acting in good faith is bound by the results of the action, is no part of the law of this state. The doctrine of *lis pendens* has long been deemed hard and dry law. *Sorrell v. Carpenter*, 2 P. Wms. 482. It is there said: "A purchaser *pendente lite*, though without actual notice and for a valuable consideration, shall be set aside, and though in this case the rule in equity be hard, yet it is in imitation of the common law, where in a real action if the defendant aliens pending the writ, the judgment will overreach the alienations." The rule is, undoubtedly, a wise one in its imitation of the common law as to real estate. In commercial transactions, no benefit can be derived from it, and only its hardship is apparent.

The judgment of the court below must be affirmed.

All concur.

Judgment affirmed.

ROBINSON v. NATIONAL BANK.

(95 N. Y. 637. 1884.)

Appeal from a judgment of the supreme court, general term, fourth department, entered upon an order made April 14, 1883, affirming a judgment in favor of the plaintiff entered upon the report of a referee.

This action was brought by the plaintiff, a resident of this state, against the defendant, a corporation organized under the acts of congress authorizing the formation of national banks, located and doing business at New Berne, North Carolina, to recover certain dividends declared and unpaid upon sixty-one shares of capital stock of the defendant, of which plaintiff claimed to be the owner. The shares were originally owned by one John Satterlee.

It is provided by the national banking act (Rev. St. U. S. § 5139), and by the act of congress passed June 3, 1864, that the capital stock of corporations organized under it shall be transferable on the books of the company in the manner provided by its by-laws. The defendant's by-law in relation to the transfer of stock provides (section 15) that "stock of this bank shall be assignable only on the books of this bank subject to the restrictions and provisions of the act, and a transfer book shall be kept in which all assignments and transfers of stock shall be made."

The further facts material to the questions discussed are stated in the opinion.

FINCH, J. The question here respects the plaintiff's right to recover dividends declared upon sixty-one shares of the capital stock of the Bank of New Berne. These shares became the property of one Satterlee, who owned fifty of them in January, 1867, and the remaining eleven in May, 1869, all of which stood in his name upon the stock ledger of the bank, whose certificates he held as owner. Previous to July, 1869, Satterlee, for a good and valuable consideration, by an instrument in writing, sold and assigned these shares to Anthony S. Hope, and transferred to him the certificates. At the date last named, Hope sent to the defendant corporation, such stock certificates and their assignment to him, and demanded a transfer upon the books of the bank. The defendant refused and sent back to Hope the assignments and certificates. We stop at this point to determine the legal rights of the parties as established by what had occurred. Hope had become the owner of the stock as against Satterlee and as against the bank. By the assignment and transfer of the certificates he had obtained the entire legal and equitable title. *McNeil v. Bank*, 46 N. Y. 331. Of this fact the bank had notice, and it became its duty to make the transfer requested on the books. Its refusal was a wrong from which no right could spring. Thereafter the bank was bound to recognize Hope's title ex-

actly as if it had done its duty and made the transfer on its books. The requirement of a registry, existing only for its own protection and convenience, must be deemed waived and non-essential when it wrongfully refuses to obey its own rule. *Isham v. Buckingham*, 49 N. Y. 220; *Billings v. Robinson*, 94 N. Y. 415. In *Johnson v. Laffin*, 17 Alb. Law J. 146, Fed. Cas. No. 7,393, the United States circuit court said of a sale by transfer of the certificates, "that the transaction between Laffin and Britton was complete without registration of the transfer, and that it is equally complete as to the bank unless the bank had some valid reason for refusing to register the transfer." And such must necessarily be the rule unless the arbitrary consent or refusal of the bank is to determine the validity of a sale which it merely requires to be registered. As easily might it be said that the consent of a county clerk or register was essential to the operative force of an executed deed.

While Hope was thus absolute owner as against the bank, the latter sued Satterlee, and upon an attachment seized and sold Hope's stock, the Bank of Raleigh becoming the purchaser. It is not easy to see how that bank can be deemed a bona fide purchaser, or acquired any right in the property of Hope by an attachment against Satterlee; but assuming the possibility of such a result as flowing from the condition of the registry (*Fisher v. Bank*, 5 Gray, 380), yet it seems to us wholly immaterial what rights the Bank of Raleigh acquired, either as against the Bank of New Berne or as against Hope. No such question is here. What occurred, vested in Hope, as between him and the defendant, the entire legal and equitable title in the shares as perfectly as if the transfer demanded had been made. The defendant corporation cannot set up its own wrongful act to defeat the title which passed. After, as well as before the sale to the Bank of Raleigh, Hope remained the owner, as between him and the Bank of New Berne, and entitled to have and receive the dividends declared upon sixty-one shares, and what the bank did, or what obligations it incurred to the Bank of Raleigh, in no respect altered its duty and liability to Hope.

The latter, thus remaining the owner of the stock as against the defendant, transferred it by delivery and assignment of the certificates to the present plaintiff. While Hope remained owner, dividends amounting to \$3,599 on sixty-one shares were declared, and while plaintiff was owner, further dividends amounting to \$915 have accrued, and for this last amount the plaintiff has recovered judgment. A further question is raised over the sufficiency of plaintiff's demand which appears to have been for dividends amounting to \$6,080, and so very much too large. The referee found upon the facts that no demand was necessary, and the General Term affirmed the conclusion. The

point insisted upon is that the plaintiff was bound to demand a transfer to himself on the books of the bank, and which should be accompanied by notice of the transfer of the certificates to him. Why, when the bank had refused to transfer the stock to Hope upon its books when he demanded it, his assignee should be compelled to repeat the same process in the face of that refusal, we are unable to see. Hope would not have been bound to try again but could have sued without a new request and all his rights passed to his transferee. So that the question comes back to the necessity of a demand. The case principally relied on by the appellant is *Southwick v. Bank*, 84 N. Y. 432. The case is not at all pertinent. There the defendant had "lawfully and innocently received the draft and the money paid thereon." He was not and could not be put in the wrong until he had refused restoration. The distinction was drawn in *Sharkey v. Mansfield*, 90 N. Y. 229; and the necessity of a demand denied where the receipt of the money was a conscious wrong. The party already in the wrong would only become more so by a refusal. Here the defendant had explicitly disavowed any obligation to Hope, and denied his ownership, and caused the stock to be sold as the property of Satterlee. What had occurred was a distinct denial of Hope's right to the stock or any of the dividends. After such a denial it was not needed that Hope should make a demand to put the defendant in the wrong, for it already stood, deliberately and defiantly, in that attitude. Its action was equivalent to a refusal to pay any one except its own chosen transferee, whose right alone it recognized. Hope himself and

his assignee were not bound to make a demand. The refusal was already complete by the defendant's own action. It was of no concern to whom Hope assigned, for the denial of his right was a denial as to those succeeding to that right. The defendant's complaint comes to no more than this; that having once refused it ought to have a new opportunity to repent, solely because the right of action had passed to a new owner. Our conclusion does not stand upon any fancied inability of the bank to pay these dividends, or even to deliver sixty-one shares of stock, but upon the action of the defendant in totally repudiating the whole of Hope's rights.

It is further argued that plaintiff's remedy was an action in equity to compel a transfer on the books, or an action against the bank for its wrong and to recover the damages suffered. That such remedies exist does not alter plaintiff's right to pursue that which he has chosen. Each of those remedies would inevitably stand upon Hope's ownership. To compel the bank to register, is to concede the validity of the transfer and found a right upon it, and damages could only be awarded to the extent of the stock and dividends on the same theory. And if, as we have said, Hope became the absolute owner as between himself and the bank, he must be awarded the right of an owner, whatever other remedies exist. The condition the defendant may find itself in, we need not consider. There are always consequences of a wrong to a wrong-doer.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

MANDLEBAUM v. NORTH AMERICAN
MIN. CO.

(4 Mich. 465. 1857.)

Case reserved from Wayne circuit.

On the 4th day of December, 1851, the defendant was an incorporated mining company, duly organized under and by virtue of the laws of this state. On that day, the defendant, by its officers, issued and delivered to one H. J. Buckley, a resident of the city of Detroit, a certificate of stock of said company. In December, 1852, Buckley sold said stock to one William A. Pratt, and at the same time delivered said certificate, with a blank power of attorney attached, signed and sealed and subscribed by two witnesses. The name of no attorney or assignee was inserted in the power of attorney, and it was in the form following: "Be it known to all whom it may concern, that — do hereby constitute and appoint — true and lawful attorney for — and in — name, to transfer forty-two shares in the capital stock of the North American Mining Company of Detroit. Witness — hand and seal at — this — day of —, A. D. 185—. H. J. Buckley. (Seal.) Witnesses present: E. W. Fitzhugh, William T. Wheeler."

In December, 1852, said certificate, with the power of attorney attached, was stolen or taken from the possession of said William A. Pratt, without his knowledge or consent, by some person unknown, and in a few days afterwards the company was notified of the loss. Also, that Pratt was the owner of said certificate, and the company was requested for that reason not to transfer said stock upon the company's books, at the request of any person. Pratt was guilty of no negligence on the loss of the certificate, but it was proved that he exercised ordinary care and prudence in the preservation of it.

On the 2d of May, 1853, Walter Ingersoll, in good faith, and without any knowledge of the loss of the certificate, purchased it of one William Martin, and paid for it fourteen hundred dollars. On purchasing, he ascertained the name and residence of Martin, and made the inquiries usual in a transaction of that kind.

On the 9th of May, 1853, the company, at the request of Ingersoll, and with a full knowledge of Pratt's claim to the certificate, transferred the same on its books by canceling it, and issuing a new one directly to Ingersoll. Ingersoll was notified of Pratt's claim to the certificate before this transfer. In March, 1854, Ingersoll sold the certificate to the plaintiff in this suit, informing the plaintiff at the time, of Pratt's claim to the stock, and of his (Ingersoll's) knowledge of all the facts above stated. Afterwards, and on the 21st of April, 1854, the plaintiff presented said certificate to the company, and requested the same to be transferred to him on the company's books, but the company refused to make the transfer, alleging that

they would not make the transfer until the title to the stock was settled between him and Pratt.

When Pratt notified the company of the loss of the certificate in December, 1852, the company wrote him, advising him that the certificate had not been presented at its office for transfer, and directing him to advertise the loss at the place of the loss, and also at Pittsburgh, at least six weeks; and informing him, that the by-laws of the company required a good and sufficient bond of indemnity against all losses, costs, etc., which the company "might sustain in rejecting, or in any way connected with the transaction, before a new certificate could be issued;" and also offering, in case the certificate could not be found, to do anything to obtain a reissue that the proper officer of the company was authorized to do. Pratt never complied with the directions contained in the letter, by giving the notice and executing the bond therein mentioned, nor took any other steps to supply the loss.

The certificate of stock in question was made on its face, "transferable only on the books of said company (upon the return of this certificate), in person or by attorney duly authorized, at their office in the city of Pittsburgh, in the state of Pennsylvania, or at such other office as may be hereafter established."

It was usual and customary for persons dealing in the stock of the company, as well as that of other companies, to transfer the same by delivery merely, without any written assignment, and with a general understanding among the dealers in stock certificates, that there was an implied power or right in any subsequent assignee to fill up the blank in the power of attorney attached to such certificate with the names of the attorney and assignee, as might suit the convenience of the holder, and this was not usually done in the market, but only when the assignee wished to have a transfer of the stock on the books of the company. Such custom, at the time Ingersoll became the purchaser of the stock, was proved to be almost universal in Michigan, where the stock was purchased.

Upon the refusal of the company to make the transfer, the plaintiff brought an action on the case for such refusal. The defendants, under the plea of not guilty, gave notice of the loss of the certificate by the former owner, etc., and the court below (Hon. David Johnson presiding) reserved the case for the opinion of this court.

MARTIN, J. The certificate which was issued to Ingersoll by the defendants, became the property of the plaintiff by purchase, and was transferred to him in the manner in which it is found by the court below. Such instruments are usually negotiated in market. The endorsement was blank; the power of attorney remaining to

be filled up by whatever holder might desire an entry upon the books of the company of the transfer of the stock, and the issue of a new certificate to himself. By this endorsement and delivery, the transfer was, under our statute, valid, as between the parties thereto. The entry thereof on the books of the company being only necessary for the benefit and security of the company, and not to the validity of the holder's title. See Rev. St. c. 55, p. 211, § 7. Whatever title, then, Ingersoll had in the stock for which the certificate was issued to him, or acquired by such transfer upon the company's books and the new issue, this plaintiff now holds; and the transfer of this certificate he asks to have intimated upon the books of the defendants, and for a new certificate to be issued to him thereupon. This request the defendants refuse to comply with, until the title to the stock represented by the original certificate acquired by Ingersoll shall have been settled between this plaintiff and Pratt; and for such refusal this action is brought.

It becomes unnecessary, in the view we take of this case, to inquire into Pratt's title, under the original certificate of stock issued to Buckley; or into that of Ingersoll under his purchase from Martin. Neither is it necessary to inquire into the rights of Pratt as against Ingersoll's title, while the latter held the certificate now owned by this plaintiff, and which was substituted for the one he claims to have owned, nor what may be his rights as against the defendants, or as against this plaintiff, should he assert them by proper proceedings in law or equity. Indeed, there would be an impropriety in doing so, for he does not appear as a party in this suit, nor can we see that it is defended at his instance, or in his behalf. That it is the duty of the company to allow intimations of transfer of stock to be made upon their books, upon the application of the owners thereof, is not denied, nor is the liability of the company in case of an improper refusal questioned, and it appears that, upon the entry of the transfer, the company cancels the original certificate, and issues a new one to the transferee. Before Ingersoll presented his certificate to the defendants in order that the transfer might be thus intimated, and a new certificate issued to himself, and, indeed, before he purchased it from Martin, the defendants had been informed by Pratt of his loss of the certificate he purchased from Buckley, and cautioned against transferring the stock to the holder thereof, if it should be presented for that purpose. Notwithstanding this caution, the defendants did transfer it upon their books upon Ingersoll's request, canceled the certificate which Pratt claimed, and issued the one which is the foundation of this controversy. What may have induced the defendants to recognize the title of Ingersoll to the first certificate does not appear; perhaps it was

the neglect of Pratt to take the steps for securing them against loss or liability, as prescribed in their letter, which is made an exhibit in this case, or perhaps from the long silence of Pratt, and the lapse of time since the communication to him, it was concluded that he had no valid claim upon it, or that it had been adjusted between him and Ingersoll. However this may be, the transfer seems to have been made by the company deliberately, and without any fraud or concealment on Ingersoll's part. Had they refused the request of Ingersoll, and compelled him and Pratt to interplead respecting, or otherwise to settle their conflicting claims to the certificate, they could have fully protected themselves against the consequences of any transfer and new issue which might thereafter be made, pursuant to such settlement; but not having done this, and having recognized Ingersoll's title, canceled the original certificate, and issued a new one to him, they cannot now be permitted to question the genuineness of that recognition, or the validity of that new certificate upon this claim of Ingersoll's transferee.

When the company permitted this transfer to Ingersoll to be intimated upon their books, and issued this certificate to him, they well knew that it might, and probably would, pass from hand to hand, upon his endorsement, through numberless bona fide holders, before it would be returned for a like intimation of transfer, and new certificate thereupon. It is true that this is not commercial paper, in the strict sense of the term; but by our statute, as has been stated, it is transferable by endorsement and delivery, so as to confer a valid title as between the parties thereto, and is, we think, by this provision of the statute, so far assimilated to such paper, that the holder is entitled to every right respecting it, as against third parties, which the law confers upon the holder of commercial paper. In this respect, the provisions of our statute are unlike those of every charter, and of the by-laws of every incorporated company to which we have been referred, and upon which adjudications have been made. It enlarges the effect of the endorsement and delivery, and thereby facilitates the transfer of these instruments, thus adding another element of value to them. Once endorsed, the certificate passes from hand to hand, like commercial paper, and an ordinary purchaser would, and under our statute well might regard the usual endorsement if genuine, as sufficient; and suspicion would naturally be lulled, and inquiry would be silenced beyond such as would, by mercantile law and usage, be required upon the purchase of commercial paper. And if inquiry were further pressed, and the party desirous of purchasing should seek further evidence of the genuineness of the title of his vendor, the entry upon the company's books corresponding with the issuing of such certificate, would, almost of

necessity, impel him to the conclusion that, up to that point, the title was unquestionable, and that behind it he need not pursue his investigations. It would be regarded, and properly too, as the recognition by the company of a title upon which every subsequent purchaser could safely rely.

Such being the force and effect of the transfer and the certificate to Ingersoll, the defendants are estopped from denying their validity, or from going behind them, and asserting, in defence of this action, a title which was thereby repudiated. Now, when this certificate was issued, the defendants virtually guaranteed its genuineness to whomsoever might become the purchaser of it; and it would operate as a fraud upon the public to permit them, under such circumstances, to question the validity of the instrument, or to deny their obligation under it. No higher recognition of Ingersoll's title could be given than has been given, and the purchaser from him, or from one deriving title from him, can, by no principle of law or of fair dealing, be required by the defendants to look beyond their books to inquire under what circumstances it was issued. The principle of estoppel is peculiarly applicable to this case, both for the protection of private rights, and upon grounds of public policy. "If," says Parke, B., in *Freeman v. Cooke*, 2 Exch. 654, "whatever a man's intentions may be, he so conducts himself, that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be precluded from contesting its truth." This principle applies as well to corporations as to individuals, and to acts as to assertions, and with conclusive force when these acts result from deliberate purpose, with a full knowledge of surrounding facts, and are induced by no fraudulent representations or concealments.

Nor is there anything in the circumstances attending the plaintiff's purchase of this certificate which relieves the defendants from the operation of this rule. It is true that he purchased with a full knowledge of all the facts known to Ingersoll, but he also knew that these facts were known to the company, and that Ingersoll's title had been recognized by them, notwithstanding Pratt's claim, and with full knowledge of it. The very fact that he purchased with such knowledge, is evidence of his reliance upon the acts of the defendants for the protection of his title, and of bona fides in making the purchase. He had a right to believe that the defendants had deliberately recognized Ingersoll's title, and had assumed a liability to him and his transferees, after a full investigation of that title, and he had a right to rely upon this new certificate, as an assertion by them of their repudiation of Pratt's claim, and that all persons were safe in purchasing it, and of their undertaking

with whomsoever might become the owner that his title would be recognized. And he may now insist that a responsibility thus deliberately assumed ought not to be resisted by the assertion of that claim which was thus disregarded when the certificate which he holds was issued.

Good faith and public policy require that the defendants should be held to this rule, and it is upon these broad grounds that this doctrine of estoppel stands interposed, to prevent injustice, and to guard against fraud, by denying to a party the right to repudiate his deliberate acts or admissions, when these have been acted upon by those persons to whom they were directed, and whose conduct they were intended to influence. *Alexander v. Walter*, 8 Gill, 239.

We have not been referred to, nor have we been able to find upon examination, any case which is precisely parallel with the present, but we think the reasoning of all the cases, and especially of *Davis v. Bank*, 2 Bing. 393, and of *Horton v. Improvement Comrs*, 14 Eng. Law & Eq. 379, 7 Exch. 780, sustains the conclusion to which we have arrived. In the former of these cases, when certain stock belonging to Davis had been transferred upon the books of the bank under a forged power of attorney, but, unlike this case, without notice to the bank, suit was brought for the refusal to pay over the dividends which had fallen due upon the transferred stock, and for permitting the transfer. The court held, that the bank was liable to the plaintiff for not paying over the dividends notwithstanding the transfer; but in speaking of the rights of subsequent purchasers of the stock transferred under the forged power, they use this language: "We are not called upon to decide, whether those who purchased the stock transferred to them under the forged power might require the bank to confirm that purchase to them, and to pay them the dividend on such stocks, or whether their neglect to inquire into the authenticity of the power of attorney might not throw the loss on them that has been occasioned by the forgeries. But to prevent as far as we can, the alarm which an argument urged on behalf of the bank is likely to excite, we will say, that the bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, the persons of whom you bought are not legally possessed of the stocks they sold you, the answer would be, the bank in the books which the law requires them to keep, and for the keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners. If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? It has ever been an object of the legislature to give facility to

the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfers to all the various persons through whom such stock has passed. Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons, under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock as you can that of an estate. You cannot look further, nor is it the practice ever to attempt to look further than the bank books for the title of the person who proposes to transfer to you."

Although this is obiter dictum, yet it is so consonant to reason and sound policy, that we do not doubt the correctness of the principle, nor hesitate to apply it to the case at bar. If, in such a case, the bank would be prohibited from denying the right of the subsequent purchaser of the stock, by a much stronger reason, do we think these defendants are estopped from denying this plaintiff's right, since the transfer to Ingersoll was entered upon their books with full knowledge of Pratt's claim of title, and of loss; and a certificate was issued thereupon to him genuine in form, and containing nothing to excite suspicion, or to suggest inquiry on the part of the purchaser.

Let it be certified to the circuit court for the county of Wayne, as the opinion of this court, that the plaintiff is entitled to recover.

WINTER v. MONTGOMERY GAS-LIGHT CO.

(7 South. 773, 89 Ala. 544.)

Supreme Court of Alabama. May 7, 1890.

Appeal from city court of Montgomery;
THOMAS M. ARRINGTON, Judge.

The bill in this case was filed by the appellee, the Montgomery Gas-Light Company, and prayed to have the defendants, appellants here, interplead as to the rightful ownership of five shares of stock in said company. The facts upon which the claim to the said stock was based are sufficiently set forth in the opinion. Upon the final hearing by the chancellor, on the pleadings and proof, he decreed that the complainant, Montgomery Gas-Light Company, should register the said stock to the respondent, A. T. London, as administrator of the estate of D. S. Schanck, deceased. It is from this decree that the present appeal is prosecuted, and the same is here assigned as error.

CLOPTON, J. The uncontroverted facts are: That on March 30, 1871, there stood on the books of the Montgomery Gas-Light Company, a corporation, 30 shares of its capital stock in the name of "J. S. Winter, trustee for Mary E. Winter." On that day J. S. Winter, trustee, assigned the 30 shares to J. Gindrat Winter, which transfer was registered on the books of the company. On August 21, 1871, certificates for the five shares in controversy, being part of the 30 shares, were issued by the company to J. Gindrat Winter, who, on the 25th day of the same month, delivered them to J. S. Winter, indorsing on each a power of attorney, authorizing him to transfer, set over, and assign on the books of the company the shares to such person or persons, and for such consideration, as he may elect, with full power to appoint one or more persons with like powers and authority to make and effect the transfer of the shares. On August 26, 1871, J. S. Winter, by instrument in writing, assigned and transferred the certificates of shares, with all dividends, to D. S. Schanck to secure the payment of three notes, amounting in the aggregate to \$500, his individual debt, with irrevocable power of attorney to Schanck to surrender the stock and have the same issued to him in his own name. It appears from the pleadings and evidence that the stock was the statutory separate estate of Mrs. Winter. It is insisted that the transfer to J. Gindrat Winter is void, for the reason that under the statutes then in force no valid sale or conveyance of the separate estate of a married woman could be made other than by an instrument in writing, executed by her husband and herself jointly, attested by two witnesses, or acknowledged, as provided by law. It will be admitted that J. S. Winter, holding the stock as trustee for his wife, and as her statutory separate estate, had no right or authority to sell and transfer or to pledge it for his individual debt; also that, J. Gindrat Winter having notice of the trust, both of them are responsible to the *cestui que trust* for the unauthorized use and disposition of the stock. The insistence of counsel would be

sustained if the question involved only the validity of the transfer to J. Gindrat Winter or his transferee with notice. But the question presented by the record reaches beyond this, and is, when a certificate of stock is accompanied by a power of attorney indorsed thereon, by the person in whose name it is issued, authorizing the attorney to transfer it to any person, and for such consideration as he may elect, will the title of a purchaser for value, without notice of any intervening equity, be protected? The general rule is that when the legal title and apparent unlimited power of disposition is vested in a person, the rights of a purchaser from him, for a valuable consideration, without notice of a secret trust upon which the property is held, are unaffected. The purchaser, in such case, acquires an equity equal in dignity to the outstanding equity of which he has no notice. This principle is applicable to the sale and transfer of certificates of stock. It has accordingly been held that a power of attorney on a certificate of stock, authorizing its transfer to any person, renders the stock transferable by delivery, and if the holder of such certificate is shown to be a purchaser for value, without notice of an outstanding equity from the person to whom it was issued, or his transferee, his title as such owner cannot be impeached. This principle, so far as we have discovered, is uniformly sustained by the authorities. We cite a few: Turnpike Co. v. Ferree, 17 N. J. Eq. 117; Nutting v. Thomason, 46 Ga. 34; Brewster v. Sime, 42 Cal. 139; Weaver v. Barden, 49 N. Y. 286; Bank v. Wayman, 5 Gill, 336. The rule is that as between two equities merely the prior equity will prevail; hence, in order to give the purchaser precedence, unless under exceptional circumstances, the legal estate must be annexed to his equity. It is contended that the purchaser of a certificate of stock obtains the legal title only by a registry of the transfer on the corporate books, and that the transfer to Schanck not having been registered, the equity of Mrs. Winter is superior. By an examination of the cases in which it has been expressed that a transfer on the books of the corporation is essential to pass the legal title, it will be seen that the expression was used in reference to the construction and purpose of the statute, making the stock of corporations transferable on the books, and to protection against creditors and subsequent purchasers. In Bank v. Hartwell, 84 Ala. 379, 4 South. Rep. 156, we said that to this end, and for this purpose, the transfer must be made in the mode prescribed by the statute; and while a transfer on the books is essential to pass the legal title, and operate as notice, a purchaser of the stock, though no registry is made on the books, may acquire such right thereto as a court of equity will enforce and compel its transfer on the books. And in Campbell v. Iron Co., 83 Ala. 351, 3 South. Rep. 369, speaking of the transfer of a certificate of stock without registration on the books, it is said: "If in proper form, and otherwise unobjectionable, such a conveyance is good and valid between the parties, although it may be void as against *bona fide* creditors, or subsequent purchasers without notice, and although

as against the corporation itself it may convey an equitable title, conferring no right to vote, draw dividends, or other like incidents of ownership." *Bank v. Pinckard*, 87 Ala. 577, 6 South. Rep. 364. What title passes, as between the parties, is a different question. The registry on the books of the company of J. Gindrat Winter, as the owner, and the issue of new certificates in his name, vested the legal title in him, and clothed him with all the *indicia* of ownership and the apparent right of disposition. As between him and Schanck, his transfer passed to the latter the title he possessed, and armed the latter with power to compel a transfer on the corporate books, and his representative demanded, October 5, 1886, the transfer to be registered. Whether, in such case, the title of Schanck will be upheld against intervening equities arose and was expressly decided in *Dodds v. Hills*, 2 Hem. & M. 424, in which case Smith, at the time he took the transfer, had no notice that Hills held the stock in trust, but received notice before he set it for registration. It is said "Although it is true that, as between him and the company, Smith did not become the owner until after registration, nothing but his own act was necessary to make him complete master of the shares. His position was like that of a person to whom an estate is conveyed, to become legally vested on the performance of some condition, such as the making of a demand, or the like; and in such a case notice of a trust would not prevent the subsequent performance or effect of this condition." And in *Cook, Stocks*, § 325, the author, after alluding to the rule in England, remarks: "In this country a different rule prevails, and it is accepted and assumed as elementary that a *bona fide* purchaser for value of stock belonging to a trust-estate, and sold in breach of trust, is nevertheless protected in the purchase, although he has not registered the transfer on the corporate books." The case of *Land Co. v. Dennis*, 85 Ala. 565, 5 South. Rep. 317, does not militate against this view. In that case, on the principle that a certificate of stock, indorsed in blank by the person to whom it was issued, is not a negotiable instrument, which may be regarded as well settled, it was held that, such certificate having been lost or stolen from the owner without fault on his part, his right to it is superior to that of any other person who may acquire it by purchase for value from any other holder. It will be observed that the finder or thief had no apparent right or claim; no color of title. The blank in the power of attorney was not filled in. The transferrer was not possessed of the legal title, or any

indicia of ownership, or the apparent power of disposition. Schanck derived title to himself directly from the last-registered stockholder. The cases are not parallel. By J. S. Winter's transfer to J. Gindrat Winter, causing it to be registered, and by the issue of new certificates in his name by the company, the transferrer to Schanck was vested with the legal title regular on its face, without any indications to awaken suspicion. He acquired the title which his transferrer had, but no better, except that it was discharged from the trust,—a legal title sufficient to his protection against prior latent equities. In *Mills v. Townsend*, 109 Mass. 115, it is said that while a transfer of shares by an assignment of the certificates can be effective only between the parties to the assignment, it has been held, in accordance with the usages of trade, that the indorsement of the certificates invests the assignee with the legal title to the interest so assigned as against all persons except the corporation. It was ruled that a *bona fide* purchaser, through mesne conveyances, starting from a trustee who sells the stock in breach of a trust, is protected. While certificates of stock are not negotiable instruments, when indorsed in blank, they are nevertheless intended to pass from hand to hand by delivery. The purchaser looks to the genuineness of the certificates, and, the *indicia* of ownership appearing on their face, he is without means to ascertain the rights of his vendor. If the purchaser were required to look beyond the last registry on the books of the corporation to ascertain whether there are any equities, or whether the stock was held in trust, facility in disposing of them would be greatly obstructed, if not destroyed. Hence a purchaser for value from the party who is the last-registered stockholder, and to whom new certificates have been issued without notice, is not affected by the rights of holders back of the registry. *Cook, Stocks*, §§ 369, 443. There is no pretense that Schanck had any notice of Mrs. Winter's equity, and in the instrument assigning the certificates to him J. S. Winter covenants and agrees that he is the lawful owner and holder of the stock, and has just right and authority to sell and dispose of the same. The company is estopped to deny Schanck's right and title, and to his equity a legal title was annexed sufficient to give him precedence over the equity of Mrs. Winter, of which he had no notice, and which was back of the registry to J. Gindrat Winter. *Mandlebaum v. Mining Co.*, 4 Mich. 465. This conclusion renders unnecessary the consideration of the question arising on the statute of limitations. Affirmed.

SIMM et al. v. ANGLO-AMERICAN TEL. CO.

ANGLO-AMERICAN TEL. CO. v. SPURLING et al.

(5 Q. B. Div. 188. 1879.)

The first of these actions was brought for wrongfully representing that certain persons were registered holders of stock in the defendants' company, and as such had title to transfer and sell the same, and also for the recovery of the purchase-money of the stock and the dividends thereon. The second action was for an indemnity.

The facts are commented upon in the judgments of LINDLEY, J., and the lords justices hereinafter set out; they may be here shortly stated as follows:

In November, 1876, Coates was the owner of £5,000 stock in the Anglo-American Telegraph Company, which was registered under the companies act, 1862; and upon the 26th of that month Phillips, who was a clerk to Coates, instructed Thompson, a broker, to sell £5,000 stock in that company. Burge, Brown, and Dennis became the ultimate buyers of that amount of stock, and they passed the names of P. Spurling and J. Skinner as transferees. The transfer to P. Spurling and J. Skinner purported to be executed by Coates, but it was in truth a forgery. Upon the 2d of December, Spurling and Skinner, acting for Burge, Brown, and Dennis, presented the transfer to the company for registration; the company thereupon forwarded to Coates a written notice of the transfer, to which, however, they received no reply, the notice to Coates having been intercepted by Phillips. In the matter of the transfer, Spurling and Skinner were mere nominees and trustees for Burge, Brown, and Dennis. Upon the 6th of December the forged transfer was registered, but before a certificate was issued to Spurling and Skinner, they by a transfer dated upon that day transferred to Simm and Ingelow £10,000 stock in the company. This sum of £10,000 included the sum of £5,000 supposed to have been bought from Coates. The transfer to Simm and Ingelow was lodged with the company for registration, and the company gave notice thereof to Spurling and Skinner. Subsequently Simm and Ingelow were registered as transferees of £10,000, and by a certificate dated the 9th of December, the company certified that Simm and Ingelow were the registered holders of £10,000 stock. Ingelow was the manager, and Simm was the secretary of the National Bank, London, and they accepted the stock as trustees for Burge, Brown, and Dennis, subject to any lien or claim which the National Bank might have thereon. The bank made advances to Burge, Brown, and Dennis, upon the security of the £10,000 stock. Up to the 1st of August, 1877, dividends on the stock were paid to Simm and Ingelow, but the forgery of the trans-

fer purporting to be executed by Coates was then discovered, and verbal notice thereof was given to them, and on the 19th of September they received written notice from the solicitors to the telegraph company, that the transfer to Spurling and Skinner was forged, and that Coates claimed to be the proprietor of the stock. On the 19th of September, £5,000 was due from Burge, Brown, and Dennis, to the National Bank, but on the 28th of September this sum was paid off, and no further advances were made to them by the bank against the stock, which had belonged to Coates. Upon the 7th of November the dividend was paid by mistake to Simm and Ingelow, but in February, 1878, the telegraph company refused to pay any further dividends to them. The writ of summons in the first action was issued on the 14th of March, and in the second on the 29th of March, 1878.

The actions came on for trial before LINDLEY, J., when it was agreed that Burge, Brown, and Dennis, should be added as plaintiffs in the first action, and as defendants in the second.

The following judgment was delivered:

"1878. Dec. 20. LINDLEY, J. It appears to me that the first action is comparatively simple; the second action is much more difficult. Before I give my reasons for my judgment, I will state at once the inferences of fact which I draw, as distinguished from those about which there is no dispute; and the main inference of fact which I draw is this: that no negligence in the sense of want of reasonable care is to be imputed to Spurling and Skinner, who left this forged transfer with the telegraph company, none to Simm and Ingelow, none to Burge & Co., and none to the telegraph company. I say that because there are clumsy forgeries and there are clever forgeries, and on looking at the forged transfer, I am bound to state that the forgery appears to me to have been so skilfully done, that in my opinion the clerks and officers of the telegraph company were not guilty of any want of reasonable care in failing to observe that it was a forgery. What the legal consequences of that may be, I will consider presently; but I think that is nearly the only inference of fact which it is necessary for me to draw. Fraud is not imputed to anybody with whom I have to deal, and I absolve all parties from negligence in the sense of want of reasonable care. Now, let me take the case step by step, and see how it works out. The facts are these. In November, 1876, Mr. Coates was the registered owner of £5,000 stock in the Anglo-American Telegraph Company. On the 29th of November, Phillips, his clerk, procured and forged a transfer, which was handed to Spurling and Skinner, and they, knowing nothing about the forgery, and not being guilty of any want of reasonable care, took it as a genuine document. That transfer having been executed, it was sent by Spurling

and Skinner to the office of the telegraph company, and, on the 2d of December, 1876, a clerk of the company sent the usual notice to Mr. Coates, addressed to him at his usual place of business, which notice was in these terms: "I beg to inform you that a transfer, purporting to have been signed by you, has been left at the offices of the company, and unless I hear to the contrary, it will be assumed to be correct." Unless that was answered, the company would not have their suspicions aroused; and, in point of fact, it was not answered; therefore the company assumed the transfer to be genuine. On the 6th of December, Spurling and Skinner were registered as the owners of this stock, pursuant to that transfer. At that time Spurling and Skinner held this stock as trustees for Burge & Co. By an arrangement between Burge & Co. and the National Bank, Burge & Co. undertook to procure a transfer of that stock to the National Bank, and the National Bank undertook to allow Burge & Co. to draw upon them. Accordingly, upon the 6th of December, the transfer was executed from Spurling and Skinner to Simm and Ingelow. About the 9th of December a notice from the company was sent to Spurling and Skinner, to which, in like manner, they received no answer. The telegraph company, therefore, naturally inferred again that all was correct, and Simm and Ingelow were registered as holders of this stock, and they obtained the usual stock certificate. Spurling and Skinner had not, in fact, obtained a certificate; it had been prepared, and would probably have been issued to them, had they remained on the register. Pausing there for a moment, let me see what the position of Simm and Ingelow then was. They were, in fact, holders for value of that stock; I say for value, because, although they did not pay Spurling and Skinner anything, the value which they gave to Messrs. Burge & Co. was this, that in consideration of having this stock transferred into the names of Simm and Ingelow, the National Bank, who were the cestui que trusts of Simm and Ingelow, allowed Burge & Co. to draw upon them. Therefore, it appears to me that Simm and Ingelow were not in the proper sense of the words mere trustees for Burge & Co., or merely identified with Burge & Co., but they were also in law and equity, as they were in fact, trustees for the National Bank, who had acquired this stock bona fide and for value from the persons who were in point of fact registered by the company as holders. What had the company done to induce the National Bank to become holders of these shares in the names of their trustees, Simm and Ingelow? They had in point of fact registered Spurling and Skinner, that is to say, they had done that which apparently conferred upon them power to transfer the stock and to give a good title, and upon the strength of that the National Bank took this stock for value, and they allowed Burge & Co. to draw upon them. It appears to me, there-

fore, that the title of Simm and Ingelow, as between themselves on the one side and the telegraph company on the other was a good title by estoppel. I do not doubt that in the least. I think *In re Bahia & S. F. Ry. Co.*, L. R. 3 Q. B. 584, and *Hart v. Mining Co.*, L. R. 5 Exch. 111, go to that length fully; and, subject to a remark which I shall make presently as to the effect of the bank having been paid off, it appears to me that if the case stood there the title of Simm and Ingelow against the company would be a good title by estoppel, founded, I will not say upon misrepresentation, because perhaps it is rather a harsh word, but upon the acts of the company themselves in accepting Spurling and Skinner, under a mistake no doubt, but still in accepting them and putting them in a position to hold themselves out as owners of the stock and entitled to transfer it; and upon the faith of that Simm and Ingelow acted, and are entitled to say that they did act as the truth was. It has been argued, however, that as Simm and Ingelow have been paid off, their title as between them and the company has ceased; and it is contended that on and after the 28th of September, 1877, Simm and Ingelow held this stock solely in trust for Burge & Co., and that inasmuch as it was by Burge & Co.'s fault that the company were induced to put this stock into the names of Simm and Ingelow, the latter, who now merely represent Burge & Co., cannot take advantage of the transaction. The argument appears to me to be met by two observations. In the first place I quite agree with what the counsel for the telegraph company has urged, namely, that the title of Simm and Ingelow was not a legal title as distinguished from a title by estoppel. If the two are to be contrasted, it was a title by estoppel; but, on the other hand, what does that mean? When it is said that a company is estopped from denying a title, what is that but that they are estopped from denying the legal title? I do not understand that they are estopped from denying any other title. It appears to me, therefore, on that view of the case, that it will stand in this way: Simm and Ingelow had acquired, as between themselves and the telegraph company, a good title by estoppel. When did they lose that title? Not, in my judgment, by any fluctuations of the account between themselves and Burge & Co., nor by anything which has affected the relation in which they stood towards Burge & Co. That is one answer I give. The other answer is this, that even if Simm and Ingelow were in point of fact trustees for Burge & Co. after the 28th of September, and even if we are to look behind the title created by estoppel, nevertheless, for reasons which I shall give presently, I still think that their title must prevail against the company's. I shall give my reasons for that hereafter, when I come to deal with the second action. I merely notice the point now for the purpose of shewing that

I do not overlook it or intend to pass it by. But it appears to me, as regards the first action, that the title which Simm and Ingelow acquired as bona fide holders for value, without notice of anything wrong as to this stock, as between themselves and the company never ceased. I cannot say that they are entitled to stock, because the company cannot be sued for stock which they do not possess, nor am I prepared to say that I ought to compel the company to go into the market and invest their capital in the purchase of their own stock. There may be a legal difficulty about that. But the consequence of my view of the case will be that Simm and Ingelow were entitled to the value of the stock at the time when the company denied their title. That appears to be the rule adopted in the case of *In re Bahia & S. F. Ry. Co.*, L. R. 3 Q. B. 584. They are entitled in the first action to the value of the stock at that time and to the payment of that value; the certificate ought to be delivered up to the company to be cancelled, and the company are to be at liberty to remove the names of Simm and Ingelow from the register in respect of that £5,000 stock. That will put matters right as far as I can see in the first action, the telegraph company to pay the costs of it.

With regard to the second action, which is much more difficult to deal with, it appears to me, after the best consideration which I can give to the case, that the company must bear the loss, for this reason:—The question really turns on the effect of the purchaser of stock taking to the company for the purpose of registration a transfer supposed to be genuine, but not genuine; and in order to ascertain the effect of that I must look at the obligations, if any, under which he is to the company, and the obligations, if any, under which the company are to him, and for the purpose of unravelling this part of the case, which is by far the more difficult, let me first see what the obligations are of a person taking a transfer to the company. Now does he represent anything more than this, that, so far as he knows, it is a good and valid document? Is there any authority for saying that he does more than that? Of course, if he takes a transfer to the company, knowing that something is amiss with it, he must take the consequences of his own knowledge; he cannot fasten any obligations upon the company. But supposing that he knows nothing wrong about it, are the company entitled to say to him, "We assume, from the fact, that you bring this transfer to us, that it is a genuine document." I apprehend that they are not entitled to say so to him. They are only entitled to say to him, "We assume that you come honestly to us, and that you do not know that anything is amiss with regard to the transaction." Now, let me see what their obligation is. Their obligation by statute is to keep a proper register; it is a duty imposed upon them by section 29 of the companies act, 1862; and further than that, when

a transfer is brought to them to be acted upon, they do in point of fact take upon themselves the duty or the task of making inquiries about it; and it appears to me that when a person innocently and honestly takes a transfer to the company, it is no more than a statement by him to the following effect: "So far as I know, the transfer is a genuine document: I shall leave it with you for a certain time to make inquiries, and if you make inquiries and find that it is a genuine document, of course you will receive me as a stockholder; if, on the other hand, the result of the inquiries is to shew that it is not a genuine document, then of course you will not register me as a stockholder." It appears to me that the case is stronger against the company than the case of a customer is against a banker paying a forged cheque; a banker is under an obligation to pay the cheques of his customers and of no one else, and if he pays the cheque of some one else, he cannot charge a customer with the amount paid upon it. In this case a statutory duty is imposed on the company to keep their own register correctly; and that is a duty, not only towards persons who are actually stockholders, but also towards persons dealing in shares or stock, and I make that observation because I think it warranted by the judgments in both *In re Bahia & S. F. Ry. Co.*, L. R. 3 Q. B. 584, and *Hart v. Mining Co.*, L. R. 5 Exch. 111, as well as by the section of the act. Why is the register to be kept? It is open to inspection by anybody on the payment of a fee, and the object is that it may be seen who is and who is not on the list of stockholders. And it appears to me that a duty is thrown on the company to look to their own register, which involves, of course, the looking after the transfer of stock or shares standing in the names of persons on the register; and that duty the company owe to those who come with transfers, and I do not see any corresponding or conflicting duty on the part of the person who brings the transfer, except, of course, that of bringing what he believes to be an honest document. I think the true view is this: that there being no negligence in the sense of want of care on either side, but there being a duty on the part of the company to keep the register correct and themselves to look after the transfers between innocent parties the loss must fall upon the company, and their claim for indemnity against Spurling and Skinner or against Burge & Co. fails. The utmost which the company are entitled to say is this: "It was your duty not to produce to us to be acted upon any transfer which you knew or suspected to have been forged." I think that the duty of the persons bringing the transfer does not go beyond this. Can the claim against Skinner and Spurling be sustained by looking at it from what I call a broader point of view? The first of these actions is brought against the company, and

the second is in reality brought against Burge & Co.: can it be said even if the question be looked at as between Burge & Co. on the one side and the company on the other, that the loss ought to fall on Burge & Co., rather than on the company? I do not think it can. It appears to me that the case is analogous to the case of a forged cheque, and as a banker paying a forged cheque to an innocent holder for value cannot recover back its amount and is compelled to pay it twice over, so here the company must pay the amount of the stock twice over. The duty being cast upon the company to look after the register and the transfers, it appears to me that between two innocent parties the company are not entitled to claim compensation from Burge & Co. nor to resist at Burge & Co.'s expense the recognition of that title, which they themselves have created by their own act. It appears to me that Burge & Co. are entitled to say: "We did not deceive you; you made inquiries, and you accepted us as stockholders and put us on the register, and you cannot now turn round and say that as between you and us, we do not hold that position which you have led us to believe that we are entitled to." My conclusion is, that the telegraph company are in the wrong, though, of course, perfectly innocent parties, and what I propose to do is this, to order the telegraph company to pay Simm and Ingelow the value of £5,000 stock in that company on the 1st of February, 1878, and interest at the rate of 4 per cent. since that date. In the second action judgment will be entered for the defendants.

Judgment accordingly.

The Anglo-American Telegraph Company appealed from the judgment of LINDLEY, J., in each action.

Dec. 5 the following judgments were delivered:—

BRAMWELL, L. J. I have come to the conclusion that the decision of LINDLEY, J., in the first action cannot be supported, and that our judgment must be for the company. Burge & Co. are now joined as plaintiffs; Simm and Ingelow continue to be plaintiffs, but they have no beneficial interest in the suit, and have merely a bare trust for the benefit of Burge & Co. Under these circumstances, it seems manifest to me that the action must be dealt with as if Burge & Co. had been the sole plaintiffs, and as if Simm and Ingelow had been joined as defendants with the telegraph company, according to the practice in equity whereby all necessary parties were made either plaintiffs or defendants, or as if Simm and Ingelow had not been joined, and there had been no objection for want of parties, Burge & Co. being treated as the sole plaintiffs. I think it established as a matter of demonstration that Burge & Co. cannot have any greater right or better title against the company, be-

cause they procured the transfer to be made to Spurling and Skinner, and procured the names of Spurling and Skinner to be registered, and then caused Spurling and Skinner to transfer to Simm and Ingelow the stock standing in the names of the latter. We must consider the action as if Burge & Co. themselves had taken to the company the document purporting to be transferred signed by Coates, and as if the defendants had registered Burge & Co. as proprietors, and had issued to them certificates that they were stockholders. In that event would Burge & Co. have had the right against the telegraph company which they now claim? They would have had no true title, because the transfer purporting to be executed by Coates was a forgery; that is beyond doubt. Then, would they have had a title, or, if that word is inaccurate, a right by estoppel? That is to say, would the company have been estopped from saying that Burge & Co. were not the holders of that stock, and could not call upon the company to indemnify them? I do not wish to speak against the principle of estoppels, for I do not know how the business of life could go on, unless the law recognized their existence; but an estoppel may be said to exist, where a person is compelled to admit that to be true which is not true, and to act upon a theory which is contrary to the truth. I do not undertake to give an exhaustive definition, but that formula nearly approaches a correct definition of estoppel. If the company are estopped from denying that Burge & Co. are stockholders, it must be because they are estopped from denying those circumstances which, if they had existed, would have constituted Burge & Co. stockholders. What are those circumstances? For a man to have a true title as the transferee of stock his transferor must have had the stock; his transferor must have executed an instrument of transfer, and the transferee must have accepted that instrument. The last-named condition is no doubt fulfilled, for Burge & Co. did intend to accept the supposed instrument of transfer. Upon general principles, and upon the authority of the cases cited to us, I think that the company would have been estopped from denying that Coates was the holder of the stock; but why are they estopped from denying that he transferred it? I desire to avoid using an expression involving a controversy as to points of law, and it is needless to say that Burge & Co. by their agents represented that Coates was a stockholder; but Burge & Co. sent to the company a document purporting to be transferred from Coates, and in effect demanded to be registered as transferees of the stock; to this demand the company assented. How can these facts constitute an estoppel against the company? What have they done that they should be debarred from saying that Coates did not transfer the stock? What more have they done than to accept the invitation of Burge & Co.? Let us look

at the question from another point of view, and consider whether, if the company should desire to hold Burge & Co. responsible, the latter would be estopped from denying themselves to be stockholders. I know it may be said that estoppels are mutual and reciprocal, and that if the company are estopped, Burge & Co. likewise are estopped. But suppose that the company were desirous of saying to Burge & Co., "You have so conducted yourselves that as against you we have the right to affirm that to be the truth which is not the truth." Why should that be more unreasonable in the mouth of the company than it is in the mouth of Burge & Co.?

It seems to me impossible to hold, under these circumstances, that Burge & Co. are estopped. It has been argued upon their behalf that the company were estopped because it was their duty to make inquiries, and because it must be taken against them that they were satisfied by the inquiries which they had instituted, and that they affirmed to Burge & Co., not merely that Coates had been a stockholder, but also that he had executed the instrument of transfer. I dissent entirely from that argument. I believe that the system of inquiry by companies before the registration of a transfer is modern; no doubt that is a very reasonable and proper step for companies to take; nevertheless, as it seems to me, it is clearly a practice to which they have recourse for their own benefit, and not for the benefit of any one else; because, although there may be no estoppel between them and a person who brings transfers to them, there would be between them and his transferees, and therefore, in order to keep themselves out of trouble, they ought to endeavour to ascertain whether the transfer brought to them is a valid instrument. The existence of this practice does not help the case for Burge & Co. I cannot see any principle by which the company are precluded from saying to Burge & Co., "You brought us a forged transfer: we believed it to be genuine, and we have registered you as stockholders; but we are not precluded from saying that the transfer was forged, and that you had not a real title." That argument seems, as a matter of principle, to express the ground of the decision at which we ought to arrive. Is there anything in the cases cited which ought to lead to a conclusion in favour of Burge & Co.? I think not. In *Knights v. Wiffen*, L. R. 5 Q. B. 660, the court of queen's bench held that the defendant had affirmed to the plaintiff that he held sixty quarters of barley separated from the rest at the plaintiff's disposition. The plaintiff had not told any untruth, nor had he, by any conduct on his part, offered any inducement to the defendant to make that statement. That case, therefore, is not like the present, where Burge & Co., however innocently, caused to be presented to the

company a false and fraudulent instrument as genuine. The next case to which I will refer is *In re Bahia & S. F. Ry. Co.*, L. R. 3 Q. B. 584. From the facts in that case it appears that the transferees had acted upon the certificates issued by the company to former shareholders, or at least to supposed former shareholders, and the court of queen's bench held that, inasmuch as the company had issued those certificates for the purpose of being acted upon, so that the shares might be sold or be used as a security for a loan, they were upon the principle of *Pickard v. Sears*, 6 Adol. & El. 469, and cases of a similar kind bound to indemnify those who had acted upon the faith of those certificates. That state of facts does not exist here: the company have made no untrue representation: they issued certificates to Burge & Co., but this they were induced to do by the conduct of that firm. The next case is *Hart v. Mining Co.*, L. R. 5 Exch. 111. In that case also the plaintiff had made no incorrect representation, he had not committed any mistake, upon the faith of which the defendants acted; but they admitted him as a partner, and he was induced to pay a call, and it was held rightly or wrongly, that they were estopped from denying they were liable to indemnify him. That case, therefore, is no authority against our decision. I wish to say a few words as to my own judgment in *Hart v. Mining Co.*, L. R. 5 Exch. 111, at page 115. I am afraid that I did not perceive the effect of the certificates which had been issued, and did not appreciate the judgment in *re Bahia & S. F. Ry. Co.*, L. R. 3 Q. B. 584. I can see now that the form of the certificates was important, and perhaps the case in the court of queen's bench did not govern the case in the court of exchequer. If the decision in *Hart v. Mining Co.*, L. R. 5 Exch. 111, was wrong, it will be competent to this court, at a proper moment, to overrule it: I think, however, that it was not wrong, but that it does not apply to the present case.

In the view which I take it is unnecessary to consider whether, in order to support the suggested estoppel, it is imperative that any damage should have accrued to Burge & Co., and whether in point of fact they have suffered any damage. I frankly own that even if Burge & Co. could be shown to have missed a benefit, or incurred a loss by the conduct of the company, the legal result would be the same: the misfortune of Burge & Co. arose from their having accepted a forged transfer.

I wish it to be distinctly understood that I do not express any opinion whether the second action would have been maintainable, if any damage had accrued to the company: cogent arguments no doubt may be adduced in favour of either view; but the company are willing to pay the costs of the action brought by them rather than have a doubtful question discussed, and they are content

that judgment be recorded against them, although technically they do not consent to it so as to preclude themselves from appealing, if it is wished to take the opinion of a higher tribunal. The result is that in each action judgment will be entered for the defendants.

BRETT, L. J. In the first of these actions it seems to me that two questions arise, first, whether the judgment of my Brother Lindley can be supported on the grounds which he has assigned; and secondly, whether it can be upheld for other reasons. With great deference to him, and after much hesitation, I have clearly come to the conclusion that the judgment of my Brother Lindley cannot be supported for the reasons upon which it is founded. Those reasons are that Burge & Co., supposing themselves to have become transferees of the stock, which really belonged to Coates, mortgaged it to Simm and Ingelow representing the National Bank, and that a certificate was issued by the company which asserted that Simm and Ingelow were the holders of the stock, and consequently that an estoppel existed against the company in favour of Simm and Ingelow or the National Bank. Pausing here, I may say that I think it clear upon the authority of *In re Bahia & S. F. Ry. Co.*, L. R. 3 Q. B. 584, that the certificate issued by the company, being acted upon by Simm and Ingelow, did raise an estoppel between them. My Brother Lindley, however, proceeded to hold that, inasmuch as this estoppel existed in favour of Simm and Ingelow as against the company, there was a title by estoppel to the stock, and that, when Simm and Ingelow ceased to be mortgagees upon the advance being paid off, they became trustees of the stock for Burge & Co., who may rest upon the title passing to them as cestui que trusts of Simm and Ingelow. With great deference, it seems to me that my Brother Lindley has given a wrong interpretation to the phrase, that Simm and Ingelow had a title by estoppel. The doctrine of estoppel was recognized in the courts of common law just as much as it was in the courts of equity, and it seems to me that an estoppel gives no title to that which is the subject-matter of estoppel. The estoppel assumes that the reality is contrary to that which the person is estopped from denying, and the estoppel has no effect at all upon the reality of the circumstances. I speak not of that estoppel, which is said to arise upon a deed of conveyance or other deed of a similar nature. I incline to think that when the word "estoppel" is used with reference to deeds of that kind, it is merely a phrase indicating that they must be truly interpreted. I am speaking now of the estoppels which arise upon transactions in business or in daily life, and, as it seems to me, these estoppels have no effect on the reality of the transaction. It may be that under some circumstances an estoppel will prevent a person from dealing in a particular

manner with goods; for instance, if a person is estopped from denying that he has made a contract to deliver goods, and if the goods are still in his possession, in a suit to enforce performance of the alleged contract he may be obliged to hand over the goods, although, in fact, there was no contract, and he may be liable to act as if there had been a contract, and to fulfil his supposed obligation. But suppose that although a person is estopped from denying that he has made a contract to deliver goods, he has parted with the goods and has sold them to somebody else: it seems to me that although he may be estopped as against the person claiming delivery under the supposed contract, he cannot be compelled to deliver the goods, which, there being no contract, have legally passed to somebody else: owing to the estoppel he cannot deny that a contract was entered into, but he cannot fulfil it by delivering another person's goods; and therefore the only remedy against him is that he shall pay damages for not delivering the goods. In a similar manner a person may be estopped from denying that certain goods belong to another; he may be compelled by a suit in the nature of an action of trover to deliver them up, if he has them in his possession and under his control; but if the goods, in respect of which he has estopped himself, really belong to somebody else, it seems impossible to suppose that by any process of law he can be compelled to deliver over another's goods to the person in whose favour the estoppel exists against him; that person is entitled to maintain a suit in the nature of an action of trover against him; but that person cannot recover the goods, because no property has really passed to him; he can recover only damages. In my view estoppel has no effect upon the real nature of the transaction: it only creates a cause of action between the person in whose favour the estoppel exists and the person who is estopped.

Apply these principles to the present case. For a time an estoppel existed in favour of Simm and Ingelow, representing the National Bank, because the telegraph company had issued a certificate stating that the stock was then the property of Simm and Ingelow, and the National Bank had acted upon that certificate. In my opinion, if Simm and Ingelow could have shewn that damage had accrued to the bank from the issuing of the certificate, they might have maintained an action against the telegraph company; but so soon as Burge & Co. had paid off the advance made to them by the National Bank, the bank was no longer in a position to suffer damage from the issuing of the certificate, and no action upon the ground of estoppel could be maintained for its benefit. The only persons who could have availed themselves of the estoppel were Simm and Ingelow, and that estoppel did not give them any legal title to the stock, as my Brother Lindley has supposed; it only gave them for a

time a right of action against the telegraph company, and therefore when they themselves could not maintain an action, it is wrong to say that they could transmit a right of action to Burge & Co. The latter cannot maintain this suit upon the ground that the company were at one time estopped as against Simm and Ingelow, when at the time of bringing the action no estoppel existed between them and Simm and Ingelow. With great deference, therefore, I cannot agree with the grounds upon which the judgment was founded.

It may be argued, however, that the judgment can be supported on other grounds. If Burge & Co. are to be considered as the only plaintiffs, I come to the conclusion, upon two grounds, that no estoppel exists in their favour against the telegraph company; first, because in point of fact no representation sufficient to raise an estoppel was made by the company to Burge & Co.; and, secondly, because even if a representation upon which an estoppel might be founded was made, that representation caused no substantial alteration in the position of Burge & Co.

As to the first ground, Burge & Co. supposed that they had bought stock through a broker upon the stock exchange; they received a transfer supposed to be signed by Coates, and a certificate from the company that Coates was the holder of stock. They sent the transfer to the company in order that the names of their nominees might be put upon the register, and then the company did that which is said to be the ordinary course, namely, they sent a letter to Coates requesting to know whether he had authorized the transfer of the stock. That letter was intercepted by a fraudulent clerk, so that the company received no answer to it, and they therefore supposed that Coates had agreed to transfer his stock, and upon that they registered Skinner and Spurling as the holders, and afterwards they issued a certificate to Simm and Ingelow, stating that they were the holders of the stock. The only fact relied upon as raising an estoppel is the issue of that certificate. It has been argued that this certificate amounts to a representation, although no representation was made in words on behalf of the company. At the time Burge & Co. bought the stock on the stock exchange they did not rely upon anything said or done by the company; they trusted wholly to the broker through whom they purchased, and that broker is personally liable to them by reason of the course of business, and perhaps by the rules of the stock exchange; they relied entirely upon him; they paid the price to him upon the faith of a transfer which he alleged that he had obtained from Coates, and not upon the faith of anything done by the company. If Burge & Co. paid the price upon the faith of the former certificate issued to Coates, that certificate is perfectly true, and in it no false representation was made by

the company. Nothing in that transaction can possibly raise an estoppel in favour of Burge & Co. against the defendants. After they had paid the money, they sent the transfer to the company in order that they might induce the company to put the names of their nominees upon the register, and thus complete their title. It is true that it is the course of business for the company to make inquiry of the person whose name is upon the register, but it seems to me that they are under no obligation to the person who sends the transfer to make that inquiry; it is obvious that they make it entirely for their own protection. I can see nothing which casts a duty upon them to make that inquiry on behalf of the alleged transferees; in truth the intending transferees, if they distrust the broker, can require to be informed of the name of the person whose stock is to be eventually transferred to them, and they can themselves make inquiry and ascertain from him whether the broker has his authority to transfer his stock. It seems to me that all the circumstances which are supposed to have entitled Burge & Co. to have the names of their nominees put upon the register of the company, and to obtain a certificate, lay as much within the knowledge of Burge & Co. as within that of the company; at all events they have the same power and duty to make inquiries as the company, and indeed some of the facts are more within the knowledge of Burge & Co. than of the company; as, for instance, it is Burge & Co. who knew what the contract was, and whether it was a contract to transfer. Under this state of facts the company did that which, if the transfer had been valid, would have made Burge & Co. stockholders—in other words, the company accepted their nominees as fit to put upon the register; this, however, was done mainly upon the statement, that the nominees had received a transfer from Coates. The certificate which the company issued to Simm and Ingelow did not contain a statement of anything which Burge & Co. did not know; it did not contain a statement of a transaction or of facts which must be known to the company, but were not known to Burge & Co., and with regard to which any statement of the company was to have an effect upon their conduct; the contract had been concluded before the certificate was issued, upon which alone the estoppel is alleged to arise. As I have already intimated, the certificate declaring Simm and Ingelow to be stockholders was issued not for any purposes of the company; it is obvious that the only use of the certificate in the hands of Simm and Ingelow was to empower them to transfer the stock, or to enable them by producing it to show to an intending buyer that they had been admitted as members of the company—in other words, that certificate declaring Simm and Ingelow to be upon the register was issued in order that they might hand over

the stock to a subsequent purchaser. That certificate would raise an estoppel against the company in favor of a subsequent purchaser from Simm and Ingelow acting for Burge & Co., because by that certificate the company have made a statement of facts which must be taken to be known to them, and cannot be known to a subsequent purchaser, and because the certificate was issued in order that a subsequent purchaser might act upon it. These facts fall within the well-known principles of estoppel. To my mind, however, a person buying from Burge & Co. would have no title to any stock; he would not be a stockholder in the company; he would not be entitled to have stock delivered to him by the company; his only remedy would be in damages. And, whatever may be the rights of a purchaser from Burge & Co. no representation was made by the company to Burge & Co. upon which the latter acted. It is not necessary to consider it, but I doubt much whether any representation was made by the company which could raise an estoppel, even if Burge & Co. had acted upon it; for it seems to me that neither of them made any representation in order that it might be acted upon by the other party.

As to the second ground, I think it right to say that, even if there was a representation by the company to Burge & Co., their substantial and legal position has not been altered by that representation, and that there being no alteration of circumstances by reason of that representation, there can be no estoppel against the company. But it seems to me that if a representation was made by the broker who sold to Burge & Co., they had a right of action against him, and that remedy exists just as much at this moment as at the time when the representation was made. It is possible that Burge & Co. might have had some remedy under the rules of the stock exchange. If the remedy created by the law remains intact (and by supposition of law that is a perfect remedy), I doubt very much whether the loss of the remedy under the rules of the stock exchange would be sufficient to raise an estoppel; but it seems to me that Burge & Co. now have the same remedy under the rules of the stock exchange as they had at the moment of the company registering Spurling and Skinner, and therefore that the position and the legal rights of Burge & Co. are not in any way altered. They have their claim for breach of contract against the broker who sold to them; they have the same remedy against that broker under the rules of the stock exchange which they had before, and if nothing could have hindered them from availing themselves of that remedy upon discovering at the time the nature of the transaction, nothing prevents them from availing themselves of it now. It has been further argued that Burge & Co. have been put to rest as to their remedy. Possibly they

have been put to rest, but it seems to me that that is not sufficient: it must be shewn not only that they have been put to rest, but also that they have been damaged by being put to rest. I can understand that it may be held that if a person is put to rest by a representation, and if by the delay in enforcing his remedy he suffers damage, he has the same rights as if his position had been altered at the time of the representation; for instance, if a representation had been made by the company, and if Burge & Co. had been put to rest as against the broker who sold to them, and if between the time when they were put to rest and the time when they resolved to act the broker had become insolvent, they would have suffered damage, and the case would have fallen within *Knights v. Wiffen*, L. R. 5 Q. B. 660, and they might be entitled to recover. I do not, however, think it necessary to say whether an action by them would be successful under these circumstances. At present I do not venture to differ from *Knights v. Wiffen*, L. R. 5 Q. B. 660. I understand that the learned judges construed a certain statement as having not merely its ordinary meaning, but also a mercantile meaning, and they were of opinion that the mercantile meaning of the statement was that the defendant had sold the goods separated from other goods and held them for the benefit of the plaintiff. I confess it seems to me that in that case two well-known doctrines were mixed up, the doctrine of estoppel, and the doctrine of attornment by a warehouseman who has goods in his hands. But in any point of view *Knights v. Wiffen*, L. R. 5 Q. B. 660, does not govern this case, even if the company did make a representation, and even if the doctrine as to putting another person to rest be true; for in the present case there is no evidence that Burge & Co. sustained damage by being put to rest.

I have stated my views at length, but the case is important, and I have thought it right to point out what are the reasons, which have convinced me that the judgment of LINDLEY, J., cannot be supported either on the grounds assigned by him or on any other grounds. In my opinion there was no estoppel between Burge & Co. and the telegraph company, and our judgment ought to be for the company.

It is unnecessary to say anything as to the action brought by the telegraph company.

COTTON, L. J. In this case we have the misfortune to differ from LINDLEY, J., and I think it right to say at starting that he appears to have delivered not a considered judgment, but a judgment immediately after the case had been heard in order to prevent delay: therefore he had not had leisure to review the case in all its aspects. The first action is founded upon the supposition that as against the company the plaintiffs are en-

titled to be treated as stockholders, and it is brought on the ground that the company have denied to them the rights of stockholders. When the real facts are ascertained, it is clear that independently of the question of estoppel, the action cannot be maintained; for the title of Simm and Ingelow has its origin in a forged transfer from one Coates. The stock which they claim is still at law and in equity vested in Coates, and he alone is entitled to be registered as the holder of it. But it has been urged that by the doctrine of estoppel the plaintiffs are to be deemed the owners of it, and the question has been argued as if Burge & Co. were the only plaintiffs; I will, therefore, deal with the case upon that footing. I will first consider what is the meaning of the words "title by estoppel" or if that phrase be objected to "right by estoppel." As I understand, it means that where one person makes to another a statement which is afterwards acted upon, in any action afterwards brought upon the faith of that statement by the person to whom it was made, the person making it is not allowed to deny that the facts were what he represented them to be, although in truth they were different. It has been contended that upon this doctrine Burge & Co. had a right of action against the company, and reliance has been placed upon *In re Bahia & S. F. Ry. Co.*, L. R. 3 Q. B. 584, and *Hart v. Mining Co.*, L. R. 5 Exch. 111, but they were in truth very different. In the present case certain persons on behalf of Burge & Co. took to the company a transfer purporting to be executed by Coates: he was in fact a stockholder, but the transfer was a forgery, and the question is whether the company by issuing a certificate of registration to Simm & Ingelow, the nominees of Burge & Co., in any way made a representation, which prevents them from saying that Simm & Ingelow are not the owners of the stock. I need only refer to the first of the two cases which I have mentioned, in order to shew how different they are from this: there the persons making the application were not in the position of Burge & Co., but were in the position of a person who might have bought the stock in open market from the nominees of Burge & Co., and might have paid the price upon the faith of the certificate of registration issued by the company. To a buyer who did not know the real facts, the certificate would amount to a representation that the sellers were entitled to the stock, and under the doctrine of estoppel the buyer might maintain an action against the company, not as the real owner of the stock, but as a person whom the company were bound to treat as the real owner, because they had stated to him that the sellers to him were the real owners and that the transfer to the sellers was valid. But the facts here are very different. Burge & Co. are driven to admit that Coates was the registered owner, and

that he did not execute a transfer of the stock to them; but they contend that the company is estopped from denying that Coates did transfer the stock to them. Why ought the company to be estopped? All that occurred was that a transfer purporting to be executed by Coates was brought to the company's office: Burge & Co. and the company had at least equal means of knowing whether the transfer was genuine. It was argued that as the company are bound to keep a register, they are bound to ascertain whether a transfer brought to them is a forgery, and that by issuing the certificate they must be taken to have made a representation as to a matter within their own knowledge, and must be considered to have represented to Burge & Co. that the transfer was genuine. Even if this duty exists, the real question is whether it exists towards Burge & Co., because if it does not exist towards them, I cannot think that the fact of there being a duty towards someone else to inquire, makes the acceptance of the transfer brought by Burge & Co., a representation to them by the company that it was a genuine document. In fact the use of the word "duty," is an indirect mode of saying that if the company accepts a forged transfer they will be liable to a person innocently bringing it, and it is clear that they would be equally liable according to that view whether or not they did make inquiries. The duty of the company is not to accept a forged transfer, and no duty to make inquiries exists towards the person bringing the transfer. It is merely an obligation upon the company to take care that they do not get into difficulties in consequence of their accepting a forged transfer, and it may be said to be an obligation towards the stockholder not to take the stock out of his name unless he has executed a transfer; but it is only a duty in this sense, that unless the company act upon a genuine transfer, they may be liable to the real stockholder. There being in my opinion no duty between Burge & Co. and the company to make inquiries, I think that there was no representation by the company to Burge & Co. that the transfer was genuine: as it seems to me, the action cannot be maintained upon that ground. It is unnecessary to determine whether, if any representation had been made, Burge & Co. could be considered to have acted upon it.

I must proceed to deal with the view upon which LINDLEY, J., seems to have chiefly based his judgment, namely, that Burge & Co. are to be treated as the parties beneficially entitled to the stock in the names of Simm and Ingelow. It has been argued that as Simm and Ingelow once had a good title by estoppel, it still remains, because it is impossible to say at what time that title by estoppel came to an end. Simm and Ingelow were purchasers for value; and no doubt, while their interest remained they had a right of

action against the company, who were estopped as against them from saying that their transferors, Spurling and Skinner, were not stockholders. The action would have been founded upon a representation made to Simm and Ingelow by the company of circumstances, which, if true, would have entitled them to maintain an action as stockholders. But the learned judge appears to have considered that a real title by estoppel existed in Simm and Ingelow, and that that title could be transmitted to Burge & Co., or at least be held for the benefit of Burge & Co., the persons actually interested. Simm and Ingelow having been paid off, have suffered no prejudice from the representation made to them by the company, and I do not think that they have transmitted their title to Burge & Co. As I understand the question, a good title by estoppel may exist in some cases; for instance, by indenture a lease for years may be granted of land in which at the time the lessor has no interest, but if he afterwards acquires a sufficient interest to support the lease, by estoppel it becomes valid for the term created and the lessee has a good title to the subject-matter of demise. There may be also a good title by estoppel to things which do not require any instrument to transfer them, as for instance, goods: if an action is brought upon the ground that the property in goods has passed to the vendor of the plaintiff, and if that question depends upon whether a particular parcel of goods has been set apart and appropriated to the contract between the vendor of the plaintiff and the defendant, an admission by the defendant, the owner of the goods, that there had been a setting apart of the goods, would be effectual as against him to pass the property in the goods to the plaintiff's vendor: as against the plaintiff who has paid for the goods, the defendant is estopped from denying that the goods have been set apart, and the plaintiff is entitled to rely upon the admission of the defendant, which if true would have given the plaintiff a good title to the goods. A case of that description is *Knights v. Wiffen*, L. R. 5 Q. B.

660. In the present case, however, we are dealing with stock, which cannot be transferred except in a particular manner, and to which the company cannot give an actual title by any admission of their own. If stock is sold, the buyer can only gain title to it by an instrument executed in the manner required by the articles of association. No right can be acquired by estoppel to any specified portion of stock, except where the owner has represented that which in a court of equity he may be bound to make good. The only right by estoppel which can be gained against the company is a right of action founded upon statements by the company, which if true would have entitled the plaintiff to be registered as stockholder. If Simm and Ingelow had sold in the market the £5,000 stock belonging to Coates, an innocent purchaser would have acquired a title by estoppel against the company; not because Simm and Ingelow had transmitted to him any title of their own, but because he had acted upon the faith of the representation made by the company in issuing the certificate: he would have had a right in consequence of that statement to maintain an action against the company, as if the statement upon which he acted had been in fact true. In the present case, however, Simm and Ingelow have not sold to any one, and, in my opinion, no representation was made by the company so as to give Burge & Co. any right against them under the doctrine of estoppel and the latter cannot gain that right, on the ground that Simm and Ingelow were the holders of the stock, and before they parted with their interest had the right to maintain an action against the company if their title should be denied.

As regards the second action, it is to be understood that no opinion is expressed in favour of either party.

In *Simm and others v. Anglo-American Telegraph Co.* judgment reversed and entered for defendants.

In *Anglo-American Telegraph Co. v. Spurling and others* judgment affirmed.

MACHINISTS' NAT. BANK v. FIELD et al.
(126 Mass. 345. 1879.)

Bill in equity against William N. Field, a broker, Joseph P. Hawes and Francis Henshaw, auctioneers under the firm of Hawes & Henshaw, and Theodore Dean. Hearing before Ames, J., who reported the case upon the pleadings and the following facts, for the entry of such decree as, in the opinion of the full court, the case might require:

Elizabeth W. Pratt was the owner of twelve shares of the capital stock of the plaintiff bank, for which she held a certificate, dated October 15, 1875, and this certificate was taken from her house without her knowledge by Charles C. Pratt, and, with a forged power of attorney, delivered to the defendant Field, who employed Hawes & Henshaw to sell the twelve shares by auction; and they sold the same, on March 8, 1876, to Dean, for \$1,920. On March 10, 1876, Field called on Hawes & Henshaw, for the proceeds of the sale, and they informed him that, in accordance with their practice, they would pay over the same on receiving from the bank a certificate of the shares; and thereupon Field, believing the power of attorney to be genuine, sent the certificate, with the forged power of attorney, to the bank, with a letter, requesting a transfer of the shares to Hawes & Henshaw. The president of the bank, believing the power of attorney to be executed by Elizabeth W. Pratt, inserted his own name therein as attorney, and transferred the twelve shares to Hawes & Henshaw, and issued a certificate therefor to them, and sent this certificate to Field, who delivered it to Hawes & Henshaw, and they paid him the proceeds of the sale less \$1.50, their commissions for selling. Hawes & Henshaw delivered this certificate to Dean with a power of attorney to transfer the same, and Dean paid them therefor \$1,920. Dean, who was then the holder of a certificate for forty-three shares of said stock, executed an assignment of the twelve shares to himself, and, upon the surrender of the respective certificates for forty-three shares and twelve shares, the bank issued to him a certificate for fifty-five shares, which he now holds. The bank paid to Dean the dividend declared in April, 1876. Field, on March 13, 1876, paid to Charles C. Pratt the amount received by him from Hawes & Henshaw, less \$1.50, his commission as broker on the sale.

Neither Hawes & Henshaw nor Dean ever saw the certificate of the shares in the name of said Elizabeth W. Pratt, nor the power of attorney under which the same were transferred, or ever knew or heard that she was the owner of the same, or who was the owner of the same till after the issue by the bank of the certificate to Hawes & Henshaw, and until after the transfer and issue of the certificate to Dean.

Field acted in good faith in the sale of the shares, and there was no evidence that he

had any knowledge or suspicion of the forgery of the power of attorney, and he never made any representation to the bank or its president, or had any communication with either, except the letter above referred to.

Elizabeth W. Pratt, in June, 1876, filed a bill in this court against the bank, praying that said twelve shares might be reissued to her, and obtained a decree ordering the bank to "procure and transfer to the plaintiff her twelve shares of the capital stock of the defendant corporation, as described in the bill, and make and deliver to the plaintiff a proper and legal certificate for the same, and make a proper and legal record upon the books of said corporation of said transfer and certificate;" and also to pay to the plaintiff the dividends declared upon the twelve shares. See *Pratt v. Manufacturing Co.*, 123 Mass. 110. The bank reissued to Elizabeth W. Pratt a certificate for her twelve shares, and there are now outstanding, issued by the bank, certificates for twelve shares more than the authorized capital.

The present bill concluded thus: "Wherefore, inasmuch as there are now two different parties, claiming distinct rights or interests in the same stock, which cannot be justly and definitely decided in an action at law, and whereas there is no plain, adequate and complete remedy at the common law, but the same is properly cognizable only in a court of equity, the said bank brings this bill in equity, and prays for a decree that said Field and said Hawes & Henshaw may be ordered to repay to said bank the amount so received from said Dean for said twelve shares of stock, that said bank may return the same to said Dean, or to repay the same to said Dean directly; and that he may be ordered to surrender to said bank his said certificate of fifty-five shares, and retake his former certificate of said forty-three shares before owned by him, and all parties restored to their former position; or that such other orders and decrees may be made as law and justice may require, or as to your honors may seem meet;" with a prayer for process.

GRAY, C. J. This bill cannot be maintained. The sole ground on which it invokes jurisdiction in equity is that "there are now two different parties claiming distinct rights or interests in the same stock, which cannot be justly and definitely decided in an action at law;" and the relief specifically prayed for is that Dean may surrender to the plaintiff bank the certificate of the new shares issued by it to him, and that Field and Hawes & Henshaw may be ordered either to repay to the plaintiff the money received by Hawes & Henshaw from Dean for these shares, so that the plaintiff may return that money to Dean, or else to repay the money to Dean directly.

Dean cannot be ordered to return his certificate, because he purchased the shares in

good faith and for valuable consideration, and the certificate issued to him is as against the bank conclusive evidence of his title. The bank has no right to compel him rather than any other stockholder to give up his certificate, and thereby assume the responsibility of its own illegal act in issuing a greater number of shares than the law authorized. *Salisbury Mills v. Townsend*, 109 Mass. 115, 122; *Pratt v. Bank*, 123 Mass. 110, 112; *Lowry v. Bank*, Taney, 310, 328, Fed. Cas. No. 8,581; *In re Bahia & S. F. Ry. Co.*, L. R. 3 Q. B. 584; *Holbrook v. Zinc Co.*, 57 N. Y. 616. The relief specifically prayed for against Field and against Hawes & Henshaw is for Dean's benefit, and contingent upon his being ordered to surrender his certificate, and as he is not bound to do so, he has no claim to be repaid any money by either of the other defendants.

The general relief prayed for must be con-

fined to the ground of jurisdiction stated in the bill; and it quite clear that there are not two parties before the court, claiming distinct rights or interests in the same stock. Mrs. Pratt is not a party, but has obtained her rights in her former suit against the bank. The only party claiming the shares in question is Dean, whose title, as we have seen, this plaintiff cannot controvert. Hawes & Henshaw claim no title in the stock, and are protected, equally with Dean, by the certificates issued to them by the plaintiff. Field also has and claims no title in the stock, and if, by reason of his having presented to the bank the forged power of attorney upon which the new certificates were issued, he is liable to the bank in any form, (of which we give no opinion,) the bank has an adequate remedy against him alone by action at law.

Bill dismissed, with costs.

JOSLYN v. ST. PAUL DISTILLING CO.

(46 N. W. 337, 44 Minn. 183.)

Supreme Court of Minnesota. July 22, 1890.

Appeal from district court, Ramsey county; OTIS, Judge.

COLLINS, J. At the commencement of this action, one of the defendants, Lizzie M. Hicks, appeared on the books of the defendant corporation to be the owner of shares of its corporate stock of the par value of \$30,000. There had previously been issued to her, and in her name, a certificate representing and evidencing these shares, in which was the usual clause and recital that the stock was "transferable only on the books of the company, on the indorsement and surrender of this certificate." The object of this action was to compel the defendant corporation to cancel the certificate to the extent of \$15,000, and to issue its certificate to plaintiff for that amount of its corporate stock, upon the ground that to that extent the certificate had been fraudulently obtained by Lizzie M. Hicks, and that plaintiff was the real owner of the stock. The trial court had jurisdiction of the parties defendant, but did not obtain possession of the stock certificate issued to Mrs. Hicks. By its decree the full relief demanded in the complaint was awarded by the court.

The character and qualities of stock certificates are the only questions involved here. If they are to be treated as if they were the shares themselves, and, when properly transferred, as passing to the assignee all the equitable rights of the holder, and the legal right to be admitted as a shareholder on the books of the association, it must follow that, upon a regular assignment and delivery of the certificates, there has been transferred to the purchaser the full legal and equitable ownership of the shareholder's contract, with all the *indicia* of such ownership. While there has been some difference of opinion upon this, the weight of authority is, undoubtedly, that where a corporation having authority to issue a stock certificate does issue such a certificate, wherein it is affirmed, as in the case at bar, that a designated person is entitled to a certain number of shares of stock, transferable only on the books of the association, on the indorsement and surrender of the certificate itself, it thereby holds out to persons who may deal in good faith with the person named in the certificate that he is the owner, and has capacity to transfer the shares. There is in the certificate, which evidences and represents the shares, the assurance of the corporation to the commercial world that no prior right to the stock can be obtained, unaccompanied by possession of the certificate, and that the shares shall not be transferred upon the books of the corporation unless the certificate is first surrendered. As was said in *Bank v. Lanier*, 11 Wall. 377, when speaking of stock certificates in which the same assurance was found, "no better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which

can be transferred on the books of the corporation * * * when the certificates are surrendered, but not otherwise. This is a notification, to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates regularly assigned, with power to transfer, is entitled to have the stock transferred to him; and the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates." These conclusions have not been adopted by the courts on any view of the negotiability of stock certificates, but on general principles appertaining to the doctrine of estoppel. A representation, which has tended to enhance the value of the stock, has been made with a view or expectation that it would be acted upon by another; it has or may have been so acted upon; and a person who has relied upon the representation will be injured or damaged, if it be withdrawn.

The certificate itself must be regarded as a continuing affirmation of the ownership by the person to whom it has been issued, and of his power over, and right to sell, the stock, until this power and right has lawfully terminated. It is clear that at any time, at least prior to the commencement of this action, a purchaser of the certificate in good faith, from Mrs. Hicks or her assigns, would have had the right to rely on the certificate securing to him the shares of stock it represented and evidenced. *Bank v. Lanier*, supra; *Holbrook v. Zinc Co.*, 57 N. Y. 616; *Factors', etc., Ins. Co. v. Marine, etc., Ship-Yard Co.*, 31 La. Ann. 149; *Bridgeport Bank v. New York, etc., Ry. Co.*, 30 Conn. 231. See, also, as bearing upon the question, *National Bank v. Lake Shore, etc., Ry. Co.*, 21 Ohio St. 221; *Railroad Co. v. Robbins*, 35 Ohio St. 483; *Eby v. Guest*, 94 Pa. St. 160; *Bank v. McElrath*, 13 N. J. Eq. 24; *Strange v. Railroad Co.*, 53 Tex. 162; *Galveston City v. Sibley*, 56 Tex. 269; *Cherry v. Frost*, 7 Lea, 1; *Van Norman v. Circuit Judge*, 45 Mich. 204, 7 N. W. Rep. 796; *Lowry v. Bank*, Camp. Dec. 310; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. Rep. 369. As a good-faith purchaser, he would be fully protected; and a decree in these proceedings against the corporation, of the nature of that now under consideration, would be of no avail should such a purchaser hereafter demand recognition as a stockholder. While the doctrine adopted in the cases cited commends itself to us as sound in every way, it may also be said to be obvious that the interests of the defendant company, a domestic corporation, should not be hazarded by the adoption in this state of a rule of law contrary to that of the federal courts upon the same subject by compelling it to issue a new certificate to plaintiff while the other may have passed into the hands of, a non-resident, good-faith purchaser who may in time assert his rights. The result of such a holding would be to place our own citizens at a disadvantage.

Attention has been called by the respondent to section 114, (formerly section 49,) c. 34, Gen. St. 1878, whereby it is enacted that corporate stock shall be deemed

personal property, and be transferable only on the books of the association, in a form to be prescribed by the directors. Based on this statute, the claim is made that the decree herein will protect defendant corporation against any holder of the stock of whose rights it had no notice at the time of the rendition of the decree. In *Baldwin v. Canfield*, 26 Minn. 43, 62, 1 N. W. Rep. 261, 276, 585, it was held that this section was intended solely for the protection and benefit of the corporation; that, except as against the corporation, the owner and holder of shares of stock might transfer the same as any other personalty of which he was the owner; and that a shareholder was not thereby incapacitated from transferring his stock without an entry on the books. In this case the stock certificates had been pledged as collateral security, and the rights of the pledgees were adjudged paramount to those of another, who had become an equitable owner of the stock, while the certificates were in the possession of the pledgees. In *Nic-*

ollet Nat. Bank v. City Bank, 38 Minn. 85, 35 N. W. Rep. 577, it was declared that an assignment and delivery of stock certificates without a transfer upon the books of the corporation invested the assignee with an equitable title which would be protected as against all parties not showing a superior right. Both of these cases are in line with the conclusion herein announced.

Finally, respondent contends that in any event the judgment below will protect the defendant corporation, should it obey the mandate, and issue a certificate to plaintiff as commanded. Such a position cannot be maintained, for it is obvious that in the trial of this case the rights of only those who were before the court could be passed upon. In an action against these defendants the court could not determine the rights and interests of another person, who may have become the *bona fide* owner and holder of the certificate issued to Mrs. Hicks. The decree below was erroneous. Judgment reversed.

BEAN v. AMERICAN LOAN & TRUST CO.,
Impleaded, etc.

(26 N. E. 11, 122 N. Y. 622.)

Court of Appeals of New York, Second Division.
Dec. 16, 1890.

Appeal from supreme court, general term,
first department.

Action by Edwin Bean against the American Loan & Trust Company, impleaded with others. Plaintiff appeals from a judgment of the general term reversing a judgment in his favor on appeal by the American Loan & Trust Company.

HAIGHT, J. This action was brought to obtain from the defendant the American Loan & Trust Company 266 bonds and certificates for 6,650 shares of stock of the defendant the Sovereign Mining Company. Issues were disposed of by the judgment, which are not brought up for review by this appeal, and we shall only call attention herein to such facts as bear upon the questions presented.

On or about the 1st day of March, 1883, the plaintiff became the owner of 1,777 shares of the stock of the defendant the Sovereign Gold Mining Company. Thereafter, and during the summer or fall of 1884, a new corporation was organized under the laws of this state, known as the "Sovereign Mining Company," and an agreement was entered into by the stock holders of the former company other than the plaintiff herein to sell their stock to the new company, and to accept in payment therefor the bonds and stocks of that company. In such agreement the defendant, R. M. Whipple, represented himself to be the owner of 3,677 shares of the stock of the old company, and signed for that number, when in fact 1,777 shares thereof belonged to the plaintiff. The agreement further provided that the bonds and stock of the new company, which by the terms thereof were to be given to the stockholders of the old company, should be deposited in escrow with the defendant the American Loan & Trust Company for the period of one year from the 1st day of December, 1884, that company agreeing to take such bonds and stock, and to hold the same in escrow for the period aforesaid, and to issue to the stockholders of the Sovereign Gold Mining Company a certificate in each case to the effect that the person named in the certificate was the owner of the number of bonds and shares of stock therein mentioned, as the case might be, of the Sovereign Mining Company, and that the same was held in trust by it for the period aforesaid, and that at the expiration of that period the bonds or stock, as the case might be, should be delivered to the stockholder, or his order, at the option of the holder thereof, on the surrender of his certificate. The provisions of the agreement having been carried out, the defendant Whipple represented to the officers of the Sovereign Gold Mining Company that he was the owner of the 1,777 shares of the stock, which was in fact owned by the plaintiff, and that the same was with the plaintiff in Chicago, on loan; that if they would direct the defendant the American

Loan & Trust Company to deliver to him the certificates for such stock, he would, immediately upon his return to Chicago, take up the stock held by the plaintiff, and return the certificates therefor to the secretary of the Sovereign Gold Mining Company. Thereupon the directors of the Sovereign Gold Mining Company authorized its secretary to represent to the defendant the American Loan & Trust Company that the defendant Whipple was the owner of the bonds and stock of the new company that under the agreement was to be issued for the 1,777 shares of the stock of the old company, and that he was entitled to receive the certificates therefor, and thereupon, upon receiving such representation, the defendant the American Loan & Trust Company did issue such certificates in his name, and delivered the same to the secretary of the defendant the Sovereign Mining Company, who delivered the same to Whipple. Subsequently, the plaintiff, upon hearing of these facts, demanded of the defendant the American Loan & Trust Company the surrender to him of the bonds and stock in question, which was refused, and thereupon this action was brought.

The trial court adjudged and determined that the plaintiff was entitled to recover of the defendant the American Loan & Trust Company the bonds and stock in question, and the defendant Whipple was adjudged and directed to deliver up to the American Loan & Trust Company its certificates which had been issued to him. It will be observed that the defendant the American Loan & Trust Company was a mere depository of the stocks and bonds, having no pecuniary interest therein; that it had but executed the provisions of the contract of the stockholders, and had issued its certificates to the owners of the stock as represented and directed by the officers of the corporations. It is conceded to be an innocent party acting in good faith, and is therefore, under the circumstances, entitled to the fullest protection that the court can give; and this right appears to have been recognized by the trial court, for in its opinion it states: "The practical question is whether the trustee will be protected by the decrees directing the delivery of the bonds and shares to the plaintiff. If it will be, then there is no necessity for imposing upon the plaintiff a conditional judgment which Whipple might frustrate by remaining out of the jurisdiction, and refusing to turn over the certificates." The learned trial judge then proceeds to call attention to the fact that Whipple was a party to this action; that there had been no transfer of the certificates by him up to the end of the year in which the bonds were to be left in escrow; that by the judgment herein the plaintiff was adjudged to be the rightful owner; and reached the conclusion that the defendant the trust company would be amply protected. In this conclusion we are inclined to the opinion that the trial court was mistaken, and that the protection to the trust company is not as ample as it should be. The defendant Whipple resides in the city of Chicago, out of the jurisdiction of the court, and it is powerless, therefore, to compel a surrender of the certifi-

cates. The certificates issued by the trust company to Whipple pledged the trust company to deliver the bonds and stocks to him, or his order, on the surrender of the certificates. He had but to indorse the certificates, and pass them to another person, to enable such person to present the certificates and demand the delivery of the bonds and stocks called for. True, he was in possession of the certificates after this action was brought, but whether he still remains in possession, or has sold and transferred the same to an innocent purchaser for value, does not appear. We shall not stop to determine whether or not the certificates are negotiable, or whether they were transferred before or after the expiration of the year that they were to remain in escrow. All we now wish to assert is that circumstances may exist in which the plaintiff would be estopped from questioning the title of an innocent purchaser for value.

The contract, by its terms, was only to be binding when signed by all the owners of the stock. Consequently, the plaintiff was not prejudiced thereby. His stock in the old company was not affected or his rights impaired. He had no interest in the new company, or right to any of its bonds or stock, unless he came in and made himself a party to the contract. He has not subscribed the contract or turned in his stock in the old company. The only way he has made himself a party thereto is by ratifying that which has been done in reference to his stock. Whipple had signed for the plaintiff's stock, and received a certificate therefor, and in order to entitle the plaintiff to recover in this action he must be treated as electing to ratify the acts of Whipple as his agent *ex maleficio*, thus making the contract his own, and becoming bound by its provisions. By its terms the stock and bonds in question were to be delivered to the trust company, to be held by it for the period of one year, and it was required to issue its certificates therefor. This had been done, and Whipple was thus given the evidences of title, and has it in his power to induce innocent persons to purchase and pay value therefor under circumstances in which the plaintiff may be estopped from claiming the certificates, and the bonds and stocks that they represent. The certificates issued to Whipple were for a larger number of bonds than the plaintiff is entitled to. A portion of the bonds embraced in the certificates were owned by Whipple, and he had the right to dispose thereof. If, therefore, other persons should present to the trust company its certificates with Whipple's indorsement thereon, it would be powerless to determine whether the

certificates were the certificates of Whipple or those which should belong to the plaintiff. It may be true that stocks and bonds have no ear-mark so that one may be distinguished from another, but we think it must be admitted that Whipple could sell and transfer his certificates for bonds and stock until that which was left in his possession was reduced to the number belonging to the plaintiff; but the trust company is left powerless to determine when such amount has been transferred by him. It can determine only when a certificate is presented to it indorsed by him, and certificates may have been previously transferred to other parties for the entire amount owned by him. It may be claimed that the trust company improperly issued the certificates to Whipple, but we must bear in mind that the company was dealing with the persons who had signed the contract, and that it had only issued the stock to the persons directed by the officers of the Sovereign Gold Mining Company, and not even then was the delivery made by the trust company to the stockholders, for the certificates were in fact delivered by the trust company to the secretary of the Sovereign Gold Mining Company, who distributed and delivered them to the parties entitled thereto. We see nothing in this transaction which charges the trust company with negligence in reference thereto, or why it should not receive full protection from any liability by reason of the issuing of any such certificates.

We are, however, inclined to the view that a reversal by the general term was not necessary, but that the judgment should instead have been modified. It was adjudged that "the defendant Rodney M. Whipple be and he hereby is directed to forthwith deliver to the defendant the American Loan & Trust Company its certificates for the bonds and stock of said Sovereign Mining Company, to an amount equal to the said 266 bonds and said 6,650 shares of stock." Although a non-resident, we cannot assume that he will disobey the commands of the decree. The judgment should be modified by adding to the above provision that, upon the surrender of the certificates of such bonds and stock to the defendant the American Loan & Trust Company, it forthwith deliver to the plaintiff, Edwin Bean, or his attorney, 266 bonds and certificates for 6,650 shares of the stock of the defendant the Sovereign Mining Company, etc., as is already provided for in the judgment. The judgment of the general term should be reversed, and that of the trial court modified as herein indicated, without costs of this appeal to either party. All concur.

Judgment accordingly.

RICE v. ROCKEFELLER et al.

(31 N. E. 907, 134 N. Y. 174.)

Court of Appeals of New York, Second Division.
Oct. 1, 1892.

Appeal from supreme court, general term, first department.

Action by George Rice against John D. Rockefeller and others, trustees of the Standard Oil Trust. From an order of the general term, (9 N. Y. Supp. 866,) reversing judgment entered on decision of the special term in favor of plaintiff, and granting a new trial, plaintiff appeals. Reversed.

The other facts fully appear in the following statement by BRADLEY, J.:

The main purpose of the action was to require the defendants to transfer to the plaintiff upon their books six shares of stock in the Standard Oil Trust on the surrender of the certificates of such shares held by him. The Standard Oil Trust was created in January, 1882, by agreement in writing made or adopted by the stockholders and members of certain corporations and limited partnerships, and certain individuals therein named, or that might thereafter join in it at the request of the trustees. The stockholders and most of the other individuals making or adopting the agreement were interested as stockholders or otherwise in the mining, manufacturing, refining, and dealing in petroleum and its products, the materials used in the business, and the business in some manner relating thereto. The trustees, pursuant to the trust as provided for by such agreement, received from the parties making or adopting it certain bonds and stocks in trust, and issued to them therefor Standard Oil Trust certificates transferable on the books of the trustees. And by virtue of the agreement the parties so surrendering their bonds and stock for such certificates became the beneficiaries under the trust, as did also the transferees of such certificates. The par value of the certificates which have been so issued from time to time by the trustees exceeded \$90,000,000. And they have a regular market value, and are dealt in in the open market in the city of New York, and were at the time of the commencement of this action held in considerable amounts by many persons who were transferees thereof, and not parties to such agreement. One of the objects of the agreement creating the trust was to secure to the trustees the general supervision, so far as practicable, of the affairs of the various corporations, limited partnerships, and manufactories coming within the adoption of the agreement. The above is a statement substantially of facts alleged in the complaint and admitted by the answer. It further appears by the evidence, and was also found by the court, that on or about October 14, 1886, the plaintiff purchased in the open market in the city of New York Standard Oil Trust certificate No. 1,987 for five shares of stock duly issued to one L. B. Mallaby by the trustees, and paid for it \$190 per share in cash, and the certificate was thereupon transferred to him by Mallaby. The following is a copy of the certificate and of the transfer

indorsed upon it, to wit: "Shares, \$100 each. Standard Oil Trust. Number 1,986. Shares, 5. This is to certify that L. B. Mallaby is entitled to five shares in the equity to the property held by the trustees of the Standard Oil Trust, transferable only on the books of said trustees on surrender of this certificate. This certificate is issued upon condition that the holder or any transferee thereof shall be subject to all the provisions of the agreement creating said trust and the by-laws adopted in pursuance of said agreement, as fully as if he had signed the said trust agreement. Witness the hands of the president, secretary, and treasurer of the board of trustees, this 25th day of August, A. D. 1885, at the city of New York. WM. ROCKEFELLER, V. President. J. F. FREEMAN, A. Treasurer. H. M. FLAGLER, Secretary." Upon the back of it is the following, to wit: "For value received I hereby sell and transfer to George Rice, of Marietta, Ohio, five shares of the Standard Oil Trust, standing in my name on the books of said trust. And I hereby irrevocably appoint said George Rice my attorney to make the necessary transfer upon the books of said trust, in accordance with the regulations thereof, and upon the condition expressed on the face of this certificate. Dated August 26th, 1885. L. B. MALLABY. In presence of C. F. STREIGHTOFF."

After this purchase, and prior to June 20, 1887, a stock dividend was declared by the trustees amounting to one share of stock for every five shares outstanding, and certificate No. 3,057 for one share of the Standard Oil Trust stock was thereupon issued to Mallaby, who about June 20, 1887, transferred it to the plaintiff. This certificate and transfer indorsed upon it are in form the same as those above set forth. And on January 20, 1888, the plaintiff, at the office of the trustees in the city of New York, made a formal written demand for the transfer to him of such six shares upon surrender of the certificates, which, with the transfers thereon indorsed, he then exhibited. The following is a copy of the written demand: "To the Standard Oil Trust, No. 26 Broadway, New York, and its trustees, officers, and agents: You will take notice that I am the legal owner of certificate number 1,987 for five shares, and certificate number 3,057 for one share, in the equity to the property held by the said trustees of the said Standard Oil Trust, and that each of said certificates was issued to L. B. Mallaby and has been duly transferred by him to me, said original certificates and transfers being herewith exhibited to you. I hereby offer to surrender to you said certificates on receiving the new certificate hereinafter referred to, and do demand that you forthwith transfer said six shares to me on the books of said trustees of the Standard Oil Trust, and issue to me a new certificate therefor in my name. GEORGE RICE. Dated New York, January 20th, 1888." The transfer to the plaintiff on the books was refused, and this action followed. Further facts appear in opinion.

BRADLEY, J., (after stating the facts.) The defense is founded upon the propo-

sitions (1) that the plaintiff failed to prove that he was a beneficiary under the Standard Oil Trust agreement, or entitled to become such by means of transfer upon the books of the shares represented by the certificates held by him; and (2) that he is not seeking such relation in good faith, but for purposes hostile to the trust, and for that reason is not entitled to the aid of the equitable powers of the court in that behalf. The Standard Oil Trust represents a voluntary association. It was created by agreement of the stockholders of various corporations and others engaged or interested in a certain enterprise and the several branches of business connected with and incidental to it. The effect of its creation is the concentration of supervisory power in nine trustees, whose certificates of the trust are taken in place of the stock and bonds of the several corporations. The characteristic feature of it is in the voluntary surrender of the control and management of the business of those corporations, and in the fact that for its continuance it has the capacity of succession. The agreement constituted not a partnership, but a trust in behalf of the beneficiaries. And while it is not a corporation, it by the agreement took some of the attributes of a corporation, in so far that through its trustees certificates of shares in the equity to the property held by them were issued and were transferable in like manner, apparently, as are those of corporations. They are transferable on the books of the trustees, and until that is done it is said that the holder is not a beneficiary of the trust. And it is further urged that it does not appear that the plaintiff is entitled to that relation because the right to transfer upon the books depends upon the provisions of the agreement and by-laws and compliance with them in that respect, and, as they were not put in evidence, the conditions requisite for the purpose do not appear. It is true that the burden was with the plaintiff to show that he was entitled, within the meaning of the agreement and by-laws, to the relation of a transferee or beneficiary, and to have it perfected by transfer on the books. The fact that the shares were transferable and were for sale in the open market enabled the plaintiff to become the holder of those he did purchase. It may be observed that by the terms of the certificates the shares appear to have been "issued upon condition that the holder or any transferee thereof shall be subject to all the provisions of the agreement creating said trust and of the by-laws adopted in pursuance of said agreement, as fully as if he had signed the said agreement." This relation of holder was given the plaintiff when he became such by taking the transfer from Mallaby. It is said that this does not constitute him a transferee, and that transfer on the books was essential to that relation and to make him a beneficiary. By the terms of the certificate, the holder and transferee are alike subject to the provisions of the agreement upon which the trust is founded. But to give him the character of transferee for the purposes of recognition by the trust, the

transfer on the books is requisite, inasmuch as the shares are transferable only upon them. This is for the benefit and protection of the trust. *Bank v. Smalley*, 2 Cow. 770. The holder, as between him and his assignor, having the title, would seem in some sense to be a beneficiary of the trust, since he is subject to all the provisions of the agreement on which it is founded and its by-laws.

The allegations in the complaint of what purport to be the nature, purpose, and effect of the agreement are by the defendants' answer admitted. The fact thus appears that the shares are transferable on the books of the trustees. From that arises the inference that the conditions were applicable alike to all purchasers and holders. And this quality of the shares is recognized by the terms of the certificate and of the blank indorsement for transfer upon the back of and accompanying it, in which, when filled out, appears the name of the person designated by the transferor as his attorney to make the necessary transfer upon the books of the trust in accordance with the regulations thereof, and upon the conditions expressed in the certificate. Those conditions are that the transferee shall be subject to all the provisions of the agreement creating the trust and of the by-laws adopted pursuant to it. The quality of transferability given to the shares would seem to import the right to make it effectual by transfer on the books, as that is treated as essential to accomplish it. And when the plaintiff applied to have it done, it may, in view of what appears in the indorsement upon the certificate as well as in it, be assumed that he sought to have the transfer made to him upon the books of the trust "in accordance with the regulations thereof," and upon the conditions in the certificate. They seem to relate to the manner and effect of doing it, and not to the right to have it done. And therefore, when the essential fact of the transferability of the shares, and the general nature and purpose of the trust as created by the agreement, were made to appear, as they did by the admitted allegations of the complaint, there was nothing wanting in the evidence to establish the right of a holder of shares to effectually become a transferee. And it cannot be presumed that there were in the agreement any negative provisions qualifying such apparent right. If there were any such, it was for the defendants to make it appear. In *Burrall v. Railroad Co.*, 75 N. Y. 211, the question arose upon demurrer to the complaint, which did not allege any facts tending to show that transfer of shares of stock on the books of the company was requisite to perfect it; and it was held that, if it was not, no transfer upon them was necessary for such purpose. The defendants here claim that the holder of shares in the trust is not entitled to recognition as such or as transferee until transfer is made on their books, and accordingly it appears that they declined to treat him as a beneficiary for the purpose of receiving dividends upon the shares he had purchased, but paid them to Mallaby, who was named in the certifi-

cate as such, and as the consequence the plaintiff was not permitted to take any dividends upon, or rights as holder of, the shares otherwise than through him. The denial of the right to transfer upon the books is not consistent with the transferable quality of the shares, which imports that the purchaser taking an assignment of them in a duly formal manner has the right to become a transferee within the meaning of the agreement upon which the trust was formed. And it is difficult to see any substantial distinction in that respect between a holder of such shares and of those of a corporation, which are transferable only upon its books. In such case it is within the equitable power of the court to compel such transfer to be made. *Cushman v. Manufacturing Co.*, 76 N. Y. 365. And unless some further reason appears for the denial of such right, the plaintiff was entitled to such relief in this action.

It is evident from what appears that the ground of the refusal of the defendants to grant the plaintiff's request to make the transfer on the books was personal to him. And they, among other matters, by their answer charge, in effect, that the plaintiff, as competitor of the companies whose stock is held by the defendants in trust, in the business of manufacturing and dealing in oil products, is hostile to them, and that his demand for transfer of his shares on the books of the defendants is not in good faith, but that he seeks to vex and harass them. Upon that subject the trial court found that since in 1876 the plaintiff has been a competitor and rival of the constituent corporations of the Standard Oil Trust, and since its creation he has been such of the trust in the business of oil refining, and has maintained a hostile attitude and been engaged in hostile transactions and proceedings towards those companies, the trust, and the defendants as trustees; that he believes an oil trust ought not to exist, and is opposed generally to trusts of that character; and that since that time, to the commencement of this action, he has been prosecuting or aiding in prosecuting litigations and proceedings in courts as well as before the interstate commerce commission, and before an investigating committee in congress, directed mainly and in effect against such corporations or the trust, for the purposes of securing from the railroads what he considered equal rates with those corporations and such trust for carrying his products. The court also found that the plaintiff, "having for ten or more years been engaged in the oil refining business at Marietta, Ohio, had suffered from discrimination in freight rates for the transportation of oil by various railroad companies against him and in favor of his competitors in the trade; that the litigations instituted by him before the interstate commerce commission against a number of railroad companies were conducted by the plaintiff in good faith and for his protection from unjust discrimination against him on freight charges by them in such transportation; and that, in *quo warranto* suits of the state of Ohio against certain named railroad companies,

it was found as a fact and determined by the referee in each of them that a discrimination in freight rates for transportation of oil existed, greatly to the injury of the business of the plaintiff in this action; and that his connection with those suits "was in good faith, wholly justifiable, and in the protection of his legal rights." The facts so found by the court in the present action had the support of evidence. And it also appears that the plaintiff proposed and offered to sell his oil property and works to the defendants for a sum greatly in excess of their value, and that in December, prior to the creation of the trust, he published a severe pamphlet against the Standard Oil Company, which became one of the constituent companies of the trust. In this publication he manifested his hostility to the company for reasons, as expressed in it, having relation to its rival business methods, which he charged were conducted in a manner and with a purpose to injure and oppress him in his business of like character. In view of all these facts it is urged by the defendants that the motives of the plaintiff in seeking to become a recognized member of the association and beneficiary of the trust were such as to justify the refusal to permit him, by transfer of his shares on its books, to take such relation to it. The question of motive of the plaintiff, so far as it had any essential bearing in the case, was one of fact. And upon that subject the plaintiff testified that he had no hostile purpose in purchasing the shares, and in seeking a transfer of them on the books, but that it was his "idea, if possible, to become a record stockholder in order to enjoy the ordinary legal rights of a stockholder." And the trial court determined that there was nothing in the relations of the plaintiff to the defendants and the trust that should prevent such transfer on the books of the defendants. The plaintiff purchased the shares in the trust with his own money, and he represents no interests or purposes other than his own in this action. His claim is founded upon a right of property lawfully acquired. He, as holder, became subject to the agreement by which the trust was created and its by-laws, and if the transfer to him is perfected he will necessarily continue in such relation of subjection to them. When no discretionary power is reserved to that effect, there is not, nor should there be, any rule of law which will enable a corporation or company whose stock is on sale in the open market to so discriminate between *bona fide* purchasers who invest money in it for their own benefit as to deny to some of them the right to make their title effectual for recognition by the company in the manner provided by it for that purpose. The perfection in such case of the transfer is one of apparent right incident to the purchase, and which the holder who thus acquires the stock in the market is permitted to assume will be effectuated. *Weston's Case*, 4 Ch. App. 20. A discretion in that respect when given or reserved by the articles under or pursuant to which the company is organized, or in any manner requisite to vest the power in those charged with its executive duties, may be effec-

tually exercised. In re Stranton, etc., Co., L. R. 16 Eq. 559, 7 Moak. 581; Moffatt v. Farquhar, 7 Ch. Div. 591, 23 Moak. 731.

In the present case no such discretionary powers seem to have been vested in the trustees. And the purchase of the stock was open to the plaintiff, and fairly made by him. Attached to it was the quality of transferability, and with it was presumptively the right of the beneficial holder to have recognition as such by means of transfer to him on the books of the trust. And this was essential to the protection of his rights derivable from the title. The remedy sought by the plaintiff is within the equitable powers of the court, and is founded upon an indubitable title, as between him and his vendor, and a right in property. In such case it is difficult to see that motive legitimately becomes a subject of consideration unless the relief in view may for that reason result unjustly to others in whose behalf it is resisted, or to the prejudice of their legal rights. *Bloxam v. Railway Co.*, 3 Ch. App. 337; *Ramsey v. Gould*, 57 Barb. 398, and cases there cited. And how that could be the consequence is not evident. The transfer on the books to the plaintiff does not change the identity of the shares, but merely substitutes for one another beneficiary; and the latter is subject to the trust agreement and by-laws. It is true that equitable considerations not recognized in courts of law may control results in courts of equity. And while the granting of relief there is in some sense matter of discretion, it is not an arbitrary or capricious, but a sound judicial, discretion, controlled by established principles in equity, and exercised in view of the circumstances in each case. 3 Pom. Eq. Jur. § 1404. The party seeking relief must come into court with clean hands, as such maxim is understood in its application to that relation. If, for instance, he appears there under false colors, his complaint may for that reason be dismissed. Such was the case of *Forrest v. Railway Co.*, 4 De Gex, F. & J. 126. There a party filed his bill in behalf of himself and all other shareholders of the defendant company to restrain it from running its vessels, etc. It appeared at the trial that he was also a shareholder in a rival company; that by its direction he instituted the suit, and by it was indemnified against costs. The bill was dismissed; and on review the lord chancellor, in holding that the bill was an imposition on the court and sustaining its dismissal, said: "It is not that they persuaded him to institute the suit, nor that they instigated the suit, but that the directors of the other company have directed the suit, and are to indemnify the plaintiff against the costs of it. To use a familiar expression, the plaintiff is the puppet of that company." And he added: "I have nothing to do with the motives of plaintiffs suing in this court. If they come here in a *bona fide* character, the reason for their coming here is a matter beyond the province of a court of justice to inquire into." In the present case the plaintiff's claim to relief is founded upon his own title to the shares in question, and the action was instituted and

prosecuted solely for his own benefit. The relief, by way of transfer of his stock upon the books of the trust, is not of itself unconscionable, nor is it seen how it can be prejudicial to any legal rights of the defendants or any other beneficiary. It is not so much to the perfected title in the plaintiff of the shares that the defendants object, as it is to the relation which he will, as the consequence of the transfer on the books, take to the trust, nor so much to relief in his behalf, as in the alleged apprehension of consequences which may follow its execution; and those are dependent upon the manner he may conduct himself in that relation, whether offensively or otherwise. Whether the plaintiff would seek to do anything other than that which legitimately pertained to the right of a stockholder is entirely speculative; and it is not seen that anything more than that could be accomplished by him in such relation. The objection before mentioned might be made against any holder of stock, and the reason for its support would be one of degree. It has no relation to the plaintiff's legal right founded upon his title; but the court is called upon to make inquiry beyond that, and into his motives or purposes by which his conduct and actions towards the trust may be influenced if he becomes its recognized beneficiary. As said by a learned text writer: "When a court of equity is appealed to for relief, it will not go outside of the subject-matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands." 1 Pom. Eq. Jur. § 399. Assuming that there may be reasons for denial of relief in an action within equitable jurisdiction there sought, and founded upon unquestionable title fairly obtained, they must be such as to make it appear that the relief may result oppressively or to the undue prejudice of the defendant. In the case at bar the plaintiff's title to the stock derived from his purchase is not challenged by the evidence, but the ground of the defense is in the standing of the plaintiff in his relation to the trust of which the defendants are trustees. And this is based upon the fact that his was an attitude of hostility to the Standard Oil Company, and, after its creation, to the Standard Oil Trust, arising out of rivalry in business. This may be a reason for making his recognition as a beneficiary undesirable. But while there may be an inherent power or discretion in the trustees of a corporation or company, when its due protection requires or justifies it, to decline to perfect title to stock by transfer on the books, it cannot be supposed, unless the power is duly reserved to or conferred upon them, that they are for that purpose permitted to discriminate between *bona fide* purchasers, who are owners and holders of its stock having assignment duly and in due form made, to support application for such transfer. And in view of the facts found by the trial court, and the preponderance of evidence, as we view it, there seems to

he no sufficient reason founded upon the plaintiff's relations to the defendants or to the trust or otherwise to fairly justify a denial to him of the rights of any holder in good faith of the stock of the trust. The suggestion that the plaintiff should not have equitable relief because he has an adequate remedy at law for damages requires no consideration, as that question does not appear to have been specifically raised upon the trial or for determination of the trial court. And in view

of the fact that the shares of the trust were unqualifiedly transferable, there seems, for the purposes of the relief, to be no practical or substantial reason to distinguish between them and those of a corporation. There are no exceptions requiring special consideration. These views lead to the conclusion that the order of the general term should be reversed, and the judgment entered on the decision of the special term affirmed. All concur.

Order reversed, and judgment affirmed.

BRIGGS v. SPAULDING.

(11 Sup. Ct. 924, 141 U. S. 132. May 25, 1891.)

Appeal from the circuit court of the United States for the northern district of New York.

Smith (subsequently succeeded by Hadley, Hadley by Movius, and Movius by Briggs) exhibited his bill, as receiver of the First National Bank of Buffalo, in the circuit court of the United States for the northern district of New York, on the 4th of May, 1883, against Reuben Porter Lee, Francis E. Coit, Elbridge G. Spaulding, William H. Johnson, and Thomas W. Cushing, as directors of that bank, and Anne Vought as executrix of John H. Vought, and Frank S. Coit and Joseph C. Barnes, as administrators of Charles C. Coit, former directors. Francis E. Coit died pending the suit, and Caroline E. Coit, executrix, was made a party defendant. The bill alleged the organization of the bank as a national banking association under the acts of congress in that behalf, that it carried on the business of banking from February 5, 1864, to April 13, 1882; that on the 14th of April, 1882, being then insolvent, it suspended business under and by direction of a bank examiner; and that on the 22d of April complainant was appointed receiver by the comptroller of the currency, qualified April 26th, and took possession of the bank's books, records, and assets of every description. That on December 7, 1863, at a preliminary meeting of the subscribers to the stock of the bank, certain articles of association were duly adopted and executed, a copy of which was annexed; that these articles remained unchanged, except that the number of directors was reduced from nine to five; that by-laws were adopted by the board of directors December 13, 1863, a copy of which was annexed, and continued unaltered from thence forward; and that on January 7, 1879, at a meeting of the directors, a resolution was adopted requiring the directors to meet regularly at the bank once in each month to look after the affairs of the bank, and transact such business as might come before them. It was further alleged that defendant Lee was a director from January 12, 1877, to April 14, 1882; that defendants Spaulding and Johnson were directors from January 10 until April 14, 1882, "except as the defendant Spaulding was disqualified by the sale of his stock on April 11, 1882;" that defendant Francis E. Coit was a director from May 20, 1881, and so remained, except as disqualified by the sale of his stock, April 11, 1882; that defendant Cushing was a director from June 7, 1879, to January 10, 1882, on which day his successor was elected; that John H. Vought was a director from January, 1865, and remained such, except as he was disqualified by the sale of his stock, January 18, 1882; and that Charles T. Coit was elected a director January 11, 1870, and continued to act as such until about December 11, 1881, when he died intestate, and letters of administration were issued to Frank S. Coit and Joseph C. Barnes as administrators. It was further averred that from June 7, 1879, to December 11, 1881, Charles T. Coit was president of the bank, and defendant

Lee its cashier; that down to about October 3, 1881, Charles T. Coit continued in the active discharge of his duties as president, and on that day was given a leave of absence for one year from those duties, and the defendant Lee was made vice-president, and placed in charge of the bank; that Lee also continued to be cashier, and one McKnight was assistant cashier thereof; and that on January 10, 1882, a new board of directors was elected consisting of the defendants Spaulding, Johnson, Francis E. Coit, Lee, and Vought, who elected officers for the ensuing year,—Lee as president, Francis E. Coit as vice-president, McKnight as cashier, and one Bogert as assistant cashier. The bill then charged that down to about October 3, 1881, being the date when the defendant Lee was made vice-president and placed in charge of the bank, "the said bank was solvent, and engaged in a prosperous business; that the capital stock of said bank was one hundred thousand dollars, which was entirely paid up, and was divided into shares of the par value of one hundred dollars each, and that said shares were then salable at not less than one hundred and fifty dollars each, and were actually worth about that sum; that from the time of its organization down to said last-mentioned date the said bank had declared and paid dividends on its said capital stock, amounting in the aggregate to upwards of 285 per cent. thereon; that said bank then had a surplus or reserve fund representing undivided profits of said bank amounting nominally to seventy-four thousand two hundred and seventy-seven dollars and three cents, (\$74,277.03.) and had actually a large surplus;" that on April 14, 1882, the bank was largely insolvent; that its surplus and capital stock had been exhausted; that its total liabilities to its creditors, not including the amount of its capital stock, or other liability to its stockholders as such, amounted to \$1,160,763.77; that its assets were nominally not less than \$1,351,199.69, not including the liability of the stockholders on their stock; that a large portion of such assets were utterly worthless, and that the deficiency then existing in the good assets as compared with its liabilities was not less than \$535,163.42, or about 46 per cent. of the liabilities; that statements of the nominal financial condition of the bank, as shown by its own books, as of the dates October 3, 1881, January 9, 1882, and April 14, 1882, are annexed; but those of January 9th and April 14th fail to show that "any of the bills discounted or cash items, as therein stated, were worthless or uncollectible, or that the said bank had suffered any considerable loss by reason of bad debts or wasteful management, contrary to the facts as hereinbefore and hereinafter stated." The bill further averred that the greater part of the losses of the bank during the period between October 3, 1881, and April 14, 1882, and the consequent failure of the bank, were due to the misconduct of the officers and directors of the bank, and to the failure of the directors to perform faithfully and diligently the duties of their office; and it was particularly alleged that it was the duty of

the directors, "by reason of the nature of their office and of the principles of the common law applicable thereto, and under and by virtue of the provisions of the Revised Statutes of the United States, and of the acts of congress relating to national banks, and of the articles of association and by-laws of the said bank, hereinbefore referred to, diligently, carefully, and honestly to administer the affairs of the said bank; to employ none but honest and competent persons to serve as officers of the said bank; to take from all persons so employed sufficient security for the faithful performance of their duties; to keep correct books of account of all the affairs, business, and transactions of the said bank; to see that the business of the said bank was prudently conducted, and that the property and effects of the said bank were not wasted, stolen, or squandered," etc. It was then charged that the directors utterly failed to perform each and every of their official duties, and during all the period from October 3, 1881, to April 14, 1882, paid no attention to the affairs of the bank, failed to hold or call meetings, or to appoint any committee of examination, or to require bonds, or to make personal examinations into the conduct and management of its affairs and into the condition of its accounts, but allowed the executive officers to manage it without supervision.

The bill further charged that the defendants permitted the reserve of the bank to remain below the amount required by section 5191, Rev. St., and that a large part of the losses of the bank arose from the unlawful extension of its line of discounts, and would have been prevented if the directors had performed their duty and prevented the increase; that on or about November 7, 1881, the surplus and undivided profits had been exhausted, and the capital stock impaired, and this should have been reported to the comptroller, whereby the capital would have been made good, or the said bank would have necessarily been put into liquidation, and further losses thereafter incurred by continuance of its business would have been stopped. It was also asserted that, independently of the provisions of the acts of congress, the directors were trustees for the bank and its stockholders and creditors, and it was their duty to have ascertained whether the bank had sustained losses, and made known the facts and the general condition of the bank and the methods of its management, which duties they neglected and failed to perform, and by reason thereof the bank sustained great losses, amounting in the aggregate to at least \$685,163.42. It was further alleged that it was unlawful for the bank to allow any one person, company, corporation, or firm to become indebted to an amount exceeding one-tenth of the capital stock, excepting by a discount of bills of exchange drawn in good faith, and of business or commercial paper actually owned by the person negotiating it; but that the directors from October 3, 1881, to April 14, 1882, permitted this to be done, and thereby a loss of at least \$556,215.62 was occasioned; that it was the duty of the directors and officers of the bank to make accurate reports

to the comptroller, and they did October 1, 1881, submit a report, and on December 31, 1881, and March 11, 1882, further reports, but the reports dated December 31, 1881, and March 11, 1882, were false and misleading, and particularly in representing that the bank had a surplus fund and undivided profits, amounting to large sums, and an unimpaired capital, and failing in any way to show that the bank had sustained heavy losses; whereas the bank had not at either of the dates any surplus or undivided profits, and its capital stock was exhausted, or largely impaired, on December 31, 1881, and on March 11, 1882, entirely exhausted, by reason of imprudent and careless management, etc.; that by reason of the false and misleading character of the reports the comptroller and stockholders and creditors of the bank were not informed of its actual condition, and failed to take steps to repair the losses or put the bank in liquidation, by reason of which the bank incurred further losses. And further, that it was the duty of the directors who were such from October 3, 1881, to April 14, 1882, to appoint only honest, faithful, trustworthy, experienced, and competent persons as officers of the bank, and to require bond or other security, and remove them if they were incompetent or untrustworthy in the performance of their duties; that during all that period of time the directors then in office elected and appointed to the positions of president, vice-president, and cashier persons who were unfit, untrustworthy, incompetent, and unfaithful, and more particularly in the appointment of Lee as vice-president and president, McKnight and Robert being mere clerks of the bank, and subject absolutely to the control and direction of Lee; that Francis E. Coit never actually assumed or performed any of the duties properly appertaining to the office of vice-president, and was of no value to the bank as one of its executive officers; that, by reason of the foregoing, Lee, was during all the period from October 3, 1881, down to the stoppage of the bank, in absolute control thereof, without any check, oversight, or supervision whatever, which fact was at all times known to the directors of the bank; that Lee was a person of inconsiderable financial responsibility and of insufficient age and experience to qualify him for the position, and it was an act of gross negligence on the part of the directors to trust the entire management of the bank, or even the proper performance of the duties of president, to Lee; that under Lee's management the line of discounts was increased by lending large sums of money on accommodation paper to Lee personally and to members of his family and his personal friends, and to other persons with whom the said Lee was engaged in speculations, all of whom were of little or no financial responsibility, many of the loans being in excess of the amount allowed by the acts of congress; that Lee failed to take sufficient security for the loans, and in many cases none at all; that Lee himself borrowed large sums of money upon his own notes and by overdrawing his account, and an examination of the books would have disclosed the fact, and that Lee was

lending the funds of the bank to individuals of insufficient responsibility, and otherwise improperly managing the affairs of the bank and demonstrating his unfitness for the position; and transactions with one Hall were set forth at length, and other improvident transactions; and it was charged that by reason of Lee's reckless, improvident, and criminal conduct the bank, "which had been solvent and in a fair financial condition on the said 3d day of October, 1881, became insolvent, and was compelled to go into liquidation on the 14th day of April, 1882, as hereinbefore alleged;" that all of his acts in effecting the loans appeared on the books, and might have been discovered by the directors by a proper examination, and it was owing to their negligence and inattention to duty that Lee was permitted to continue in office and to continue his mismanagement of the bank's affairs until it had become insolvent. Therefore the complainant insisted that the directors were responsible for all losses sustained by the bank through the negligence and wrongful conduct of Lee.

It was further alleged that on January 18, 1882, Vought sold his stock in the bank, and that Spaulding and Francis E. Coit sold their stock on April 11, 1882, and that thereby each of them became disqualified to act as a director, but none of them resigned. That on April 14, 1882, the stock was held as follows: Lee, 170 shares; Hall, 578 shares, purchased April 11, 1882; Prosser, 50 shares; Barnum, 30 shares; Marshall, 10 shares; Mr. Rochester, 10 shares, and Mrs. Rochester, 12 shares, all purchased in January, 1882; Gluck, 20 shares, purchased in December, 1881, and 10 purchased in January, 1882; Mrs. Stagg, 100 shares, held since 1864; and defendant Johnson, 10 shares, purchased January 9, 1882. That all the stockholders, except Lee, Hall, and Johnson, were ignorant of the bank's condition, and innocent of all participation in the negligent and wasteful management of the bank, and have been subjected, by reason of the negligence, inattention to duty, and wrongful acts of the directors, to a loss equal to double the amount of the par value of their shares of stock, together with the amount of their proportionate interest in the surplus and undivided profits, which their respective interests in the stock of the bank would have brought them if the bank "had continued in the condition in which it was on the said 3d day of October, 1881." And complainant claimed to be entitled to sue for and recover all the losses and damages which the bank, its stockholders, and creditors had sustained in the premises.

The bill prayed for answers, the oath not being waived, and for general relief, and was taken as confessed against the defendants R. P. Lee and Anne M. Vought, as executrix of John H. Vought. Spaulding, Johnson, Cushing, the executrix of Francis E. Coit, and the administrators of Charles T. Coit answered severally. These answers denied the jurisdiction of the court, and denied that the receiver could maintain the action as one for equitable relief, and insisted that the remedy, if any, was at law. The answer of the

executrix and the administrators denied that the cause of action survived. Cushing claimed that his responsibility, if any, terminated upon the sale of his stock September 24, 1881. The defense was set up on behalf of Charles T. Coit that he could not be held responsible from October 3 to December 11, 1881, when he died, because of his ill health and absence on the leave granted to him on October 3d; and it was insisted on behalf of Francis E. Coit that he should be excused for failure to attend to the business of the bank by reason of his ill health, so far as he did not attend to it, if responsible at all. The same defense was made on behalf of Johnson, with the added fact of serious illness in his family; and the age and practical retirement from business of Mr. Spaulding were also set forth. All denied any intentional wrongdoing, or omission of duty, or legal responsibility for the losses. All asserted their confidence in Lee's capacity and integrity and their belief in the sound financial condition of the bank. All denied any neglect of duty in the premises, and it was denied that any special losses occurred from January 10, 1882, to the stoppage of the bank; and asserted on behalf of Spaulding and Francis E. Coit that if any loss happened between the 11th of April and the 14th they could not be held responsible under the bill as framed, as they had parted with their stock and thereby ceased to be directors. Voluminous evidence was taken, and upon the hearing of the cause the bill was dismissed as to defendants Spaulding, Johnson, and Caroline E. Coit, executrix, without costs, and as to defendants Cushing and the administrators of Charles T. Coit, with costs. From this decree an appeal was prosecuted to this court. The opinion of the circuit court will be found in 30 Fed. Rep. 298. The circuit court held that defendant Cushing ceased to be a director of the bank prior to the occurrence of the losses as alleged, and owed no duty in that behalf; and that Charles T. Coit's absence on leave from October 3, 1881, to his death, December 11, 1881, exonerated him; and that defendants Spaulding, Johnson, and Francis E. Coit were not liable under the statute, because they did not come within its provisions, nor by the common law, for by that each was liable only for his own miscarriages, and none were shown.

Mr. Chief Justice FULLER, after stating the facts as above, delivered the opinion of the court.

In the language of appellant's counsel, the bill was framed upon the theory of a breach by the defendants as directors "of their common-law duties as trustees of a financial corporation, and of breaches of special restrictions and obligations of the national banking act." And it is claimed that the defendants should have been held liable for the losses which occurred through loans of the bank's funds and moneys during their term of office as directors to Lee, his father, his wife, and certain designated persons, which were the principal losses, though there were others smaller in amount for which they were responsible. This liability is alleged to have been incurred by Lee for all loans from October 3,

1881, until April 14, 1882; by F. E. Coit for all losses through the mismanagement of the bank from October 3, 1881, until April 14, 1882, which could have been prevented by reasonable diligence and care on the part of the directors; by John H. Vought on the same basis and for the same time; by Charles T. Coit from October 3 to December 11, 1881; by Cushing from October 3, 1881, to January 10, 1882, unless his liability terminated with the transfer of his stock on the books of the bank; by Spaulding and Johnson from January 10 to April 14, 1882. It is contended as an independent proposition that each of the defendants should have been held liable for all loans made during the periods before mentioned when the loans exceeded 10 per cent. of the capital of the bank, in violation of section 5200, Rev. St., and also for all loans made while the bank's reserve was below 15 per cent. of its deposits, in violation of section 5191, Rev. St., where such loans resulted in losses; and finally, that each of the defendants should have been held absolutely liable for all losses of the bank incurred by carrying on its business after its capital became impaired or exhausted, and the bank insolvent.

Under section 5136, Rev. St., national banking associations were empowered: "*Fifth.* To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers; define their duties, require bonds of them, and fix the penalty thereof; dismiss such officers, or any of them, at pleasure, and appoint others to fill their places. *Sixth.* To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed. *Seventh.* To exercise by its board of directors or duly-authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes, according to the provisions of this title." By section 5145 the affairs of each association were to be managed by not less than five directors, to be elected at meetings to be held in January, and to hold office for one year and until their successors were elected and had qualified; and by section 5146 every director was obliged to own in his own right at least 10 shares of the capital stock, and, if he ceased to own the required number of shares, or became in any other manner disqualified, he thereby vacated his place. By section 5148 any vacancy in the board was to be filled by an appointment by the remaining directors, and any director so appointed held his place until the next election. Section 5147 provided that "each director, when appointed or elected, shall take an oath that

he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title; and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this title," etc. By section 5211 every bank was required to make not less than five reports during each year, under the oath of the president or cashier, and attested by at least three of the directors, exhibiting in detail the resources and liabilities of the bank, and the comptroller could call for special reports. Under section 5240 the appointment of bank examiners was provided for, with power to make thorough examination into the affairs of any bank, and in doing so to examine any of the officers and agents on oath, and make a full and detailed report to the comptroller. Section 5239 is in these words: "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency in his own name, before the association shall be declared dissolved. And in cases of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation." When the banking act was originally passed, and this bank was organized, that which is now subdivision 7 of section 5136 did not contain the words "or duly-authorized officers or agents, subject to law;" that is, the original act provided that the board of directors might exercise all such incidental powers as should be necessary to carry on the business of banking as there specified, but said nothing about the exercise of those powers by the bank officers or agents. The words were inserted in the Revised Statutes 1873-74.

The articles of association of the First National Bank of Buffalo were framed under section 5133, Rev. St., and provided for an annual meeting of the stockholders; that the board of directors should appoint a president, cashier, and such other officers and clerks as might be required to transact the business of the association, and define their respective duties, and by their by-laws specify by what officers of the association or committee of the board the regular banking business of the association should be conducted, and empowered the board of directors to require bonds of the officers. The by-laws of the institution were adopted December 13, 1863, and had relation to the then powers of the board of directors. By section 13 a standing committee was provided for, to be known as the "exchange committee," consisting of the president and

three directors, appointed by the board every six months, which had power to discount bills, notes, etc., and was required to report at the regular board meetings. Under section 19 a committee was to be appointed every three months to examine into the affairs of the bank, and report to the board. Regular meetings were required to be held monthly. It is alleged that on the 7th of January, 1879, the board requested itself to meet thereafter regularly on the 1st of every month, "to look after the affairs of the bank," etc. It appears that the provisions of the by-laws were not observed, at least after the amendment in subsection 7, § 5136, and that the management of the bank was left almost entirely to the officers. No exchange committee nor examination committee was appointed, and the meetings of the board were infrequent and perfunctory. For years prior to the failure—14 at least—the business of the bank had been conducted by the president.

It is not contended that the defendants knowingly violated, or permitted the violation of, any of the provisions of the banking act, or that they were guilty of any dishonesty in administering the affairs of the bank; but it is charged that they did not diligently perform duties devolved upon them by the act. Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act, although, if any director participated in or assented to any violation of the law by the board, he would be individually liable. The corporation, after the amendment of 1874, had power to carry on its business through its officers; and although no formal resolution authorized the president to transact the business, yet, in view of the practice of 14 years or more, we think it must be held that he was duly authorized to do so. It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them. Whether they were responsible for any neglect of the board as such, or in failing to obtain proper action on its part, is another question. Indeed, it is frankly stated by counsel that, "although special provisions of the statute are quoted and relied upon, these do not create the cause of action, but merely furnish the standard of duty and the evidence of wrong doing;" and section 556, Mor. Priv. Corp., is cited, which is to the effect that "the liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule, which

renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material, under these circumstances, merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed." It is perhaps unnecessary to attempt to define with precision the degree of care and prudence which directors must exercise in the performance of their duties. The degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention, or in neglecting to use proper care in the appointment of agents. Mor. Priv. Corp. § 551 et seq., and cases. Bank directors are often styled "trustees," but not in any technical sense. The relation between the corporation and them is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract, and not of trust. But, undoubtedly, under circumstances, they may be treated as occupying the position of trustees to *cuiusque* trust.

In *Percy v. Millaudon*, 8 Mart. (N. S.) 68, which has been cited as a leading case for more than 60 years, the supreme court of Louisiana, through Judge PORTER, declared that the correct mode of ascertaining whether an agent is in fault "is by inquiring whether he neglected the exercise of that diligence and care which was necessary to a successful discharge of the duty imposed on him. That diligence and care must again depend on the nature of the undertaking. There are many things which, in their management, require the utmost diligence and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks, from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties. It is not contemplated by any of the charters which have come under our observation, and it was not by that of the Planters' Bank, that they should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers, on whom compensation is bestowed for the employment of their time in the affairs of the bank, have the immediate management. In relation to these officers the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to

their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."

Spring's Appeal, 71 Pa. St. 11, was the case of a bill filed by Spring, as assignee of a trust company, against its directors and others, to compel them to make good losses sustained by the depositors on the ground of fraudulent mismanagement of the affairs of the company; and Judge SHARSWOOD, speaking for the court, said: "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any other bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries,—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more. * * * We are dealing now with their responsibility to stockholders, not to outside parties,—creditors and depositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported cases, although there are many *dicta* not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means that their responsibility is limited to these cases, and that there might not exist such a case of negligence, or of acts clearly *ultra vires*, as would make perfectly honest directors personally liable. But it is evident that gentlemen selected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentlemen of character and responsibility would be found willing to accept such places." And see *Association v. Coriell*, 34 N. J. Eq. 383; *Hodges v. Screw Co.*, 1 R. I. 312; *Wakeman v. Dalley*, 51 N. Y. 27. It was in this aspect that Lord HATHERLEY remarked in *Land Credit Co. v. Lord Fermoy*, L. R. 5 Ch. 763: "Whatever may be the case with a trustee, a director cannot be held liable for being defrauded. To do so would make his position intolerable." And the same view is expressed by Sir GEORGE JESSEL, M. R., in his opinion in *Re Dean Coal Min. Co.*, 10 Ch. Div. 450, where he says: "One must be very careful in administering the law of joint-stock companies not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any

property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Willful default no doubt includes the case of a trustee neglecting to sue, though he might by suing earlier have recovered a trust fund. In that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle." The theory of this bill is that the defendants are liable, not to stockholders nor to creditors, as such, but to the bank, for losses alleged to have occurred during their period of office, because of their inattention. If particular stockholders or creditors have a cause of action against the defendants individually, it is not sought to be proceeded on here, and the disposition of the questions arising thereon would depend upon different considerations.

In *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. Rep. 162, it was ruled that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping; and whether that negligence existed or not is a question of fact for a jury to determine, or to be determined by the court where a jury is waived. And, further, that the reasonable care which the bailee of another's property intrusted to him for safe-keeping without reward must take, varies with the nature, value, and situation of the property, and the bearing of surrounding circumstances on its security. That was a case of persons engaged in the business of banking receiving for safe-keeping a parcel containing bonds, which was put in their vaults. They were notified that their assistant cashier, who had free access to the vaults where the bonds were deposited, and who was a person of scant means, was engaged in speculations in stocks. They made no examination of the securities deposited with them, and did not remove the cashier. He stole the bonds so deposited; and it was held that the bankers were guilty of gross negligence, and were liable to the owner of the bonds for their value at the time they were stolen. And Mr. Justice FIELD, delivering the opinion, said: "Undoubtedly, if the bonds were received for safe-keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions." No one of the defendants is charged with the misappropriation or misapplication of or interference with any property of the bank nor with carelessness in respect to any particular property, but with the omission of duty which,

if performed, would have prevented certain specified losses, in respect of which complainant seeks to charge them.

The doctrine that one trustee is not liable for the acts or defaults of his co-trustees, and while, if he remains merely passive, and does not obstruct the collection by a co-trustee of moneys, is not liable for waste, is conceded; but it is argued that if he himself receives the funds, and either delivers them over to his associate, or does any act by which they come into the possession of the latter or under his control, and but for which he would not have received them, such trustee is liable for any loss resulting from the waste, (*Bruen v. Gillet*, 115 N. Y. 10, 21 N. E. Rep. 676; 2 Pom. Eq. Jur. §§ 1069, 1081,) and that this case comes within the rule as thus qualified. Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part. And in this connection the remarks of Mr. Justice BRADLEY in *Railroad Co. v. Lockwood*, 17 Wall, 357, 382, may well be quoted: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called 'gross' negligence. If very great care is due, and he fails to come up to the mark required, it is called 'slight' negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called 'ordinary' negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfillment of various contracts, we think they go too far, since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed." In any view the degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is therefore ultimately a question of fact, to be determined under all the circumstances. The alleged liability of the defendants is such

that the facts must be examined as to each of them.

As to the defendant Cushing, the evidence establishes that on the 24th of September, 1881, he resigned his office as a director of the bank verbally to Charles T. Coit, the then president, and on that day sold to Mr. Coit the 10 shares of the capital stock of which he was the owner. The books of the bank show the sale and transfer as of September 24, 1881, but the certificate and power of attorney authorizing the transfer were apparently not delivered until October 7th, when the money was paid, being \$125 per share. According to the recollection of Lee, the entry in the transfer book was not made until November, when he thinks the stock was sent up to him by Mr. Coit from New York city, but he was informed of Mr. Cushing's resignation of his position as director on October 3, 1881, by Mr. Coit, who was then president of the bank. This was brought out upon cross-examination, after complainant had examined Lee in chief in relation to Cushing's resignation, and the vacancy created by the transfer of his stock. Cushing testified that the transfer was made on September 24, 1881, and we cannot hold that the circuit court erred in concluding that that testimony, coupled with the evidence of the record, outweighed the testimony of Lee, which was, indeed, of minor importance if the resignation had taken effect as stated. It is objected that the evidence of Cushing was incompetent, but we do not find that this objection was made when Cushing was examined and cross-examined as a witness. Nor do we think the evidence incompetent as against complainant. Section 853, Rev. St.; Code Civil Proc. N. Y. § 829; *Bank v. Jacobus*, 109 U. S. 275, 3 Sup. Ct. Rep. 219; *Snyder v. Fielder*, 139 U. S. 478, 11 Sup. Ct. Rep. 583. In *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. Rep. 61, it was held that where stock had been sold, and the certificate, with power of attorney for transfer duly executed in blank, delivered to the president of the bank, the responsibility of the original stockholder terminated. And Mr. Justice HARLAN said for the court: "It was suggested in argument that the defendants should have seen that the transfer was made. But we were not told precisely what ought to have been done to this end that was not done by them and their agents. Had anything occurred that would have justified the defendants in believing, or even in suspecting, that the transfer had not been promptly made on the books of the bank, they would, perhaps, have been wanting in due diligence had they not, by inspection of the bank's stock register, ascertained whether the proper transfer had in fact been made. But there was nothing to justify such a belief or to excite such a suspicion. Their conduct was, under all the circumstances, that of careful, prudent business men; and it would be a harsh interpretation of their acts to hold (in the language of some of the cases, when considering the general question under a different state of facts) that they allowed or permitted the name of Whitney to remain on the stock register as a share-

holder. We are of opinion that, within a reasonable construction of the statute, and for all the objects intended to be accomplished by the provision imposing liability upon shareholders for the debts of national banks, the responsibility of the defendants must be held to have ceased upon the surrender of the certificates to the bank and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on the books of the association to the purchaser." Tested by this rule, the conclusion of the circuit court on the matter was correct. The resignation was orally tendered to the president, and manifestly accepted by him, since the sale of the stock was made at the same time, and the president informed the cashier of the fact a few days afterwards. Putting a resignation in writing is the more orderly and proper mode of procedure; but if the fact exists, and is adequately proven, the result is necessarily the same, as applied to this case. We do not understand that because section 5145, Rev. St., provides that directors shall hold office for one year and until their successors have been elected and have qualified, this prohibits resignations during the year; and while the banking law is silent as to the time when and the method by which the office of director may be resigned, we think that leaves it as at common law, and that this resignation was effective. *Rex v. Mayor*, 1 Ld. Raym. 563; *Olmsted v. Dennis*, 77 N. Y. 378; *Chandler v. Hoag*, 2 Hun, 613, 63 N. Y. 624; *Bruce v. Platt*, 80 N. Y. 379; *Port Jervis v. Bank*, 96 N. Y. 550. Having sold his stock September 24th, and resigned his position, Mr. Cushing did not thereafter act as a director, and was not present at the meetings of October 3 and December 17, 1881, and January 10, 1882. The bill alleges that the bank was entirely solvent on October 3d, and engaged in a prosperous business, with a large surplus, the shares commanding a premium of 50 per cent. Upon this question there was no issue made as between complainant and Cushing, and while, as hereafter stated, we believe the bank to have been hopelessly insolvent at that date, the case must be determined upon the allegations of the bill, and there is nothing in the record to cast the least suspicion upon the good faith of the transaction. There is no charge of breach of trust prior to the resignation and sale, and the decree as to Cushing must be affirmed.

Charles T. Coit had been the first cashier of the bank, and was elected a director in 1870. He was its president from June, 1879, to the date of his death on December 11, 1881. On October 3, 1881, a meeting of the board of directors was held, at which Charles T. Coit, Francis E. Coit, Vought, and Lee were present. Cushing, who had resigned on the 24th of September, was absent. It appears that at this meeting a resolution was adopted giving Charles T. Coit, the president, a leave of absence on account of ill health for one year. No one was elected president prior to January 10, 1882, in his place. There is no doubt of the severity of his illness and the necessity for his absence; but it is contend-

ed that the resolution referred to absence as president, and not as director, and that no power existed to allow leave of absence to a member of the board, and so that the resolution should be limited to excuse him from attendance at the bank, but not to permit him to leave the city; and it is said that if he wished to be absolved from responsibility while absent in search of restored health, he should have resigned. If such were the rule, we apprehend that moneyed corporations would find extreme difficulty in obtaining proper persons to act as directors. But it is not the rule. Mr. Coit was guilty of no want of ordinary care in acting upon the leave of absence, and is not to be held because he did not resign. Invalids are permitted to indulge in the hope of recovery, and are not called upon by reason of illness to retire at once from the affairs of this world, and confine themselves to preparation for their passage into another. There was here no neglectful abandonment of duty from October 3d to December 11th, and the decree in favor of the administrators of Charles T. Coit was properly rendered.

We pass, then, to the inquiry as to the liability of defendants Spaulding and Johnson. In what did their negligence consist, and were losses occasioned by that negligence, and what losses? Their conduct is to be judged not by the event, but by the circumstances under which they acted. Johnson had done business with the bank since 1865, and from 1879 had been a customer individually, and also connected with several firms who kept accounts with the bank and had a line of discounts there. When requested by Lee in December, 1881, to fill one of the vacancies created by the resignation of Cushing and the death of Charles T. Coit, he objected to doing so, on the ground of want of knowledge of the banking business, and the fact that the nature of his own business carried him away considerably from the city; but finally, upon being informed that the bank was in prosperous condition, and that much of his time would not be required, accepted. After the 10th of January he was in the bank from time to time, and inquired about its business, and was told by Lee that everything was going on well. At Lee's request he signed the report of March 11, 1882, which had been sworn to by the cashier, and signed by Francis E. Coit before Johnson signed it. He was informed that the report contained a correct exhibit of the condition of the bank as shown by its books; and Lee testified that it did, and that, if incorrect, the error could not have been detected by an examination of the books and papers of the bank. Very soon after the 10th of January, Mrs. Johnson became perilously ill, and Johnson, through the extra strain put upon him, fell himself into such a physical and mental condition as incapacitated him from properly attending to business. Spaulding had had a large and various experience, and, as a member of congress, drafted the original national banking act, was president of a leading bank, and connected with several financial corporations, and testified that the practice of banks, so far as he knew, all

over the country, was to a large extent to carry on the business through their executive officers, especially where these officers held a majority of the stock; that when he purchased his stock he believed this bank was being conducted by its duly-authorized officers, and his judgment was that his duty as a director was discharged if he attended the meetings to which he was summoned, performed such duties as were specifically required of him, and gave such advice as was asked from him; that his summers were spent upon his farm in the country; that in 1882 he was 72 years of age; that he was in a measure retired from business, so that he gave very little attention to the affairs of his own bank, but was ready to give any advice or suggestions when called upon for that purpose upon any special matters; that for many years it had been the practice in the corporations in which he was a director to treat him as an advisory director, and not as a director occupied in the daily management of their affairs; and that he accepted the position upon the understanding that he should occupy this relation. He set forth in his answer, which was made under oath, as required by the bill, and which was, therefore, evidence, that it was well known to the stockholders and most other persons dealing with the bank that he had retired from active pursuits, and that it was only expected of him by the stockholders and the depositors of the bank that he should more especially perform such duties as he should be specifically required to perform by its board of directors and officers, and that he should impart such advice in its management as he should be asked to give in the course of its business. He further stated that he never received or expected to receive any compensation or benefit from the bank as a director; that Lee was the owner of a large majority of the stock; that, as is customary in such cases, Lee had assumed, to a large extent, the management and control of the bank, with the knowledge of the other directors, and with the knowledge of the stockholders of the bank, and most, if not all, of the depositors therein; and upon information and belief "that long before he became a stockholder of said bank, and up to the time he became such stockholder, and while he was such stockholder, it was understood by all persons having dealings with the said bank that the said Lee practically administered the affairs thereof, as its chief executive officer."

A large amount of evidence was given tending to show that nearly, if not all, of the present creditors of the bank were familiar with the fact that the business of the bank was conducted, so far as its discounts and other banking business was concerned, without the intervention of the board of directors or a committee of that board. Mr. Spaulding further testified that he never received any notice to attend directors' meetings; that he had no actual knowledge of the by-laws; that he was not appointed on any committee, or requested to perform any duty; that he supposed the bank was in a prosperous condition down to the day of its failure; that he had confidence in Lee's capacity

and integrity, and that the business of the bank was being conducted safely and prosperously under his management; that he talked with Lee in regard to the affairs of the bank, who told him the bank was in good condition; that he examined the reports made to the comptroller, December 31, 1881, and March 11, 1882, and saw by them that everything was going right; and that he knew the duty of making an examination had not been devolved upon him; and further stated that it would have taken a month to have ascertained whether the reports to the comptroller were correct, and that it was the duty of the comptroller and the bank examiner to do so. The evidence fairly establishes that this bank was in good credit up to the time of its failure. It had been in existence for 18 years; had been prosperous; had paid dividends regularly down to and into 1881, and its stock had for years stood far above par,—at 50 per cent. above, October 3, 1881, according to complainant. Neither the defendants, nor the bank's customers, nor the community, appear to have entertained the least suspicion as to its solvency. The losses which it is claimed rendered it insolvent, and for the recovery of which losses this action was instituted, occurred by reason of the discounting by Lee of the paper of persons engaged with him in outside business and speculations, who were not adequately responsible for their engagements. The vice in the situation lay, not in the reports nor in the books, upon their face, but in the unreliability of the bills receivable. Were these defendants guilty of negligence in allowing Lee to remain in charge of the bank? Would they have been so guilty if they had put him in charge for the first time on the 10th of January? It appears that Lee went into the employment of this bank in 1868, being then 18 years old, and so remained until April 14, 1882, occupying in succession the positions of messenger boy, book-keeper, teller, assistant cashier, cashier, vice-president, and president. He was the son of an old and well-known citizen of Buffalo, a graduate of its high school, was or had been one of the trustees and treasurer of a leading church in Buffalo, treasurer of the Young Men's Christian Association, and a member of the Young Men's Association. His general character was good, his reputation for integrity and financial capacity excellent, and he possessed the confidence of his fellow-citizens. Upon the 10th of January, 1882, he was the owner of two-thirds of the stock of the bank, and had apparently a greater interest than any other person in seeing that its affairs were so managed that its capital would remain unimpaired. The business of the bank had been conducted for years by the president, assisted by the other executive officers, and it had seemingly been well conducted. Lee was selected to assume the management when Charles T. Coit retired in October, 1881, by the then board of directors, and there was nothing to indicate that the choice was not a proper and fit one. We think no jury would have been justified in finding defendants guilty of negligence in retaining Lee in the management of the bank. Nor was there

any violation of law in permitting him to conduct its business, for he was duly authorized to do so under the provisions of the act. We do not mean that this dispensed with reasonable oversight by the directors, but that belongs to a different branch of inquiry.

But it is contended that defendants should have insisted on meetings of the board of directors, or had special meetings called, and at those meetings or otherwise made personal examination into the affairs of the bank, and that, had they done this, they would have discovered the condition of the bank, and prevented losses occurring subsequently to the 10th of January. Here, again, it should be observed that even trustees are not liable for the wrongful acts of their co-trustees unless they connive at them or are guilty of negligence conducive to their commission, and that Lee and Vought had long been directors. It is shown that for 14 years the affairs of the bank had been left wholly with the president and cashier, and that from the 10th of January to the stoppage of the bank the business was done as it had always been done. No bonds had been required of the officers for at least 14 years. No meetings were held by the board of directors except the annual meeting and meetings to declare dividends, or on some special occasion. No exchange committee had been appointed since 1875; and no committees had ever been appointed to examine into the bank's affairs, question its cashier, or compare its assets and liabilities with the balances on the general ledger. So that this manner of conducting the business had been sanctioned by long-continued usage, and the evidence tends to show that the method pursued must have been and was well known to many of its customers, including those who were creditors at the time of its failure, as well as its stockholders. All this was not as it should have been, and ought not to be countenanced; but the facts have an important bearing on the question whether Spaulding and Johnson should be held liable because they did not at once endeavor to change the entire methods of doing business, and enter upon an exhaustive investigation of the assets. Would ordinarily prudent and diligent men have done so under similar circumstances? It is not so much a question of holding meetings as of examination, searching, and thorough; an overhauling of the bills receivable, and the detection of the uncollectible indebtedness which rendered the bank insolvent. Were Spaulding and Johnson guilty of negligence in that they did not make such an examination within 90 days after they became directors, in the teeth of the assurances of Lee, in whom they reposed confidence, who had been connected with the bank for so many years, and who owned two-thirds of the stock? The kind of examination required is indicated by the fact that, although the evidence leaves it beyond question that the bank was insolvent on the 3d of October, 1881, its capital and surplus wholly exhausted, and losses incurred for thousands of dollars beyond that amount, complainant, after a year's close investigation, alleges that the bank was

at that time solvent, engaged in a prosperous business, with an unimpaired capital and a surplus, and with stock standing at 50 per cent. above par. Indeed, the books and papers of the bank were kept in such a condition that even the cashier swore that he did not suspect anything wrong in the management until April 10, 1882. There were, it is true, two transactions in violation of the provisions of the banking law, not entered on the books, and to which the learned circuit judge refers. On the 18th of January, 1882, Lee took \$23,680 from the cash of the bank, which he replaced by a slip of paper, with the amount on it, in the cash drawer. This was called a "cash item," and was thereafter counted as cash. It was reduced from time to time, until on April 12th, it was \$12,405. On February 15th he took \$16,737.50 in the same way from the bank's cash, and placed a similar slip in the drawer. This was reduced by April 12th to \$11,435. These transactions were not concealed from the cashier and subordinate officers of the bank, yet, in view of Lee's position and character, excited no suspicion, and the directors were not informed of the facts. Again, under section 5200, Rev. St., the total liabilities for money borrowed to any national banking association of any person, company, etc., should at no time exceed one-tenth part of the capital stock, but the discount of bills of exchange drawn in good faith against actually existing values, and of commercial or business paper actually owned by the person negotiating the same, is not to be considered as money borrowed. This provision was grossly violated; but, while Lee testified in chief for complainant that the directors could have ascertained from an examination of the books, papers, and notes whether or not the loans, which exceeded \$10,000, were for discounts of bills of exchange or business paper, within the exception, he stated, on cross-examination, that it would not have been possible, from an inspection of the paper simply, or an examination of the books of the bank, or both, to have made the discovery, thus drawing a recognized distinction between bare inspection and thorough examination, a distinction also applicable to loans when the reserve was below 15 per cent. of the deposits, and generally. We are impressed by the evidence with the conviction that a cursory glance would not have been enough.

Would it not have been the exercise of an extraordinary degree of care if these defendants had insisted within the first 90 days upon making such an examination? Certainly it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agents in business transactions, and that the degree of watchfulness must be proportioned to that presumption. "I know of no law," said Vice-Chancellor McCoun, in *Scott v. Depeyster*, 1 Edw. Ch. 513, "which requires the president or directors of any moneyed institution to adopt a system of espionage in relation to their secretary or cashier or any subordinate agent, or to set a watch upon all their actions. While engaged in the performance of the general duties of their station, they must be supposed to

act honestly until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason. Should any circumstance transpire to awaken a just suspicion of their want of integrity, and it be suffered to pass unheeded, a different rule would prevail if a loss ensued. But, without some fault on the part of the directors, amounting either to negligence or fraud, they cannot be liable." Nor is knowledge of what the books and papers would have shown to be imputed. In *Wakeman v. Dalley*, 51 N. Y. 32, Judge EARL observed in relation to Dalley, sought to be charged for false representations in the circular of a company of which he was one of the directors: "He was simply a director, and as such attended some of the meetings of the board of directors. As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation, like a railroad, or banking or insurance company, is one of constant peril. The affairs of such a company are generally, of necessity, largely intrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should." And so Sir GEORGE JESSEL, in *Hallmark's Case*, 9 Ch. Div. 332: "It is contended that Hallmark, being a director, must be taken to have known the contents of all the books and documents of the company, and so to have known that his name was on the register of shares for fifty shares. But he swears that in fact he did not know that any shares had been allotted to him. Is knowledge to be imputed to him under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered in the books, and I see no reason why knowledge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of shareholders? I know no case, except *Ex parte Brown*, 19 Beav. 97, which shows that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the

knowledge which it is sought to impute to him in this case."

We are of opinion that these defendants should not be subjected to liability upon the ground of want of ordinary care, because they did not compel the board of directors to make such an investigation, and did not themselves individually conduct an examination during their short period of service; or because they did not happen to go among the clerks, and look through the books, or call for and run over the bills receivable. Of course a thorough examination would have ascertained that the bank ought to be put into liquidation at once. Nothing that could have been done on or after the 10th of January would have saved it. Insolvent on the 3d of October, its condition had changed for the worse January 10th. And it is worthy of notice that the persons or firms, losses by reason of advances to whom are named in argument as the main cause of the failure and basis of recovery, were all debtors of the bank October 3, 1881, some of them for a long time before, and all debtors January 10, 1882, and the figures of the experts seem to show that the amounts due from them at the latter date were not many thousand dollars greater in the aggregate on April 14, 1882. The indebtedness of Lee, his father, and his wife was nominally less, while that of some of those through whom he appears to have conducted his operations was larger. According to him, such increase in poor assets as there was was substantially attributable to increased loans made in the hope of carrying through parties already in debt to the bank, and he says that there was really no material change in the character of the paper between January 9 and the stoppage of the bank. But it is unnecessary to do more than refer to these matters as indicative of the uncertainty as to what losses would have been prevented if the bank had been wound up earlier than it was, and as to the point of time to which the supposed liability should be referred if an interlocutory decree had been entered. We are not disposed, therefore, to reverse the decree as to defendants Spaulding and Johnson, and, although the case of Francis E. Coit was in some aspects different, and particularly in that he was a director for a longer period, we think it should take the same course. He was elected a director May 20, 1881, to fill a vacancy created by the death of George Coit. He was at the time an invalid, and by reason of his infirmity in health unable to transact business, at least with facility. His co-directors at the time of his election were Charles T. Coit, Vought, Cushing, and Lee. He was re-elected January 10, 1882. The evidence shows that he had for many years been afflicted with rheumatism. So far as appears, Lee, Vought, and Cushing were in good health, although Charles T. Coit was not, but the latter continued in the management of the bank down to the 3d of October. While it may be said that Francis E. Coit should not have accepted the position of director, and should not have allowed himself to be re-elected, yet upon this question of passive negligence the rule would be an exceedingly rigorous one which made no allowance for the per-

son charged under such circumstances; and upon the whole we do not feel called upon to question the decision as to him. It must be remembered that in cases turning upon questions of fact, in order to reverse, we must be prepared to hold that the findings were not justified, and this we cannot do, taking into consideration all the facts contained in this voluminous record, which we have attempted thoroughly to explore. The turning point, so far as defendants Spaulding and Johnson are concerned, (and we include with them Francis E. Coit,) is whether under all the circumstances they were guilty of negligence, producing any of the losses in question, not affirmatively, but because they did not prevent them; and this depends upon whether they should have made an examination of the books and assets of the bank, and whether, if they had, that would have enabled them to discover such a condition of affairs as would have resulted in placing the bank in liquidation, and whether thereby some of the losses would have been averted. Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention; but in this case we do not think these defendants fairly liable for not preventing loss by putting the bank into liquidation within 90 days after they became directors, and it is really to that the case becomes reduced at last. For the reasons given, the decree will be affirmed.

HARLAN, J., (dissenting.) Mr. Justice GRAY, Mr. Justice BREWER, Mr. Justice BROWN, and myself are unable to concur in the opinion and judgment of the court.

We accept as sufficient the reasons given for the exemption of the estate of Charles T. Coit and of Cushing from liability for the losses of the bank here in question. But we are of opinion that, under the evidence, the defendants Elbridge G. Spaulding, Francis E. Coit, and W. H. Johnson became respectively liable for such of those losses as could have been prevented by proper diligence upon their part as directors. It would serve no useful purpose to refer in detail to all the evidence establishing their dereliction of duty. In our opinion, the proof is clear and convincing that a considerable part of the amount lost to the bank, and therefore to its stockholders and depositors, could have been saved if they had exercised such care in the supervision and management of the bank's business as men of ordinary diligence exercise in respect to their own business. In fact, those gentlemen, while they were directors, had no knowledge whatever of what was being done by Lee in the conduct of the bank. They took his word that all was

right, and gave no attention whatever to the management of its business. Their eyes were as completely closed to what he did from day to day in directing the affairs of the bank, as if they had deliberately determined not to see and not to know how he controlled its business. In the cases of Francis E. Coit and Johnson there are some mitigating circumstances arising out of the condition of their health at particular dates, but they are not such as to relieve them from the responsibility they assumed by becoming directors. When Lee asked Johnson to become a director, the latter expressed doubt as to whether he could give the bank much of his time. But Lee said to him that he "could fix that all right." Johnson having upon one occasion inquired in a general way how the bank was getting on, Lee replied, "Nicely;" and Johnson was satisfied. Both Francis E. Coit and Johnson signed reports to the comptroller of the treasury that were false and fraudulent, without having the slightest knowledge of their truth or falsity. They signed and certified to their correctness entirely upon their faith in Lee. They acted as if confidence in him discharged them from all responsibility touching the management of the bank.

In the case of Mr. Spaulding there are absolutely no circumstances of a mitigating character. He was learned in the law, and had large experience in banking. He accepted the position of director to accommodate Lee, and without any examination of the condition of the bank. Lee told him the bank was all right; and upon that, and that alone, he rested with implicit confidence. Having taken the oath required by the statute, that he would, so far as the duty devolved upon him, diligently and honestly administer the affairs of the association, and having ascertained that the executive officers were in charge of the bank, performing the duties belonging to their respective positions, he did not, he says, "go any further." Under such circumstances, and as he interpreted the national banking act, he felt himself "relieved from any specified duty." He "had no knowledge of either the provisions of the by-laws or articles of association." In his opinion, if the directors imposed upon the executive officers of the bank the duty of conducting its business, the duties of directors became thereafter "nominal." He performed no duty while he was director, except "to examine the reports;" but he made no examination to ascertain their correctness. He says: "I regarded my duty as ended, to a great extent, when I saw the bank was in the same charge that it had been." Being asked whether he went to the bank and made an examination of its books, papers, or affairs, he replied: "I did not. I took Mr. Lee's word for it." When asked in reference to the enormous overdrafts, made while he was director, and whether he did anything to prevent them, he replied: "I didn't go to the bank to ascertain. I left the officers in charge as I found them." In response to the question whether from the 10th day of January down to the failure of the bank he had anything to do with the affairs of the

bank, aside from holding 10 shares of its stock, he said: "I never examined its books or affairs, and I only examined the reports which it made to the comptroller, whose duty it was to see that those reports were correct." He never requested any of his co-directors, or any officer of the bank, to call a meeting of the board of directors, for, said he, "that duty was devolved upon the cashier." Lastly, and as sufficient evidence that the directors abandoned to Lee the absolute control of all the bank's affairs, and forbore to exercise the slightest control or supervision over him or them, only two meetings of the directors were held from October 3, 1881, until the bank closed its doors on the 14th of April, 1882, over the whole of which period the dishonest practices of Lee extended,—one, December 12, 1881, for the purpose only of passing resolutions relating to the death of Charles T. Coit; and the other, January 10, 1882, when Spaulding and Johnson were made directors. One of the by-laws provided for regular meetings of the board of directors on the first Tuesday in every month. But he had no knowledge of such a by-law, or of any such meetings. It is plain from the evidence that if, with his long experience in banking business, he had given one hour, or at the utmost a few hours' time, in any week while he was director, to ascertain how this bank was being managed, he would have discovered enough that was wrong and reckless to have saved the association, its stockholders and depositors, many, if not all, of the losses thereafter occurring. Upon his theory of duty, the only need for directors of a national bank is to meet, take the required oath to administer its business diligently and honestly, turn over all its affairs to the control of some one or more of its officers, and never go near the bank again, unless they are notified to come there, or until they are informed that there is something wrong; and when it is ascertained that these officers, or some of them, while in full control, have embezzled or recklessly squandered the assets of the bank, the only comfort that swindled stockholders and depositors have is the assurance, not that the directors have themselves diligently administered the affairs of the bank, or diligently supervised the conduct of those to whom its affairs were committed by them, but that they had confidence in the integrity and fidelity of its officers and agents, and relied upon their assurance that all was right. No bank can be safely administered in that way. Such a system cannot be properly characterized otherwise than as a farce. It cannot be tolerated without peril to the business interests of the country.

We are of opinion that when the act of congress declared that the affairs of a national banking association shall be "managed" by its directors, and that the directors should take an oath to "diligently and honestly administer" them, it was not intended that they should abdicate their functions, and leave its management and the administration of its affairs entirely to executive officers. True, the bank may act by "duly-authorized officers or agents" in respect to matters of current

business and detail that may be properly intrusted to them by the directors. But certainly congress never contemplated that the duty of directors to manage and to administer the affairs of a national bank should be in abeyance altogether during any period that particular officers and agents of the association are authorized or permitted by the directors to have full control of its affairs. If the directors of a national bank choose to invest its officers or agents with such control, what the latter do may bind the bank as between it and those dealing with such officers and agents. But the duty remains, as between the directors and those who are interested in the bank, to exercise proper diligence and supervision in respect to what may be done by its officers and agents.

As to the degree of diligence and the extent of supervision to be exercised by directors, there can be no room for doubt under the authorities. It is such diligence and supervision as the situation and the nature of the business requires. Their duty is to watch over and guard the interests committed to them. In fidelity to their oaths and to the obligations they assume, they must do all that reasonably prudent and careful men ought to do for the protection of the interests of others intrusted to their charge.

In respect to the dealings of a bank with others this court has said: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known, in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." *Martin v. Webb*, 110 U. S. 7, 15, 3 Sup. Ct. Rep. 428. A rule no less stringent should be applied as between a banking association and directors representing the interests of stockholders and depositors. Subscriptions to the stock of a banking association, and deposits with it, are made in reliance upon the statutory requirement, which cannot be dispensed with, that its affairs are to be managed and administered by a board of directors, acting under oath, and with such diligence as the situation requires.

In *Cutting v. Marlor*, 78 N. Y. 454, 460, Chief Justice CHURCH, delivering the unanimous judgment of the court, said: "A corporation is represented by its trustees and managers. Their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this, but, in addition, they are required to exercise such supervision and vigilance as a discreet person would exercise over his own affairs. The bank might not be liable for a single act of fraud or

crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practice, especially those so openly committed and easily detected as these are shown to have been. Here were no supervision, no meetings, no examination, no inquiry." This case was referred to with approval in *Preston v. Prather*, 137 U. S. 604, 614, 11 Sup. Ct. Rep. 162. So in *Hun v. Cary*, 82 N. Y. 65, 71, which involved the question of the degree of diligence to be exercised by directors of a savings bank, Judge EARL, speaking for the whole court, said: "Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them,—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such degree of care and prudence, and it is a gross breach of duty — *crassa negligentia* — not to bestow them." *Ackerman v. Halsey*, 37 N. J. Eq. 356, 361, 38 N. J. Eq. 501, 510; *Society v. Underwood*, 9 Bush, 609, 621; *Mining Co. v. Ryan*, 42 Minn. 196, 44 N. W. Rep. 56; *U. S. v. Means*, 42 Fed. Rep. 599, 603; *Delano v. Case*, 121 Ill. 247, 249, 12 N. E. Rep. 676; *Percy v. Millaudon*, 3 La. 568, 591; *Marshall v. Bank*, 85 Va. 676, 684, 8 S. E. Rep. 586; and *Bank v. Bosseux*, 3 Fed. Rep. 817.

The case of *Charitable Corp. v. Sutton*, 2 Atk. 400, 405, 406, which involved questions of the liability of directors of a corporation for alleged breaches of trust, fraud, and mismanagement, is very instructive upon this general subject. Among the objects of the corporation was the lending of money upon pledges, etc., and banking with notes payable on demand within the amount of its stock. One of the breaches of duty complained of was non-attendance by committee-men or directors upon their employment. While conceding that the employment was not one affecting the government, Lord Chancellor HARDWICKE said: "I take the employment of a director to be of a mixed nature. It partakes of the nature of a public office, as it arises from the charter of the crown."
* * * Therefore committee-men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation. In this respect they may be guilty of acts of commission or omission, of malfeasance or non-feasance." Referring to malfeasance or non-feasance upon the part of directors, he said: "To instance, in non-attendance, if some per-

sons are guilty of gross non-attendance and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others. By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees. Another objection has been made that the court can make no decree upon these persons which will be just, for it is said every man's non-attendance or omission of his duty is his own default, and that each particular person must bear just such a proportion as is suitable to the loss arising from his particular neglect, which makes it a case out of the power of the court. Now, if this doctrine should prevail, it is indeed laying the axe to the root of the tree. But if, upon inquiry before the master, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine they are not all guilty. Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity." So, in *Land Credit Co. v. Lord Fermoy*, L. R. 5 Ch. 763, 770, Lord HATHERLEY said: "I am exceedingly reluctant in any way to exonerate directors from performing their duty, and I quite agree that it is their duty to be awake, and that their being asleep would not exempt them from the consequences of not attending to the business of the company."

The observations of Lord Chancellors HARDWICKE and HATHERLEY were referred to with approval by the court of errors and appeals of New Jersey in *Williams v. McKay*, 40 N. J. Eq. 189, 201, where Chief Justice BEASLEY, speaking for the court, said: "I entirely repudiate the notion that this board of managers could leave the entire affairs of this bank to certain committee-men, and then, when disaster to the innocent and helpless *cestui que trustent* ensued, stifle all complaints of their neglects by saying, 'We did not do these things, and we know nothing about them.'"
* * * The misconduct in question was manifested in frequent, glaring instances; and it is not easy to imagine how they, or some of them, failed to be discovered by these boards of managers, on the supposition which, in their favor, the law will make, that they exercised their office in this respect with a reasonable degree of vigilance. The neglectful acts in question cannot be regarded by the court as isolated instances, for they run through the whole period of the life of the institution, and thus evince a systematic and habitual disregard of the directions of the company's charter, and a very striking indifference to the security of the money held in trust by them."

These salutary doctrines, if applied to the present case,—as, in our judgment, they ought to be,—require a reversal, with directions that a decree be entered adjudging Elbridge G. Spaulding, Francis E. Coit's estate, and W. H. Johnson liable for such losses occurring during the period in ques-

tion as could have been avoided by the exercise of reasonable diligence upon the part of said Coit, Johnson, and Spaulding, respectively, in performing the duties appertaining to them as directors. The case is one of supine, continuous negligence upon the part of the three directors named, in the discharge of duties they owed to the bank and to those interested in it. No usage of a national bank, nor any authority to carry on its business through executive officers and agents, will relieve its directors from the duty imposed upon them by law of diligently managing and diligently administering its affairs, and actively supervising the conduct of its officers and agents. There was here no diligence, no supervision, but absolute inaction in respect to the affairs of the bank.

It was said at the bar that if such a rule be rigidly applied, a gentleman of property and means would hesitate long before accepting the position of director in a banking association. This could not be the result if gentlemen of that class, be-

coming directors of such institutions, would exercise anything like the care and supervision they or any other prudent, discreet persons give to the management of their own business. They ought not, by accepting and holding the position of directors, to give assurance to stockholders and depositors, whose interests have been committed to their control, that the bank is being safely and honestly managed, without doing what prudent men of business recognize as essential to make such an assurance of value. A banking corporation, publicly avowing that its business was to be wholly administered by executive officers, and that the directors would have nothing in fact to do with its management, would not long retain the confidence of stockholders and depositors; a fact which, of itself, shows that the abdication by directors of their duties and functions not only tends to defeat the object for the creation of such an institution, but puts in peril the interests of stockholders and depositors.

JACKSON'S ADM'RS v. NEWARK PLANKROAD CO.

(31 N. J. Law, 277. 1865.)

On demurrer to declaration.

The opinion of the court was delivered by THE CHIEF JUSTICE.

This is an action of assumpsit. The first two counts of the declaration are special, and, in substance, are identical; the gravamen of each consisting of the following circumstances, viz.: that the plaintiffs' intestate was the owner of certain shares of the capital stock of the defendants, for which he held certificates; that thereby he became a stockholder in said corporation, and entitled to all the rights of a shareholder and to a participation in the profits of said corporation, and to his share and full proportion of all profits made by said corporation, and of the dividends thereof declared or made among the shareholders, and that in consideration thereof the said corporation thereby promised said intestate that he should be entitled to all the rights of a shareholder therein, and that he should receive a share of the profits made by the said corporation, and of the dividends thereof declared among the shareholders, in proportion to the number of shares so held by him. The breach assigned is, that the defendants, having made large profits, to wit, five per centum on each share of their capital stock, declared a dividend thereof to each of their shareholders, except to the plaintiffs' intestate.

As the demurrer admits these facts, it would seem to follow, as an inevitable conclusion, that the plaintiffs have a cause of action against the defendants, and that the only question to be considered is, whether it is enforceable in this present form of proceeding. The suit appears to be one of the first impression, but this circumstance is of no importance if it be founded in correct legal principles.

The theory upon which the plaintiffs' case rests appears to be this: a person holding, as owner, the stock of a corporation, becomes thereby entitled to a proportionate share in the profits of the company, and that, consequently, a duty is imposed, by law, on the body corporate, to distribute all dividends which, from time to time, may be declared, ratably on all its capital stock; and from this duty, it is said, springs the implied promise stated in the declaration.

I am unable to perceive any flaw in this statement of principles, or in the deduction which is made from them. It is clearly, as a general thing, the duty of the corporation to give to each stockholder an equal share of such dividends as are declared, and it has been an established doctrine of the courts that most of the duties imposed upon corporations by law, raise implied promises which will sustain, when broken, the action of assumpsit. A long line of well consid-

ered decisions rests upon this foundation. It is not deemed necessary to refer to them in detail; a number of the most important will be found collected in Ang. & A. Corp. 384.

The class of adjudications which bears the closest analogy in principle to the case now considered, is that which relates to the remedy on the refusal of the corporation to transfer stock at the request of the owner. As long ago as the time of Lord Mansfield, it was decided that a special action of assumpsit was the remedy for such breach of duty (*Rex v. Bank of England*, 2 Doug. 525); and the same rule has been repeatedly sanctioned and enforced by the courts of this country (*Shipley v. Bank*, 10 Johns. 484; Ang. & A. Corp. c. 16). And upon like grounds, in *Gray v. Bank*, 3 Mass. 364, it was held by the supreme court of Massachusetts, that a special action on the case would lie against an incorporated company for a refusal to permit one of its stockholders to subscribe for a fair proportion of certain new stock, which had been issued by the corporation, with a view to increase its capital.

It will be perceived that in each of these cases the promise sued on was implied from the legal duty due from the corporation to the stockholder, growing out of the mere relationship between them. It is one of the obligations of a corporation, inherent in its essential nature, to permit, at the request of the holder, a transfer of its stock; and as this is an obligation not due to the members at large, but exclusively owing to the individual stockholder, it was properly held that the law, upon its ordinary principles, implied an agreement on the part of the company to discharge such specific obligation. But the right to transfer stock is no more an incident to its ownership than is the right to dividends upon it; and the duty of the company, in making a distribution of profits, to appropriate a quota to each share of stock, is, in all respects, as definite and specific as is the duty to allow a transfer of stock on a sale. In neither case does the act to be done rest in the discretion of the company, and in both of them the duty is due, not to the members in general, but to each separate stockholder. It is not perceived how these two classes of cases are to be discriminated. If a suable promise can be deduced from the absolute and specific duty to allow stock to be transferred, so must the same result follow from the absolute and specific duty to set off, when dividends are declared to each share of stock, its distributive allotment. It appears to me that the general rule, distinguishing between that class of duties which give rise to actionable promises my implication and those which do not, may be thus stated: that in all cases in which the duty is definite and due to the individual, such promise will be implied; but that, on the other hand, when such duties are indefinite or are due to the members.

in their collective capacity, no such promise can be inferred. Thus, as an illustration, the duty to declare a dividend, where profits are in hand, is one of the indefinite and general character alluded to, it is, to a certain extent, discretionary in its nature, and it is due, in no sense, to any particular member, but to the community of members, and hence there is no promise for its performance to be drawn in favor of the separate shareholder. But after a dividend is declared, the right to the profits becomes individualized, and the duty to distribute, in certain proportions, which, so far from being arbitrary, are mere matters of arithmetical calculation, becomes attached as a right to each member distributively; and from these incidents arises the promise by implication.

The case of the State v. Baltimore & O. R. Co., 6 Gill, 363, which was much relied on

by the counsel of the defendants, does not seem to me to be at all in point. In that case the dividend which was declared was directed to be paid to the smaller stockholders in cash, but to the others partly in stock and partly in money—the company not being in funds to the whole amount of the dividend. The plaintiff, who belonged to the latter class of stockholders, refused to take payment to any extent in stock, and sued for money had and received, and it was held that such action could not be maintained. As the money sued for had never been in the hands of the company, it was clear that the suit was misconceived, but the principle on which the decision rests has no application to case now before this court.

Judgment should be entered for the plaintiff on the present record.

Judgment for plaintiff.

WHEELER v. NORTHWESTERN SLEIGH CO.

(39 Fed. 347.)

Circuit Court, E. D. Wisconsin. Aug. 5, 1889.

At law. On motion for judgment.

JENKINS, J. At the trial a special verdict was taken, upon which both parties moved the court for judgment. The plaintiff sues to recover a certain dividend declared by the defendant upon stock in its company at the time owned by the plaintiff. This dividend was declared on the 1st day of March, 1886, and was payable by the terms of the resolution on May 1st and July 1st next thereafter. The defense is that after the declaring of the dividend, and before it was payable, the plaintiff sold the dividend to Chapman & Goss, to whom it was paid by the defendant.

The facts established by the evidence and the special verdict are these: Soon after the dividend was declared, the plaintiff authorized one H. S. Benjamin to sell his stock at par, but did not empower him to dispose of the dividend declared. To the contrary, in his instruction the dividend was expressly reserved. The plaintiff retained possession of the stock. Benjamin, on March 12th, contracted with Chapman & Goss, then and previously stockholders in the company, and connected with its management, to sell them the plaintiff's stock at its par value, representing that the dividend declared would, and agreeing that it should, go with the stock. From the amount of stock offered them, Chapman & Goss supposed that it was the stock once owned by the plaintiff, but were told by Benjamin, and believed, that the stock was then owned by Benjamin's wife. They were not informed of the plaintiff's instructions to Benjamin, and did not know that Benjamin was the agent of the plaintiff. At the time of the contract of sale, Benjamin did not, as Chapman & Goss knew, have possession of the stock, and did not receive it from the plaintiff until March 15th, the date of its transfer to the purchasers. It was sent to the agent by the plaintiff pursuant to advice that he had sold it at par. Benjamin delivered the stock to Chapman & Goss, who paid therefor the par value upon the faith of Benjamin's representation that the dividend would, and his agreement that it should, go with the stock. There was no formal assignment or transfer of dividend. The plaintiff received from Benjamin the avails of the stock in ignorance of Benjamin's representation and agreement, and still retains the same. The defendant, after demand by the plaintiff, paid the dividend to Chapman & Goss upon receiving indemnity. It does not appear when, if at all, the plaintiff had information of the representation and agreement of Benjamin. So far as the record discloses, no communication upon the subject at

any time passed between the purchasers of the stock and the plaintiff. The latter had notice about May 1st, when he applied for payment, that Chapman & Goss claimed the dividend, but was not advised of the nature of their claim. At the trial Benjamin denied the representation and agreement alleged, insisting that he merely expressed to Chapman & Goss an opinion upon the question whether, as matter of law, the dividend would follow the stock. His contention in that respect is settled adversely to him by the special verdict. Chapman & Goss have never tendered to the plaintiff the stock, or demanded return of the money paid, nor has the plaintiff tendered back the money, or demanded the stock.

It is insisted for the defendant (1) that, as matter of law, the dividend passed with the stock; (2) if otherwise, that the plaintiff is bound by the representation and agreement of his agent; (3) that the plaintiff, by retention of the avails of the bargain, has ratified the contract made by his agent.

1. Stockholders are, as to the property of the corporation, quasi partners, holding *per my et per tout*. The earnings of the corporation are part of the corporate property, held by the same tenure, and, until separated from the general mass, the interest of the stockholder therein passes with a transfer of the stock; and this, irrespective of the time during which earnings have accrued. By the declaration of a dividend, however, the earnings, to the extent declared, are separated from the general mass of property, and appropriated to the then stockholders, who become creditors of the corporation for the amount of the dividend. The relationship of the stockholder to the corporation, as to the amount of the dividend, is thus changed from one of partnership ownership to that of creditor. He thereafter stands to the corporation in a dual relation,—with respect to his stock, as partner and part owner of the corporate property; with respect to the dividend, as creditor upon a par with other creditors of the corporation. The severance of the earnings from the general mass of corporate property, and the promise to pay, arising from the declaration of the dividend, works this change. The earnings represented by the dividend, although the fruit of the general property of the company, are no longer represented by the stock, but become a debt of the company to the individual who at the time of the declaration of dividend was the owner of the stock. That the dividend is payable at a future date can work no distinction in the right. The debt exists from the time of the declaration of dividend, although payment is postponed for the convenience of the company. The right became fixed and absolute by the declaration. This right could, of course, be transferred with the stock by special agreement, but not otherwise. The dividend would not pass as an

incident of the stock. *Brundage v. Brundage*, 60 N. Y. 544; *Hill v. Newichawanick Co.*, 8 Hun, 459, affirmed 71 N. Y. 593; *Boardman v. Railway Co.*, 84 N. Y. 178. So a legatee of shares is not entitled to a dividend thereon declared before, but payable after, the death of the testator. The dividend forms part of the corpus of the estate, and passes to the executor. *De Gendre v. Kent*, L. R. 4 Eq. 283. The dividends are earnings growing out of the stock, but when declared are immediately separated from it, and exist independently of it. They are happily likened in the case last cited to fallen fruit, which does not pass with the sale or gift of the tree. The cases of *Clive v. Clive*, Kay, 600, and *Burroughs v. Railroad Co.*, 67 N. C. 376, relied upon by the defendant, are not availing. The former case was ruled upon the peculiar terms of the corporate articles of the company, providing that the shareholder should not receive any dividends after the period at which he ceased to be proprietor of the shares, but that dividends on such shares should continue in suspense until some other person should become proprietor of them. In the latter case, the resolution declaring a dividend payable on two future dates provided that the transfer books should be closed for 30 days prior to each such date. The court lay stress upon the language of the resolution, and construe it as an express declaration that the dividend was payable, not to present shareholders, but to those who should be shareholders upon the books at the maturity of the dividend, since otherwise the closing of the books would be a useless ceremony. In this view the decision may be upheld, although much of the argument of the opinion is opposed to the current of authority.

2. It is, of course, correct to say that if a principal puts his agent in a position to impose upon an innocent third person, by apparently pursuing his authority, he shall be bound by his acts. It is, however, equally true that one dealing with an agent must look to the extent and scope of his agency, and that an implied or ostensible agency is never construed to extend beyond the obvious purpose for which it is apparently created. Here the plaintiff had authorized his agent to sell his shares in the defendant company. He was bound by all such acts of his agent as were within the apparent authority arising from possession of the stock. But that possession did not clothe the agent with apparent authority to sell other property; did not authorize the disposition of a previously declared dividend. The ostensible, as well as actual, authority was limited to disposition of the stock, and that alone. The purchasers had no right to assume that the agent, because the possessor of the stock, was also authorized to sell the dividend, that was no part of and did not pass as an incident to the stock. As to that they dealt with the agent

at their peril. Supposing the agent to be acting for himself or his wife, and not for the plaintiff, they were bound to the greater caution to ascertain if there had been a transfer of the dividend by the plaintiff. It is clear that the plaintiff was not bound by any representation or agreement of his agent touching the dividend, because in respect thereto the agent was acting without authority, and beyond the apparent scope of authority flowing from possession of the stock.

3. The plaintiff received from Benjamin, and has since retained, the avails of the stock. This the defendant insists works a ratification by the plaintiff of the unauthorized act of the agent. It was doubtless competent for the defendant to have interpleaded these rival claimants to the dividend. *Salisbury Mills v. Townsend*, 109 Mass. 115. Instead of so doing, it paid to Chapman and Goss the dividend claimed by the plaintiff, and asserts a ratification of the contract to which it was not a party, and in behalf of those who are not before the court, nor bound by its decision. It may well be doubted if the defendant is in position to avail itself of the alleged ratification. Assuming, however, that such defense is availing to the defendant, is ratification shown? It is well established that a ratification of an unauthorized contract, to be effectual and binding upon the one sought to be bound as principal, must be shown to have been made by him with full knowledge of all the material facts connected with the transaction to which it relates, and that the existence of the contract, its nature and consideration, were known to him. But if the material facts were suppressed, or were unknown to him, except as the result of his intentional and deliberate act, the ratification will be invalid, because founded upon mistake or fraud. *Owings v. Hull*, 9 Pet. 629; *Benneck v. Insurance Co.*, 105 U. S. 360; *Bloomfield v. Bank*, 121 U. S. 135, 7 Sup. Ct. Rep. 865; *Rolling-Mill v. Railway Co.*, 5 Fed. Rep. 852; *McClelland v. Whiteley*, 15 Fed. Rep. 322; *Dickinson v. Conway*, 12 Allen, 491.

The defendant, asserting such ratification, was therefore bound to show that it was made by the plaintiff under such circumstances as to be binding upon him, and that all material facts were made known to him. *Combs v. Scott*, 12 Allen, 495; *Hardeman v. Ford*, 12 Ga. 205. Do the facts disclose ratification? The plaintiff authorized his agent to sell the stock, at par. He conferred upon the agent no apparent authority to dispose of anything else. As to the dividend, the purchaser had no right to assume that Benjamin could dispose of it. The possession or the actual ownership of the stock, subsequent to the declaration of the dividend, gave him no apparent authority to sell the dividend. As to that they dealt with Benjamin at their peril. A transfer of the stock vested no legal title to the dividend previously declared. There was no actual transfer of the divi-

dend, and none was demanded. The purchasers are chargeable with knowledge of the law that the dividend did not follow the stock; that the dividend belonged to the plaintiff, and they were bound to inquire, supposing Benjamin to be acting for himself or his wife, as to his or her ownership of this dividend. So far, therefore, the purchasers were negligent; the plaintiff was innocent.

Did the retention by the plaintiff of the avails of the stock amount to a ratification? The plaintiff received as avails of the stock the exact amount for which he had authorized his agent to dispose of his stock. He had no reason to suppose that any false representation had been made, or that his agent had assumed to dispose of any other property than the stock as the consideration for the money paid by the purchasers and received by him. Under such circumstances, the retention of the money cannot be held to be a ratification by him of the unauthorized acts of the agent, because it was retained without knowledge of the facts. *Bell v. Cunningham*, 3 Pet. 69, 81; *Hastings v. Proprietors*, 18 Me. 436; *Bryant v. Moore*, 26 Me. 87; *Thacher v. Pray*, 113 Mass. 291; *Navigation Co. v. Dandridge*, 8 Gill & J. 248; *Smith v. Tracy*, 36 N. Y. 79; *Baldwin v. Burrows*, 47 N. Y. 199; *Smith v. Kidd*, 68 N. Y. 130; *Reynolds v. Ferree*, 86 Ill. 576; *Roberts v. Rumley*, 58 Iowa, 301, 12 N. W. Rep. 323; *Bohart v. Oberne*, 36 Kan. 284, 12 Pac. Rep. 388; *Insurance Co. v. Iron Co.*, 21 Wis. 458, 464.

So far as the record discloses, the first notice which the plaintiff received that the purchasers of the stock claimed the dividend was about May 7th, when the treasurer of the defendant seems to have advised him thereof, and requested to know if the plaintiff made claim thereto. It does not appear that the grounds of the claim were then disclosed. It would seem probable that the plaintiff understood the claim to be bottomed upon the ground that by law the stock carried dividend previously declared and unpaid,—a ground insisted upon at the trial,—as the plaintiff in his letter of that date speaks of the purchaser undertaking to hold the dividend “under some technicality.” There seems to have been no communication between Chapman & Goss and the plaintiff at any time touching their claim. They asserted no claim, and disclosed no ground of claim. They knew the false representation and the agreement, of which the plaintiff was ignorant, and were, I think, bound, if they sought to hold the plaintiff to a ratification of the unauthorized act of his agent, to possess the plaintiff with facts within their knowledge, and not in his, and to assert a claim founded thereon. This they did not do, but, knowing that the plaintiff claimed the dividend, remained passive so far as concerns getting information to him of the grounds of their claim. It cannot

surely be said that under such circumstances the retention of the money was an act of affirmance. To so hold would place every principal at the mercy of his agent with respect to matters as to which he had conferred no apparent authority. So that if one should authorize his agent to sell his house for \$20,000, and the agent selling the house for that sum should include in the sale certain bank-stock which he was not authorized to sell, and of which he had not possession, the principal, by the mere receipt and retention of the sum which he had authorized to be taken for the house, and in ignorance of the fact that the bank-stock was part of the consideration running to the purchaser, would be bound to deliver the stock. I cannot yield assent to such doctrine. The purchaser had, in the case supposed, no right to trust the agent with respect to the bank-stock. He had not the possession of it, and was not clothed with any authority with respect to it. The purchaser was bound to inquire into the authority of the agent in such case. The reception and retention of the exact sum authorized to be taken for the house, in ignorance of the act of the agent with respect to the bank-stock, is no ratification. Otherwise the principal is bound for every unauthorized act of the agent, and the purchaser may trust the agent, who can exhibit no authority. Such a principle would be ruinous. Upon maturity of the dividend, suit was at once brought against the company. Until the trial the plaintiff is not shown to have knowledge of the facts upon which the claim of the purchasers to the dividend is based. They had not communicated them to him. He could not have learned them from the agent, for he denied the representations and agreement. This was no acquiescence, working ratification of the unauthorized act of Benjamin. The cases relied upon by the defendant are of the class, either of recognized agency or of acts adopted by the principal as done for him, where a right obtained by the agent is sought to be enforced, or where the principal receives the avails of a contract either authorized or adopted by him. The liability of the principal for the fraud of his agent is bottomed upon the principle that, by adopting the contract made by the agent, and receiving the avails, the principal assumes responsibility for the means adopted to effect the contract; but, as well observed in *Baldwin v. Burrows*, supra, where the cases are ably reviewed, and the lines of distinction are sharply defined, “this responsibility for instrumentalities does not extend to collateral contracts made by the agent in excess of his actual or ostensible authority, and not known to the principal at the time of receiving the proceeds, though such collateral contract may have been the means by which the agent was enabled to effect the authorized contract, and the prin-

cipal retain the proceeds thereof after knowledge of the fact." The present case is not within the class of cases relied upon. The collateral contract for the transfer of the dividend was in excess of any authority, actual or ostensible. The proceeds of the authorized sale of the stock were received in ignorance of the fraud perpetrated by the agent. The amount of such proceeds was

the exact amount authorized to be received for the stock. The plaintiff, by retaining the proceeds, adopted and ratified what he had authorized. Such action cannot be tortured into ratification of unauthorized acts. *Smith v. Tracy*, 36 N. Y. 79; *Condit v. Baldwin*, 21 N. Y. 219. Judgment for plaintiff.

GRESHAM, J., concurs.

BAILEY et al. v. CITIZENS' GAS-LIGHT
CO. et al.

(27 N. J. Eq. 196. 1876.)

. Bill for relief. On final hearing on pleadings and proofs.

THE CHANCELLOR. The facts of this case may be briefly stated. Between the Citizens' Gas Light Company, a corporation located at Newark, and existing under a special charter of this state, and the Orange Gas Light Company, a corporation located at Orange, in this state, and existing under a like charter, negotiations were commenced in the latter part of the year 1870, looking to their consolidation. They resulted in an arrangement, made in May, 1871, for the purchase by the former company of the stock of the latter, at a valuation of \$131,000, to be paid for in the stock of the Citizens' Company to the same amount, the Orange Company agreeing to purchase, at par, \$25,000 of the stock of the Citizens' Company, to enable the latter to defray the expense of making the connection between their mains in Newark and those of the Orange Company. In the negotiations which resulted in this arrangement, the committee of the board of directors of the Citizens' Company, by whom the negotiations were conducted, represented to the like committee of the Orange Company, that the indebtedness of the former company was only a convertible bond debt of \$150,000. Pending the negotiations, and after the making of this representation, the board of directors of the Citizens' Company, without the knowledge of the committee of the Orange Company, or of their principals, passed a resolution, by which they declared a scrip dividend of ten per cent. on the amount of their capital stock, with interest from the 1st day of April, 1871, payable at the option of the company. The fact of the creation of this additional indebtedness of the company (for such it was, in effect) was not only not communicated to the Orange Company, but on the other hand, was concealed from them, and the negotiations were concluded and an arrangement made as above stated, which was carried out in good faith on the part of the Orange Company, in entire ignorance of the resolution in question, or of the dividend, or of the existence of any debt beyond the \$150,000 stated in the representations above mentioned, to be the entire indebtedness of the company, on the faith of which representations the Orange Company relied.

The scrip dividend so declared, amounted to the sum of \$51,225. The Citizens' Company had, before the commencement of the negotiations, issued capital stock to the full amount authorized by their original act of incorporation. They were, by the supplement passed to authorize the consolidation, empowered to increase their stock, but only

so far as might be necessary for the purpose of consolidation. They not only had no legal authority for declaring this dividend, but there was no ground or warrant in the situation of their affairs for so doing. It appears that, from the beginning of their business up to May 1st, 1871, (the resolution was passed on the 10th of April preceding that date,) their expenses in manufacturing gas, &c., amounted to \$50,901.30, while the amount received for gas in the same period was only \$38,160.35.

The scrip was issued pursuant to the resolution. The certificates were merely certificates of the indebtedness of the company, therein declared to be payable at the pleasure of the company, with interest at the rate of seven per cent. per annum.

The bill was filed against the Citizens' Company and the holders of the scrip, for a decree to declare the scrip void, as being fraudulent and illegal, and to restrain the company from paying interest on or recognizing the scrip as a valid obligation, and from permitting the transfer thereof. The bill prays, also, that the holders of the scrip may be enjoined from transferring it, and may be required to deliver it up to be canceled, and that the company may be required to cancel it, and that the persons who have received interest on it may account for it to the company.

The company, by their answer, state that they are now under the management of a board of directors composed of persons none of whom except two were of the board by which the resolution declaring the scrip dividend was passed, and disclaim all knowledge of the transaction in question, or any information except from their minutes. None of the holders of the scrip, except Morgan L. Smith, have answered. He alleges, and has proved, that he is a bona fide holder of scrip to the amount of \$510, which he purchased in January, 1872, from one of the directors, who then transferred it to him, and that subsequently he, having relinquished for cancellation the certificate assigned to him, obtained a new one instead thereof, in December, 1872. He appears to have had no information as to any illegality or irregularity in the issuing of the scrip, and to have paid \$510 for the certificate which he purchased.

There can be no doubt as to the right of the complainants to relief. They file their bill for the benefit of themselves and of all other stockholders of the Orange Company at the time of the consolidation. They are still holders of stock received by them in the consolidation in exchange for stock then held by them in the Orange Company. The scrip dividend was a palpable fraud upon the stockholders of the Orange Company. The directors of the Citizens' Company, after making a representation to the Orange Company as to the indebtedness of their company, to induce them to agree to a plan

for consolidation, secretly created an interest-bearing indebtedness of \$51,225 to themselves and to other stockholders of their company. Nor do they attempt to defend the transaction. As before stated, none of the holders of the scrip have answered, except Mr. Smith, and the bill has been taken as confessed as against them accordingly. Justice demands that at least those to whom the certificates were originally issued, and who still hold them, should be required to deliver them up for cancellation. Where a contract has been induced by false representations, or a transaction is in any way tainted by fraud, and the defrauding party is a party to the transaction, the transaction will be set aside, or the defrauding party will be compelled to make his representation good. It is obvious that there can be no rescission of the contract here without great loss and injury to both parties.

The only question is, whether Mr. Smith, a bona fide purchaser of the scrip for value without actual notice, will be protected in his purchase. That the company had no lawful authority for issuing the certificates, cannot be doubted. Had a purchaser of any of these certificates made inquiries as to their origin, he would have discovered that they had been issued contrary to law. Nor would he have found anything in the situation of the affairs of the company to have warranted the board in issuing them. The rule which is applied to negotiable commercial paper is not applicable to such certificates as these. *Mechanics' Bank v. New York & N. H. R. R. Co.*, 13 N. Y. 599; *Marsh v. Fulton Co.*, 10 Wall. 676. On its face the scrip bears evidence of its unusual character. It declares that the person to whom it is issued is entitled to a certain sum of money therein mentioned, payable, ratably with other certificates issued pursuant to the resolution of April 10th, 1871, at the pleasure of the company, with interest at the rate of seven per cent. per annum. No warrant for this scrip would have been found in the charter, and the reference to

the prohibitory limitation contained in the act concerning corporations would have removed all question, and would have been decisive against its validity. *Charter, Laws 1868, p. 398; Revision, tit. "Corporations," § 3; Green's Brice, Ultra Vires, 147.* That the purchaser bought it without inquiry, will not protect him in his purchase, and bind the company to perform an obligation made without authority and in defiance of law. *The Floyd Acceptances, 7 Wall. 667.* Nor is the defence of the purchaser in this case strengthened by the fact that the certificate which he purchased was delivered up to the company and another issued to him in its stead. A novation of the contract was just as much beyond the power of the officers of the company as was the creation of the obligation originally. Nor will the stockholders be estopped by such action on the part of the officers. *Marsh v. Fulton Co.*, supra. The certificate held by Mr. Smith must also be delivered up to be canceled.

It appears that the fact that the scrip had been issued came to the knowledge of Mr. Charles A. Lighthipe and Mr. Blake, two of the committee on the part of the Orange Company, very soon after the arrangement between the companies had been concluded. The former gentleman held the certificate of the Citizens' Company for the stock issued in exchange for the stock of the Orange Company. No legal action was taken for relief until the filing of the bill in this cause, in April, 1875. At the hearing, the account for interest paid to the holders of the scrip was not insisted upon. The scrip is held by very many persons, most of whom had no knowledge of the existence of any wrong in the creation of it. They have, from time to time, received interest on it, believing it to be their just due. To require them to account might be a hardship. Under the circumstances, in view of the delay of the stockholders of the Orange Company in applying for relief for so long a time after they had full knowledge of the facts, I shall not order an account.

WILLIAMS v. WESTERN UNION TEL. CO.

(93 N. Y. 162. 1883.)

Appeal by defendant, the Western Union Telegraph Company, from an order of the general term of the superior court of New York City, November, 1882, reversing a judgment in favor of defendant rendered at special term, and granting a new trial. Reported below. 48 N. Y. Super. Ct. 349.

The essential facts and the nature of the action appear in the opinion.

EARL, J. The appellant, the Western Union Telegraph Company, was, on and prior to the 19th day of January, 1881, a corporation organized under the laws of this state, and its capital stock was \$41,073,410, divided into shares of \$100 each; at the same date the Atlantic and Pacific Telegraph Company was a corporation organized under the laws of this state, and its authorized capital consisted of one hundred and fifty thousand shares of \$100 each, of which only one hundred and forty thousand shares had been issued and were outstanding, and the American Union Telegraph Company was also a corporation organized under the laws of this state, and its capital was \$10,000,000, and it owed a bonded debt of \$5,000,000. The telegraph lines of these companies were, to a large extent, parallel and between the same places, but the lines of each company extended to some places which were not reached by the lines of either of the other companies.

On the 11th day of January, 1881, a conference between certain of the directors of these corporations was held for the purpose of agreeing upon a basis for the consolidation of the property, interests, and business of the three corporations, which basis, reduced to writing in the form of an agreement, provided that the Western Union Telegraph Company should purchase from the other companies all their telegraph lines, property, rights, privileges and franchises of every nature whatsoever, excepting the franchise of each to be a corporation, and that they should severally sell and convey all such property, rights, privileges, and franchises to the Western Union Telegraph Company. The consideration for the sale and conveyance of the American Union Telegraph Company was to be one hundred and fifty thousand shares of the capital stock of the Western Union Telegraph Company, of the par value of \$100 each, to be thereafter issued and delivered to the Union Trust Company of the city of New York, which was to distribute the same in exchange for the shares of the American Union Telegraph Company, to the amount of one hundred thousand shares, and the bonds of that company, not exceeding in amount the full sum of \$5,000,000, the holder of each share of American Union Telegraph Company's stock to be entitled to receive, upon surrender of the same, one share of Western Union Telegraph Com-

pany's stock, and the holder of every bond to be entitled, upon the surrender of the same, to shares of the Western Union Telegraph Company equal at par to the amount of the principal of his bond.

The consideration for the sale of the Atlantic and Pacific Telegraph Company was to be eighty-four thousand shares of the capital stock of the Western Union Telegraph Company of the par value of \$100 each, to be issued and delivered to holders of the Atlantic and Pacific stock at the rate of eighty-four thousand shares of Western Union stock for one hundred and forty thousand shares of Atlantic and Pacific stock, at the par value of \$100 each. It was further provided, that all shares of the American Union and Atlantic and Pacific Telegraph Companies, after exchange, should by the Union Trust Company be duly transferred and delivered to the Western Union Telegraph Company and belong to it; that that company should take such proceedings as it might be advised to cause its capital stock to be increased, by an addition to its then outstanding stock of \$33,926,590, represented by shares of \$100 each, and should issue the same to the Union Trust Company for distribution as follows: \$15,526,590 to those then holding its shares, the same being intended to represent its investment of earnings in the purchase, construction and equipment of additional lines, wires and general plant since the 1st day of July, 1866, and the remaining sum, \$23,400,000, for the acquisition of the property, privilege and franchises of the other companies; that the possession of the property purchased should be delivered to the Western Union Telegraph Company by the other companies on the 24th day of February, 1881, and the shares of its capital stock should be by it delivered to the Union Trust Company of New York for the purpose mentioned, on or before the same date.

The president of the Western Union Telegraph Company, for the purpose of completing that agreement, thereupon called and procured a meeting of the directors of that company to be held on the 12th day of January, 1881, and he laid the agreement before them, and the same was thereupon approved and adopted by them, and the president was formally instructed to call a special meeting of the stockholders of that company for the purpose of carrying out and effectuating the agreement. He thereupon fixed February the 5th, 1881, as the day on which the special meeting of the stockholders should be held, and mailed notices to all the stockholders, and caused notices to be published in three newspapers printed in the city of New York and in the state paper printed at Albany, to the effect and in substance, that in accordance with the by-laws and the request of a majority of the directors a special meeting of the stockholders of the corporation would

be held on the 5th day of February, 1881, for the purpose of acting upon the terms of consolidation, purchase and agreement between that company and the American Union Telegraph Company and the Atlantic and Pacific Telegraph Company for the purchase of the property, rights, privileges, and franchises of the last-named companies, and the increase of the capital stock of the Western Union Telegraph Company to the full amount of \$80,000,000. Immediately after these notices were issued, the directors of the appellant caused the agreement to be reduced to writing, and to be executed under seal by the officers of the corporations on the 19th day of January, 1881. On the 3d day of February, 1881, an agreement supplementary to the last-named agreement was made, executed and delivered by the persons in authority in the three companies, which provided, among other things, that all the properties, rights and privileges specified and described in the prior agreement of the companies should be and were transferred to the Western Union Telegraph Company; that until that company could prepare and issue the shares of capital stock agreed to be paid for such properties and rights in exchange for the stock and bonds of the American Union Telegraph Company, and for the stock of the Atlantic and Pacific Telegraph Company, and the stock agreed to be distributed to the stockholders of the Western Union Telegraph Company, it should issue certain certificates of indebtedness which need not be more particularly mentioned.

The meeting of the stockholders pursuant to the call was held on the 5th of February, 1881, three hundred and eight thousand seven hundred and eighty-nine shares being represented in person or by proxy; and three hundred and eight thousand one hundred and eighty-nine of such shares, representing more than three-fourths in amount of the whole capital stock of the Western Union Telegraph Company, then voted for the ratification of and consented to the contracts of January 19 and February 3, which were submitted to them, six hundred shares only voting against such ratification. At the same meeting three hundred and eight thousand one hundred and eighty-nine shares voted in favor of an increase of the capital stock of the Western Union Telegraph Company to \$80,000,000, and one hundred shares voted against it. The consent and ratification by the stockholders were reduced to writing, and entered upon the minutes of the meeting. On the same day more than two-thirds of the directors, by a writing to that effect signed by them, consented to and ratified and approved the increase of the capital stock of the Western Union Telegraph Company to \$80,000,000. The plaintiff in this action attended the stockholders' meeting in person or by proxy, and voted upon his one hundred shares both against ratifying and approving of the agreements,

of January 19 and February 3, and against increasing the capital stock to \$80,000,000.

On the 19th day of January, 1881, the property, franchises and privileges belonging to the Western Union Telegraph Company were worth more than the amount of its capital over and above its indebtedness, and the property, rights and franchises of the Atlantic and Pacific Telegraph Company were fully and fairly worth the sum of \$8,400,000, and the property, rights and franchises of the American Union Telegraph Company were worth \$15,000,000; and such, on that day, were the estimates of the values made by the directors of the respective companies. The actual value of the investments of the surplus earnings of the defendant, the Western Union Telegraph Company, as they existed January 19, 1881, was estimated by the directors of the company, and it was their judgment that the amount of the stock to be distributed among the stockholders of the Western Union Telegraph Company represented no more than the investments of the surplus earnings of the company since July 1, 1866; and such surplus earnings were worth the sum of over \$15,526,590.

All the telegraph lines and appurtenances thereto, mentioned in the agreement of January 19, 1881, belonging to the American Union Telegraph Company and to the Atlantic and Pacific Telegraph Company, were, on the 3d day of February, 1881, pursuant to the agreement, delivered to and received by the Western Union Telegraph Company. The plaintiff became the owner in his own right of one hundred shares of the capital stock of the Western Union Telegraph Company on the 22d day of January, 1881. This suit was commenced about the 14th of February, 1881, against the Western Union Telegraph Company and all the directors of that company, and the Union Trust Company; but before its commencement the contracts of January 19 and February 3 had, to a large extent, been carried into effect by a delivery and distribution of the stock as therein provided for.

The plaintiff alleged in his complaint the ownership by him of one hundred shares of the capital stock of the Western Union Telegraph Company, the organization of that company, and of the other two telegraph companies; that there was a fraudulent combination and conspiracy among the directors of all these telegraph companies, for various purposes stated in the complaint, and that the agreement of January 19, 1881, was entered into in pursuance of such unlawful combination and conspiracy; that the meeting of stockholders to ratify the agreement was called in furtherance of the unlawful conspiracy, and that at such meeting the defendants, who are directors in the Western Union Telegraph Company, controlling a majority of its stock, voted in favor of ratifying the contract and increasing the capital stock to \$80,000,000; that the property, rights and

franchises of the Atlantic and Pacific Telegraph Company and the American Union Telegraph Company did not exceed in value about the sum of \$8,000,000, which was well known to the directors of the Western Union Telegraph Company; that the prices named in the agreement for the purchase of those two companies were a fraud upon the rights of the plaintiff and other stockholders similarly situated; that the Western Union Telegraph Company did not have surplus property over and above its capital stock sufficient to represent the stock dividend of upward of \$15,000,000; that the dividend was a violation of law and a breach of trust on the part of the directors, which rendered them personally liable for the payment into the treasury of the company of the full face value of all such capital stock so divided and distributed; and the plaintiff prayed for judgment that the defendants, and each of them, be enjoined and restrained from issuing and delivering to any stockholder of the Western Union Telegraph Company, of the Atlantic and Pacific Telegraph Company, or of the American Union Telegraph Company, or to any person on their behalf any certificate of capital stock of the Western Union Telegraph Company until the full face value of such capital stock should be paid into its treasury, and that the directors be enjoined and restrained from voting upon any stock of the Western Union Telegraph Company, held or owned by them, or either of them, in favor of the increase of such capital stock or the ratification of the contract of January 19; that should the increased capital stock be issued, then that an account be taken and stated of all and singular the property and assets received by the defendant, the Western Union Telegraph Company, therefor; that the defendants, other than said company and other than the said trust company, be adjudged and decreed to pay to the defendant, the Western Union Telegraph Company, the amount which the stock thus issued should exceed the value of the property received therefor; that, if the amount of \$15,526,590 of the capital stock of the Western Union Telegraph Company, or any part thereof, should be issued and distributed among the stockholders, without payment in cash therefor, then that the directors of that company should be adjudged and decreed to pay the full amount thereof with interest, to that company; and that said company be restrained from permitting the transfer on its books of any of such increased capital stock beyond the authorized capital of \$41,073,410; and that the plaintiff should have such other and further relief as he might be entitled to in the premises.

The cause was put at issue by answer, and came on for trial at a special term of the court, where the trial judge found, among other facts, all the facts hereinbefore stated, and also found that the object of the purchase by the Western Union Telegraph Com-

pany of the property, privileges and franchises of the other companies was to perfect and extend the connections between that company and the other two companies in this state, and to permit their union with the telegraph systems which those companies had established in other states; and he refused to find the fraud and conspiracy alleged in the complaint; and he found as matters of law that the purchase by the Western Union Telegraph Company of the property, privileges and franchises of the other companies was valid and lawful according to the laws of this state; that the stock dividend of the Western Union Telegraph Company was not a division, withdrawal or payment to its stockholders, or any of them, of any part of the capital stock of the company, and that it was a proper and lawful exercise of the power of the corporation to issue to its stockholders certificates which afford evidence of the investment, with the consent of its stockholders, of its surplus earnings; in property necessary and useful in and about the transaction of its business; that the agreements had been so far executed that no stockholder of the Western Union Telegraph Company had any right to bring an action to restrain their complete execution; that the plaintiff had not sustained and was not likely to sustain any injury from the execution of the agreements, and had no right to restrain their execution, and that the defendants were entitled to judgment, dismissing the complaint on the merits. The judgment entered at special term was, upon appeal, reversed at the general term upon questions of law only, and then the Western Union Telegraph Company, giving the stipulation required in such cases, alone appealed from the order granting the new trial to this court.

Having thus brought to view the material facts of this case and the substance of the complaint and of the findings of the special term, we will now call attention to the statutes under which the telegraph companies were organized, and by the authority of which it is claimed the action was taken which is now complained of. The first act is chapter 265 of the Laws of 1848, which provided that any number of persons might associate for the purpose of constructing a line of wires of telegraph through this state, or from or to any point within this state, upon complying with certain requirements of the act, one of which is that the persons shall make and file a certificate which shall specify, among other things, the capital stock of such association and the number of shares into which the stock shall be divided; and section 8 further provided that it should be lawful for any association of persons organized under the act to provide, by their articles of association, for an increase of their capital and the number of shares into which it shall be divided.

Chapter 98 of the Laws of 1851 authorized the directors of any company organized un-

der the act of 1848, at any time, with the written consent of the persons owning two-thirds of the capital stock of such company, to extend its line of telegraph, or to construct branch lines to connect with its main line, or to unite with any other incorporated telegraph company. Chapter 471 of the Laws of 1853 further amended the act of 1848 by authorizing any number of persons, upon complying with the requirements of the act of 1848, to associate for the purpose of owning, constructing, using and maintaining a line or lines of electric telegraph, whether wholly within or partly within the limits of this state, or for the purpose of owning any interest in any such line or lines of electric telegraph or any grants therefor. It also enabled every telegraph company existing in the state at the time of its passage to obtain the benefit of the statute, on filing a certificate of a resolution adopted by a majority of its board of directors to organize under the amendatory act, and authorized every association entitled to the benefit of the statute, to erect and construct from time to time the necessary fixtures upon, over or under any of the public roads, streets and highways and through, across or under any of the waters within the limits of this state, subject to the restrictions of the act of 1848, and also to erect and construct such fixtures upon, through or over any other land subject to the right of the owner or owners thereof, to full compensation for the same. Chapter 425 of the Laws of 1862, further amending the act of 1848, provided that any company duly incorporated under the last-named act might construct, own, use and maintain any line or lines of electric telegraph not described in their original certificate of organization, whether wholly within or wholly or partly beyond the limits of this state, and might join with any other corporation or association in constructing, leasing, owning, using or maintaining such line or lines, and might own and hold any interest in any such line or lines, and might become lessees of any such line or lines. Chapter 568 of the Laws of 1870, containing but one section, provides as follows: "In order to perfect and extend the connections of telegraph companies in this state, and promote their union with the telegraph systems of other states, any telegraph company organized under the laws of this state, may lease, sell or convey its property, rights, privileges and franchises, or any interest therein or any part thereof, to any telegraph company organized under or created by the laws of this or any other state, and may acquire by lease, purchase or conveyance the property, rights, privileges and franchises, or any interest therein or any part thereof, of any telegraph company organized under or created by the laws of this or any other state, and may make payments therefor in its own stock, money or property, or receive payment therefor in the stock, money or property of the corporation to which the

same may be sold, leased or conveyed; provided, however, that no such purchase, sale, lease or conveyance by any corporation of the state shall be valid until it shall have been ratified and approved by a three-fifths vote of its board of directors or trustees, and also by the consent thereto in writing or by vote at a general meeting, duly called for the purpose, of three-fifths in interest of the stockholders in such company present or represented by proxy at such meeting." By chapter 319 of the Laws of 1875, section 8 of the act of 1848 was amended so as to read as follows: "It shall be lawful for any association of persons organized under this act, by their articles of association, to provide for an increase of their capital and the number of shares of the capital stock of the association. But if any such association shall have omitted so to provide for an increase of their capital, it shall be lawful after notice of an intention so to do, published once a week for six weeks successively in the state paper, and in any newspaper of general circulation published in the county where the principal office of such company is located, and with the written consent of shareholders holding and owning three-fourths in amount of the then capital stock, to provide for an increase thereof, and the number of shares into which the same shall be divided by an additional certificate specifying such increase and such number, which certificate shall be executed, proved or acknowledged by the board of directors of such association, or a majority of them, and filed as provided in section two of this act; and such certificate may, upon a like notice and consent, also contain a statement of and provision for any desired change in the general route of the lines of the association, designating the route or routes and the points to be connected, and such certificate shall be deemed and taken as a part of the articles of association already filed."

The act last named furnishes ample authority for the increase of the capital stock of the Western Union Telegraph Company. The articles of association of that company were not put in evidence, and hence it does not appear whether they provided for an increase of its capital stock or not. If they did, in the absence of any proof to the contrary, it would be assumed that the increase was justified by the articles. A stockholder coming into court and alleging that the increase of stock was unauthorized by the articles of association, in order to maintain his allegations, would have the burden to prove and establish that fact. He could not rest upon presumption, and could not ask the court to infer that a power conferred by the articles of association had been improperly or illegally exercised. If the articles of association, however, did not provide for an increase of its capital stock, then the directors of the company, for the purpose of accomplishing such increase, could proceed under the act of 1875. It is not disputed that

the steps which are required by that act to accomplish an increase of stock were taken by the directors. The requisite notices were published. There was the requisite consent of the shareholders holding and owning three-fourths in amount of the capital stock and the requisite action of the board of directors. So that upon the argument before us it was not disputed by the learned counsel for the respondent that the necessary action had been taken to make a legal and lawful increase of the capital stock of the Western Union Telegraph Company to the sum of \$80,000,000.

The shares of stock having thus been legally brought into existence, the act of 1870 furnished ample authority for the purchase by the Western Union Telegraph Company of the property, franchises and privileges of the other two companies, and paying therefor by its stock. It was found by the trial judge that the objects and purposes of the purchase were such as are sanctioned by that act. These three telegraph companies were not companies owning precisely parallel lines, or lines running exactly between the same places, but each company reached some points which were not reached by either of the others; and it is difficult to perceive how the broad and explicit language used can be so tortured as to forbid the combination of these three companies in the manner in which it was accomplished. Upon this point the opinion of Barrett, J., in *Hatch v. Telegraph Co.*, 9 Abb. N. C. 228, leaves nothing to be said. Indeed, upon the argument before us, the right to purchase the property, privileges and franchises of the two other companies by the Western Union Telegraph Company, under the act of 1870, was not much challenged. The main contention was, that the stock dividend distributing upwards of \$15,000,000 of stock among the stockholders of the Western Union Telegraph Company, was unauthorized and in violation of law, and whether it was or not is the principal matter for our determination upon this appeal.

The stock dividend was claimed to be in violation of section 2, c. 18, pt. 1, tit. 4, of the Revised Statutes, which provides as follows: "It shall not be lawful for the directors or managers of any incorporated company in this state to make dividends excepting from the surplus profits arising from the business of such corporation; and it shall not be lawful for the directors of any such company to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of such company, or to reduce the said capital stock without the consent of the legislature, and it shall not be lawful for the directors of such company to discount or receive any note or other evidence of debt in payment of any installment actually called in and required to be paid, or any part thereof due

or to become due on any stock in the said company; nor shall it be lawful for such directors to receive or discount any note or other evidence of debt with the intent of enabling any stockholder in such company to withdraw any part of the money paid in by him on his stock; and in case of any violation of the provisions of this section the directors, under whose administration the same may happen, except those who may have caused their dissent therefrom to be entered at large on the minutes of the said directors at the time, or were not present when the same did happen, shall, in their individual and private capacities, jointly and severally, be liable to the said corporation and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock of the said company, so divided, withdrawn, paid out, or reduced, and to the full amount of the notes or other evidences of debt so taken or discounted in payment of any stock, and to the full amount of any notes or evidences of debts so discounted with the intent aforesaid, with legal interest on the said respective sums from the time such liability accrued; and no statute of limitation shall be a bar to any suit at law or in equity against such directors for any sums for which they are made liable by this section; provided this section shall not be construed to prevent a division and distribution of the capital stock of such company which shall remain after the payment of all its debts upon the dissolution of such company, or the expiration of its charter."

This dividend was condemned by the general term of the superior court as a violation of that section. Our attention has been called to no other law forbidding or condemning a stock dividend, and in their allegations against it the counsel for the plaintiff rely mainly upon that section. After reading the numerous opinions that have been submitted to us, and giving careful attention to all that has been said upon the subject, we are unable to perceive that that section has any bearing whatever upon the question we are to determine. The section was taken from the act, chapter 325 of the Laws of 1825, which was entitled, "An act to prevent fraudulent bankruptcies of incorporated companies, to facilitate proceedings against them, and for other purposes." It was not part of the original revision, but was incorporated into the Revised Statutes by chapter 20 of the Laws of 1828. A careful reading of the section shows that it has reference only to the property capital of a corporation, and not to its share capital. The first clause prohibits dividends of property except from surplus profits. It is further provided that the directors of any corporation shall not divide, withdraw or in any way pay to the stockholders, or any of them, any part of the capital stock of such company, or to reduce the capital stock

without the consent of the legislature. These provisions were intended to prevent the division, distribution, withdrawal and reduction of the property of a corporation below the sum limited in its charter or articles of association for its capital, but not to prevent its increase above that sum. The purpose was to prevent the depletion of the property of the corporation, thereby endangering its solvency. All the other provisions of the section show very clearly that such was the intention. Careful provision was made that the whole amount of capital stock should be paid in, and hence there was a prohibition against receiving a note or other evidence of debt in payment of any installment actually called in and required to be paid; and in case the directors violated any of the provisions of the section they were made individually liable to the corporation and to its creditors, in the event of its dissolution, to the full amount of the capital stock of the company so divided, withdrawn or reduced. All these provisions show that it was the purpose of the legislature, by means of them, to create a property capital for the corporation, and then to keep that intact so as to secure the solvency of the corporation and its responsibility to its creditors. The "capital stock" in this section does not mean share stock, but it means the property of the corporation contributed by its stockholders or otherwise obtained by it, to the extent required by its charter. While the term "capital stock" is frequently used in a loose and indefinite sense, in this section and in legal phrase generally it means that and no more. In *State v. Association*, 23 N. J. Law, 195, Green, C. J., said: "The phrase 'capital stock' is very generally, if not universally, used to designate the amount of capital to be contributed for the purposes of the corporation. The amount thus contributed constitutes the 'capital stock' of the company." In *Burrall v. Railroad Co.*, 75 N. Y. 211, Folger, J., defined "capital stock" as "that money or property which is put in a single corporate fund by those who by subscription therefor become members of a corporate body." In *Barry v. Exchange Co.*, 1 Sandf. Ch. 280, Vice Chancellor Sandford said: "The capital stock of a corporation is like that of a copartnership or joint-stock company, the amount which the partners or associates put in as their stake in the concern." By loss or misfortune, or misconduct of the managing officers of a corporation, its capital stock may be reduced below the amount limited by its charter, but whatever property it has up to that limit must be regarded as its capital stock. When its property exceeds that limit, then the excess is surplus. Such surplus belongs to the corporation, and is a portion of its property, and, in a general sense, may be regarded as a portion of its capital, but in a strictly legal

sense it is not a portion of its capital, and is always regarded as surplus profits. The very section we are considering contemplates that there may be a surplus, and that such surplus may be divided. The surplus may be in cash, and then it may be divided in cash; it may be in property, and if the property is so situated that a division thereof among the stockholders is practicable, a dividend in property may be declared, and that may be distributed among stockholders. All such dividends diminish and deplete the property of the corporation, and that section was designed to prevent dividends of property which tended to deplete the assets of the company below the sum limited in its charter as the amount of its capital stock. But stock dividends never diminish or interfere with the property of a corporation, and hence are not within the purview of that section. After a stock dividend a corporation has just as much property as it had before. It is just as solvent and just as capable of meeting all demands upon it. After such a dividend the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property of the corporation, and after the dividend they represent that and no more. A stock dividend does not distribute property, but simply dilutes the shares as they existed before; and hence that section in no way prevented or related to a stock dividend. Such a dividend could be declared by a corporation without violating its letter, its spirit or its purpose. It is, therefore, clear that the directors of the Western Union Telegraph Company did not violate that section by the stock dividend which they declared; and if that dividend was illegal it must be because it was condemned by some other statute, or by some general principle of law or by public policy.

Our attention has been called to no statute, and we know of none in this state, which prohibits a corporation from making a stock dividend. The legislatures in some of the states have, we believe, passed laws prohibiting such dividends; but in this state no such law has been enacted.

There is no public policy which, in all cases, condemns such dividends. Shares having been legally brought into existence may be distributed among the stockholders of a company. By such distribution no harm is done to any person, provided the dividend is not a mere inflation of the stock of the company, with no corresponding values to answer to the stock distributed. It may be that a distribution of stock gratuitously to the stockholders of a company, based upon no values, a mere inflation, or, to use a phrase much in vogue, a watering of stock, would be condemned by the law. But when stock has been lawfully created and is

held by a corporation, which it has a right to issue for value, then a stock dividend may be made, provided that the stock always represents property. It is conceded that the directors of the Western Union Telegraph Company could have issued this stock for money to be paid into its treasury. It could have issued it for property to be received by it for the purposes of its legitimate business. But here it is found that over and above its capital it possessed property actually worth upwards of \$15,000,000, and we know of no law that is violated, and no public policy that is invaded by issuing to the stockholders stock to represent that amount of property rather than in any mode to divide it up and distribute it among them. If it can issue stock in payment of property to be obtained by it as part of its capital for its legitimate uses, why may it not issue stock to its stockholders in payment for property in effect purchased of them and added to its permanent capital, and which they relinquish the right to have divided? So long as every dollar of stock issued by a corporation is represented by a dollar of property, no harm can result to individuals or the public from distributing the stock to the stockholders. Here there was no fraud, no conspiracy, no unlawful combination, and we are bound, under the findings of the court at special term, to assume that all this was done in good faith; and we know of no principle of law, no public policy, and no statute that condemns a stock dividend under such circumstances. *Howell v. Railroad Co.*, 51 Barb. 378; *Jones v. Railroad Co.*, 57 N. Y. 196; *Manufacturing Co. v. McAlpin*, 5 Fed. 743; *Attorney General v. State Bank*, 1 Dev. & B. Eq. 545; *Minot v. Paine*, 99 Mass. 101; *Rand v. Hubbell*, 115 Mass. 471; *Brown v. Navigation Co.*, 49 Pa. St. 270; *Com. v. Pittsburgh, Ft. W. & C. Ry. Co.*, 74 Pa. St. 83; *Terry v. Eagle Lock Co.*, 47 Conn. 141; *Barton's Trust, L. R.* 5 Eq. 239; *Mills v. Northern Ry. of Buenos Ayres Co.*, 5 Ch. App. 621; *Pierce, R. R.* (2d Ed.) 123.

It is true that this dividend largely increases the capital stock of the company, but that is not against the policy of our laws. That cannot be against the policy of the law which the law expressly permits. There is no limit to the capital which business corporations in this state may have, and there is no limit in the law beyond which they may not increase their capital. All that can be required in any case is that there shall be an actual capital in property representing the amount of share capital issued. Indeed, so far as the solvency and responsibility of a corporation is concerned, they are increased by a stock dividend where it has a surplus of property to correspond to the amount of shares issued. In such case the surplus property is secured and impounded for the benefit of the creditors of the corporation and for the public, so that thereafter

it can never be legally divided, withdrawn or dissipated in any way.

But if it can be conceived that this was a dividend of property within the meaning of the section of the Revised Statutes above set out, then what property did it divide? Not any portion of the capital of the company; that remained intact. After subtracting the dividend, there remained to the company the full amount of its prior capital stock, to wit, property to the value of \$41,073,410. Such is the finding of the trial court, and that cannot here be disputed. The company had made surplus earnings which it could have divided, but, instead of dividing them, it had invested them in property to facilitate and enlarge its business, and such property was found to be worth \$15,526,590. That sum constituted its surplus. It was commingled with the other property of the company and used for corporate purposes. But it was not beyond the reach of the dividend making power of the directors. They could reclaim it for division among the stockholders, and, if practicable, convert it into cash for that purpose. They could borrow money on the faith of it, and divide that. They could issue to the stockholders certificates of indebtedness, redeemable in the future, representing their respective interests in such surplus, thus, in effect, borrowing the same of the stockholders. Desiring to use the surplus and add it to the permanent capital of the company, and having lawfully created shares of stock, they could issue to the stockholders such shares to represent their respective interests in such surplus. In doing these things no law would be violated, the capital would be kept intact, and no stockholders or creditors would have any legal right to complain. All this, however, depends upon the finding of the trial court that the surplus is equal to the dividend. That finding is not open to criticism here. It was not disturbed at the general term, and therefore concludes us.

When a corporation has a surplus, whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors, uncontrollable by the courts. *Brown v. Canal Co.*, 4 Eng. Law & Eq. 118; *Rex v. Bank of England*, 2 Barn. & Ald. 620; *Jackson's Adm'rs v. Plankroad Co.*, 31 N. J. Law, 277; *Ely v. Sprague, Clarke*, Ch. 351. There is no statute which requires dividends in telegraph companies or in companies generally to be made in cash. Whether they shall be made in cash or property must also rest in the discretion of the directors. There is no rule of law or reason founded upon public policy which condemns a property dividend. The directors could convert the property into cash before a dividend and divide that. So the stockholders can take the property divided to them and sell it and thus realize the cash. Within the

domain of law, it can make no material difference which course is pursued. If, however, a dividend be made payable in cash or payable generally, the corporation becomes a debtor, and must discharge such debt, as it is bound to discharge all its other debts, in lawful currency. It is true that a stockholder cannot be compelled to receive property divided to him. So he cannot be compelled to take a cash dividend. In case of his refusal to take a cash dividend, the corporation may retain it for him until he shall demand it. In case he shall refuse to take a property dividend, the corporation may retain it, and hold it in trust for him, or possibly sell it for his benefit. If such a case shall ever arise, the courts will find some way to dispose of it. So this plaintiff cannot be compelled to accept the stock divided to him, and thus incur the possible liability which it may impose upon him as a stockholder. In case of his refusal, the corporation will find some way to deal with the stock which the law will sanction, but which need not now be pointed out.

We have no occasion to scrutinize the motives of the defendants. The trial judge refused to find the alleged fraud and conspiracy, and his finding concludes us. In his opinion he said: "I have also found that the other allegations of fraud and conspiracy made in the complaint against the defendants and others were not proved on the trial. One of the very able counsel for the plaintiff, in his argument, at the close of the trial in this case, said that he was not going to lament the fact that he had failed to show such combination, that he had not been able to prove certain things by the defendants;" and the opinion of the court at the general term is to the same effect: "The complaint, among other things, charges that the corporate action complained of was the result of a fraudulent conspiracy on the part of the individual defendants, but the allegations in that respect were not sustained by the proof at the trial, nor has there been an argument made in their support upon the present appeal."

We are, therefore, of opinion, upon the facts, found at special term, that the stock dividend was authorized by law, and, therefore, valid.

The only other question which we deem it important to consider is, whether the Western Union Telegraph Company alone had the right to appeal to this court, giving the stipulation for judgment absolute against it in case the order should be affirmed. By section 190 of the Code, every party has a right to appeal from an order granting a new trial, and the only requirement is by section 191, that the notice of appeal shall contain an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against him. A party cannot be deprived of that right, because he happens to be joined with others as a defendant in a suit. It might be otherwise if

the defendants were jointly interested in the defense, as if they were sued as partners. But here the liability of the defendants is a several liability. Substantial relief is claimed against the Western Union Telegraph Company, which is not claimed and could not be claimed against the other defendants. The purpose of the action, among other things, was to annul its corporate proceedings, and to restrain and impair corporate action. It is in effect the principal defendant, because, if its corporate action was authorized and legal, then no liability attaches to any one. If its corporate action was illegal, and should be held to be null and void, or be set aside, then responsibility might attach to the other defendants.

In such a case, a defendant situated like the Western Union Telegraph Company has the absolute right, without joining with the other defendants, to appeal from an order granting a new trial, and stipulate for judgment against it in case of affirmance. If the other defendants do not desire to appeal or give a stipulation, they can go back to a new trial. In such a case the whole matter is within the control of the courts. If deemed wise, this court could postpone the argument of the appeal until the new trial as to the other defendants should be had; or the trial as to the other defendants might be suspended by the court below until the appeal should be heard. The course to be pursued is always in the discretion of the courts, which is to be exercised in view of the circumstances of the particular case. The case of *People v. Thacher*, 55 N. Y. 525, is not in conflict with these views. That was an action in the nature of a quo warranto by the people on the relation of Judson against Thacher, to determine the title to the office of mayor; and Thacher, the incumbent of the office, succeeded at the trial term, and the judgment in his favor was reversed at the general term, and a new trial granted. He then appealed to this court, giving the stipulation for judgment absolute in case the order should be affirmed, and it was held that that was not a case in which the stipulation could be given and the appeal taken, for the reason that there were two questions involved in the action; first, whether the defendant was entitled to the office; and if he was not, second, whether the relator was; and if the defendant could give the stipulation and judgment should go against him, it was held that that would not determine the right of the relator to the office; and hence that was a case in which the stipulation could not be given, as it might result in turning the relator out of court without having his right to the office determined in that action. But here there is no such difficulty, and judgment in favor of the appellant will determine the whole controversy as to all the parties. A decision against the appellant in this court would leave the other defend-

ants still with the right to defend the action as best they could.

Our attention upon the argument was called to certain exceptions taken during the trial, of minor importance, to which we have given careful attention, and we do not think that any of them point out any error prejudicial to the plaintiff.

We have not considered and do not determine the point made by the defendants, that the plaintiff, as an individual stockholder, who purchased his stock while the transactions of which he complains were in fieri, and after he had some notice of them, cannot, in any aspect of the case, maintain this

action, upon the facts existing, for the relief which he seeks. We prefer to rest our decision upon the broader ground upon which we have placed it. We are, therefore, of opinion that the order of the general term should be reversed, and the judgment of the special term affirmed, with costs.

A similar order should be entered in Hatch v. The Western Union Telegraph Company and others, and as these decisions vacate the injunction orders, the appeals from those orders should be dismissed, without costs.

All concur, except RUGER, C. J., and DANFORTH, J., taking no part.

Order reversed, and judgment accordingly.

KING v. GOVERNOR, ETC., OF THE BANK OF ENGLAND.

(2 Barn. & Ald. 620. 1819.)

Denman moved for a mandamus to the governor and company of the Bank of England, to produce an account of the income and profits for the last half year, preceding the holding of the last general court which was held on the 18th March, 1819, with an account of the charges of management for the said half year, for the purpose of enabling the next general court to consider the state and condition of the company, and to declare a dividend of all the profits, the charges of management only excepted. The affidavit, in support of the motion, stated that the applicant was a member of the corporation, and a proprietor of £500 bank stock. It then set out part of the charter, by which it appeared that it was competent to the proprietors, in their general courts, to make by-laws relating to the government of the corporation. It then stated, that in the year 1697, the following by-law was made, viz.: "That twice in every year a general court shall be held for considering the general state and condition of this corporation, and for the making of dividends out of all and singular the produce and profit of the capital stock and fund of this corporation, and the trade thereof, amongst the several proprietors therein, according to their several shares and proportions. The one of which said courts shall be held between the 10th and 25th days of September, the other between the 10th and 25th days of March, yearly." The affidavit then stated that the applicant, on the 3d of December, 1818, had given notice to the governor and directors of the bank to produce, on the day on which the next half-yearly court should be held, an account of the income and profits for the half year preceding that day, with an account of the charges of management for the said half year, to be laid before the court, for the purpose of enabling the court to consider the state of the company, and to declare a dividend on all the profits, the charges of management only excepted. The affidavit then stated that a general court was held on the 18th March, 1819, and that the governor and directors of the Bank of England refused to comply with his demand. The motion was then made that the accounts should be produced, which motion was negatived by a majority of the court. It was now contended that it was imperative on the corporation to divide their profits half-yearly; and the act of 7 Anne, c. 7, was referred to, by which it was expressly enacted, that all the profit arising out of the management of the corpora-

tion, &c., the charges of managing the business of the governor and company only excepted, should be applied from time to time to the use of all the members of the said corporation for the time being, ratably and in proportion to each member's part, share, or interest in the common capital and principal stock of the governor and company of the Bank of England. This act is imperative on the company to divide their profits, half-yearly, among all the members for the time being. Now, if the company be permitted to accumulate profits, they will not be divided among the members for the time being, but will be divided among subsequent purchasers of stock.

ABBOTT, C. J. This is an application for a mandamus to a trading corporation, at the instance of an individual member, to compel the directors of that corporation to produce their accounts and divide their profits. It is, in effect, an application on the behalf of one of several partners to compel his co-partners to produce their accounts of profit and loss, and to divide their profits, if any there be. The examination of the accounts of a trading company may be effectually entered into in the court of chancery; but this court is a very unfit tribunal for such a subject. A mere trading corporation differs materially from those which are entrusted with the government of cities and towns, and therefore have important public duties to perform. No instance has been cited in which the court has granted a mandamus to a corporation like the present, and I think we ought not now to establish the precedent.

BAYLEY, J. The court never grant this writ except for public purposes, and to compel the performance of public duties. This is an application, at the instance of one of several partners in a trading company, to compel his co-partners to divide their profits: but that is a mere private purpose, and presents a fit subject for enquiry on the other side of the hall. There is no instance in which the court have granted a mandamus to a trading corporation; and, that being so, I think that we should not now grant it for the first time.

HOLROYD, J. I am of the same opinion. The effect of this application would be to compel a public exposure of private concerns, and I think it ought not to be granted.

BEST, J. If we were to grant this rule, we should make ourselves auditors to all the trading corporations in England.

Rule refused.

PRATT et al. v. PRATT, READ & CO.

(33 Conn. 446. 1866.)

Bill for an injunction, brought to the superior court for Middlesex county.

The bill alleged that the petitioners in the year 1863 associated themselves with Julius Pratt, Henry C. Butler and others as a joint stock corporation by the name of Pratt, Read and Company, under the statute with regard to such corporations, for the purpose of manufacturing and selling ivory, bone, shell and wood combs, and piano and melodeon ivory, and other articles made in part or in whole of ivory; that the capital of the corporation was \$175,000; that the petitioners were owners of a minority of the stock; that the corporation had been and was still engaged in a profitable business, but that the directors had combined with the owners of a majority of the stock to misapply the funds of the corporation; that there was a surplus of earnings in the hands of the treasurer amounting to \$125,000, which the petitioners had insisted upon having divided, but the directors had refused; that the company was proceeding through the directors, and without any vote of the stockholders, to erect a large and expensive building for the purpose of extending their business beyond what was contemplated when the company was formed; that the petitioners were in need of their share of the surplus for their individual purposes; and that the directors and the majority of the stockholders were acting fraudulently and in disregard of the interests of the petitioners, and were conspiring together to secure their own private interests by means of the corporate organization and funds and to injure the interests of the petitioners. The bill therefore prayed for an injunction against the corporation, forbidding it to proceed with the erection of the building, and for a decree that the corporation divide among the stockholders the surplus funds on hand.

Upon the bill and the answer of the respondents the court found the following facts:

The respondents, a joint stock corporation under the name of Pratt, Read & Co., was on the 6th day of October, 1863, duly organized and located in the town of Meriden and county of New Haven, with a capital of \$175,000, divided into seven thousand shares of \$25 each, for the "purpose of manufacturing, selling, and dealing in all kinds of ivory shell, horn, bone, rubber, wood and other combs, all kinds of piano and melodeon ivory, and other articles made in whole or in part of ivory, shell, bone, india rubber, gutta percha, composition, wood or metal, and to purchase, hold, sell, and deal in all real and personal estate necessary and convenient for the prosecution of said business, and generally to do all acts connected with or incidental to said business or the prose-

cution of the same." The stockholders of the corporation are exclusively composed of the former members of the firms of George Read & Co. and Pratt Brothers & Co., late of Saybrook, in Middlesex county, and the stockholders in the former corporation of Julius Pratt & Co., late of Meriden. The petitioners are the former members of said copartnership of Pratt Brothers & Co., and now own 1,441 shares of the stock. The remaining 5,559 shares are owned and held by those individuals who formerly composed said copartnership of George Read & Co. and said corporation of Julius Pratt & Co. One of the principal objects in the formation of the new corporation by the consolidation of said copartnerships and corporation, was to secure as far as practicable uniformity in prices, and certainty in profits, and to that end it was understood by all concerned that the respondents were not to receive and be prejudiced by any competition from any of its own stockholders, and that they should not carry on the same business independently of the business of the respondents.

In June, 1864, Ulysses Pratt, one of the petitioners, purchased from the Deep River Ivory Comb Company, a corporation located in Saybrook, their factory, machinery, fixtures and privileges, and in February or March, 1865, formed a copartnership with other persons, and commenced and still carries on thereat the business of manufacturing ivory combs, and sells their manufactured goods in competition with the respondents.

At the time the respondents were organized, the real and personal assets of the corporation of Julius Pratt & Co. and of the copartnerships of George Read & Co. and Pratt Brothers & Co., was appraised by persons mutually selected at \$446,000, which was held in the following proportions, to wit: by Julius Pratt & Co. \$258,511, by George Read & Co. \$89,593, and by Pratt Brothers & Co. \$97,917; and in the subscriptions to the capital stock of the respondents the members of said corporation of Julius Pratt & Co. and of said copartnerships of George Read & Co. and Pratt Brothers & Co., subscribed and owned in the same proportions. The remainder of the real and personal estate of said corporation and copartnerships, amounting to \$271,000, after deducting and applying the capital of the respondents, \$175,000, was taken by the respondents, and the notes of the new corporation given, in the same proportions that the stock was subscribed, to said corporation of Julius Pratt & Co. and said copartnerships of George Read & Co. and Pratt Brothers & Co. All the notes so given to George Read & Co. and Pratt Brothers & Co. were paid at maturity, and all those given to said corporation of Julius Pratt & Co. had been paid at the time of the bringing of the suit, except about \$36,000, which for the accommodation and convenience of the respondents had been extended and allowed to remain over-due.

At the time of the organization of the new corporation there was a general understanding by the parties that the notes should be paid at its convenience, and that they should be extended to suit its convenience in the reasonable prosecution of its business, and that the payment of these notes to the holders should be received by them in lieu of dividends, until they were all cancelled and discharged; but the petitioners Alexis Pratt and Felix A. Dennison were not cognizant of and did not participate in that understanding, and it did not clearly appear that the other petitioner, Ulysses Pratt, did.

At the time of the bringing the petitioners' bill, to wit, on the 8th of March, 1866, the outstanding indebtedness of the respondents was about \$72,000, of which \$30,000 was matured and had been extended as aforesaid, and the respondents had then on hand in cash \$21,000, and a surplus of property and earnings including said cash of about \$130,000. This surplus, aside from said \$21,000 in cash, consisted of stock, manufactured goods, and some \$50,000 in paper, taken on short time, upon the sales of manufactured goods at their agency in New York. The amount and value of the respondents' surplus was arrived at by an inventory and estimate of its assets made, so far as that portion which consisted of manufactured goods was concerned, at 28 per cent. below the selling prices in market.

The building now in process of erection by the respondents in Saybrook is designed for the manufacture of piano key boards, a business incidental to the manufacture of piano keys, and, if carried on to a considerable extent by the respondents, requires the additional room and power and expenditure contemplated in the building and improvements which the respondents have commenced to erect and make, and which, with the machinery and fixtures, and the necessary additional outlay in lumber and materials, will call for some \$30,000 or \$35,000.

The directors of the corporation at the time of its organization contemplated the prosecution in some manner of this branch of business, and the said Ulysses Pratt was then and for some time thereafter one of its most earnest advocates; but the petitioners have never been in favor of conducting it at so great expense, or so as to interfere with the payment of fair and reasonable dividends; and the successful prosecution of the business has not yet been fully established, and at the time of the commencement by the respondents of said building, and at other times since, the petitioners have objected to and remonstrated with the directors, and insisted upon having their share of the earnings of the corporation paid to them, and the said Alexis Pratt has little other means or source of income for the support of himself and family, and needs whatever justly be-

longs to him as the avails of his stock and interest in the corporation.

The corporation has made no dividends since its organization, except one of five per cent. in July, 1865, which was declared for some purpose connected with the United States income tax; and at the same meeting at which the dividend was declared, the said Ulysses Pratt, acting for himself and as agent of the other petitioners, desired and moved a dividend of forty per cent., which motion was rejected.

The business of the corporation has from its organization been and still is very prosperous, but it has not cash funds to pay its debts, erect and make the contemplated buildings, improvements and expenditures, and pay a dividend; and if it assumes or undertakes to do all these at present it must either borrow money to a considerable amount or force the sale of its manufactured goods at a loss; but if the erection of the new building and the prosecution of the piano key board business is abandoned, it can safely make a liberal dividend from its accumulated profits. Its property cannot be forced upon the market and disposed of faster than by its regular sales at its agency in New York without material sacrifice, and the present tendency in the prices of its goods is somewhat downward, partly in consequence of sales at under prices made by Pratt, Smith & Co., a corporation of which the said Ulysses Pratt is a member and agent, and partly from other causes connected with the business of the country; and to conduct the business successfully a large capital in said material and manufactured goods is necessary, and a much larger sum than \$175,000 is required, unless a considerable amount in surplus can be retained and employed for that purpose. The corporation, through its directors, has acted in the premises without malice, improper motive or fraud towards the petitioners or either of them, and in the management of its business and concerns has exercised what they believed to have been a sound and reasonable judgment and discretion.

Upon these facts the case was reserved for the advice of this court.

HINMAN, C. J. The petitioners seek in this case the aid of a court of equity to compel the respondents, a joint stock corporation, to declare and pay over to its stockholders a reasonable dividend out of its surplus earnings; and also to enjoin it from making farther expenditures in the erection of a large factory building for the purpose of enlarging its business and thereby exhausting its surplus funds, to the injury of the petitioners, who are a minority of its stockholders opposed to such enlargement. The petitioners make in their petition a very strong case for the equitable interference of the court in

their behalf. And if it had been sustained by the facts found by the court, we could have no hesitation in granting them the relief asked for. Where a corporation is about to exceed its powers by applying its property to objects beyond the authority of its charter, it is well settled that a court of equity will grant relief to a minority of its stockholders who dissent from such use of its funds. *Railroad Co. v. Crowell*, 5 Hill, 383; *Stevens v. Railroad Co.*, 29 Vt. 545; *Sears v. Hotchkiss*, 25 Conn. 171; *Scofield v. School Dist.*, 27 Conn. 499.

Indeed this doctrine necessarily results from the principle which underlies the cases, that the corporation and the directors are trustees, and as such may be called into a court of chancery, either for an account, or to restrain them from mismanagement of the corporate property, especially for a fraudulent mismanagement of it, or for the purpose of compelling the corporation and its directors to declare dividends from its surplus earnings, where such dividends are needlessly and improperly withheld. *Robinson v. Smith*, 3 Paige, 222; *Scott v. Insurance Co.*, 7 Paige, 198. Indeed, joint stock companies in modern times are nothing but commercial partnerships, which have taken the form of corporations for the greater facility of transacting business, and to prevent a dissolution of the concern by those numerous events which are so liable to work a dissolution in a partnership composed of a great number of individuals; and they must have applied to them principles making them accountable like all trustees, or the grievance would be intolerable, since otherwise a majority of the stockholders, acting through the directors, who would thus cease to be in fact what the law considers them,—the agents of the whole body of stockholders,—and would become the private agents of the majority, might set the minority at defiance, and manage the affairs for their own supposed benefit and the benefit of the majority who appointed them. The true doctrine upon this subject appears to us to be very fairly and correctly stated by Chancellor Walworth in the case of *Scott v. Insurance Co.*, 7 Paige, 203, where he says, that “as the directors are bound to exercise a proper discretion in making dividends of surplus profits, if they abuse that power by dividing the unearned premiums without leaving sufficient to satisfy the probable losses, they may, in case of an extraordinary loss which is sufficient to exhaust the whole capital and more, make themselves personally liable to the creditors of the company. On the other hand, should they without reasonable cause refuse to divide what is actually surplus profits, the stockholders are not without remedy, if they apply to the proper tribunal before the corporation has become insolvent.” The surplus of this corporation over its nominal capital which the petitioners seek to have di-

vided is so large, and bears so great a proportion to the capital, that we have felt the necessity of stating our views of the principle which should govern in determining questions of this sort the more distinctly, in order to prevent the case from being used as a precedent against ordering a dividend to be made, where there is confessedly a large surplus over the capital on hand, and no reason can be given for withholding it from the stockholders except the mere will of the directors, acting by the advice of a majority of the stockholders. In cases of this description the question must always be, where a surplus is asked to be divided, and the directors refuse to declare a dividend, whether there is a reasonable cause for withholding it. Now, in the first place, before a dividend is ordered to be made, it should appear clearly that there is a surplus to be divided. In this case the surplus appears to be very large in reference to the nominal capital of the company; but when examined in reference to its actual capital, it is otherwise; and we think we find a sufficient reason in this fact for not ordering a dividend. In the first organization of the corporation the sum of \$175,000 was named as the nominal capital in the articles of association. But it is evident from all the facts in the case that the actual capital was much larger and consisted of all the property purchased of the individual stockholders, who had all been engaged in the business contemplated to be carried on by the company, which was of the agreed value of more than \$400,000; the difference being made up to the stockholders by the corporation notes, which were expected to be paid, as they principally have been, out of the subsequent profits of the business, and not by an immediate sale of any large portion of the assets thus purchased of its stockholders. It could not have been the intention to force the sale of this large amount of property. This could not have been done without great sacrifice, and if such had been the intention, the corporation never would have purchased it. They therefore must have intended to use it as a part of their capital, or to keep it on hand as surplus until that part of it which consisted of manufactured goods could be sold, in the regular course of business, with which all the stockholders were familiar. There is no evidence that they have not converted their manufactured goods into cash as fast as it can be done in the successful prosecution of their business, and to order them to do it faster than this is simply to order them to make needless sacrifices. The reason for stating the amount of their capital at so much less than it actually was does not appear, and it is not very important that it should. It is enough to say of it, that while it is not a course to be recommended for general adoption, the finding in this case is very full to the effect that nothing im-

proper or fraudulent was intended by it; and the success of their business fully sustains the finding, that the directors have in all their transactions exercised a sound judgment and discretion.

Again, the court finds that it was the general understanding of the stockholders that their notes against the corporation, given for the largest part of the property purchased at the time of the organization, as they should be paid, should be regarded and received by them in lieu of dividends, which implies certainly that no dividends should be declared until that large indebtedness was paid; and this has not yet been done, by some thirty thousand dollars. But there was as much reason for declaring a dividend when the corporation was first organized as there is now, except so far as the comparatively small sum in cash on hand is concerned. As then the business appears to have been honestly and discreetly managed, and as it is found moreover that to conduct it successfully requires a much larger capital than \$175,000, unless a considerable surplus is retained; and as we believe it to have been the intention of the stockholders in the organization of the company to retain a surplus to at least the amount of its capital for that purpose, and as the ordering of a dividend would necessarily involve the sacrifice of a large amount of manufactured goods at a forced sale, it appears to us that it would be very inequitable and unjust to the managing majority to advise the superior court to order such a dividend to be made.

The remaining question is, whether the corporation ought to be restrained from erecting their new factory, for the manufacture of piano key boards. The directors at the time the corporation was organized contemplated the prosecution of this business. The articles of association state the purpose of the organization to be to manufacture, sell and deal in all kinds of ivory, shell, horn, bone, rubber, wood and other combs, and all kinds of piano and melodeon ivory, and other articles made in whole or in part of ivory, shell, horn, bone, India rubber, gutta percha, composition, wood or metal, and to purchase, &c., and to do all acts connected with or incidental to the said business or the prosecution of the same. It

is not very strenuously claimed but that the manufacture of piano key boards, as connected with the manufacture of all kinds of piano ivory, and especially of all other articles made in whole or in part of ivory, composition, wood or metal, comes within the contemplated purpose of the corporation, as expressed in the articles. The question, therefore, in this part of the case, is confined merely to whether the contemplated expenditure for this new factory is so great as unnecessarily and unreasonably to hazard the petitioners' stock. On a question of this sort much must necessarily be left to the discretion of the managing directors, and so long as they keep within the objects contemplated by the articles of association, and the expenditure is not unreasonable in reference to the amount of their capital, a court of equity ought very seldom to interfere with them. In the organization of these companies, parties, if they see fit to do so, can provide specifically as to the business that shall be transacted; and if they omit to do this, but, on the contrary, express the purposes of the organization in such general terms as to admit of a very large discretion in the management of their business, the presumption is that it was intended that the discretion of the managers in this respect should be unlimited. There is nothing in the articles here that shows any intention to limit the discretion of the managers in respect to the particular business contemplated, except it be the naming of a sum as the amount of the capital. This in most cases would and ought to be some guide in respect to the amount that it would be reasonable to expend in permanent fixed property and machinery; but this, in this case, appears to have been fixed without much reference to the amount of business to be done. We feel therefore that it is impossible for us to say that the expenditure of some \$35,000 for this new factory is so clearly extravagant and disproportioned to the amount of capital stock as to justify the court in enjoining against it. We therefore advise the superior court to dismiss the petitioners' bill.

In this opinion the other judges concurred, except CARPENTER, J., who, having heard the case upon a motion to dissolve the injunction in the court below, did not sit.

DAVISON v. GILLIES.

(16 Ch. Div. 347, note. 1879.)

This was a motion by the plaintiff, William Davison, suing on behalf of himself and all other shareholders of the London Tramways Company, Limited, and the company, for an injunction to restrain the defendants, the directors of the company, from applying any part of the assets of the company which represented capital, or ought to be retained to represent capital, in the payment of dividends on the shares in the company, and from submitting to the shareholders any resolution to confirm or permit the payment of dividends out of capital, or summoning any meeting for the purpose of authorizing payment of dividends, without first fully and properly disclosing to all the members of the company the true state of the capital and other accounts of the company, and without disclosing the fact that no dividends could be paid except out of assets which ought to be retained to represent capital.

The ground of the motion was that the company's tramways had become worn out, thus necessitating a large expenditure for repairs, no due provision for which had been made by the company in their accounts; and that consequently the company had no right to pay the dividend declared on the 20th of February, 1879, as mentioned in an action of Dent v. London Tramways Co., 16 Ch. Div. 344, until these repairs had been provided for; or, in other words, until the capital so lost had been reinstated. The other facts of the case sufficiently appear from his lordship's judgment.

By amendment the company were struck out as plaintiffs and added as defendants.

JESSEL, M. R. The articles of association, which are binding on the directors and on the company, are very plain.

The 107th article is this: "No dividend shall be declared except out of the profits or the company." A general meeting cannot get over that. The dividend can never be declared but out of profits; and the allegation on the part of the plaintiffs is that this dividend is not declared out of profits at all; that there are no profits available. The right to declare a dividend depends on the facts. The word "profits," by itself, is a word which is certainly susceptible of more than one meaning, and one must ascertain what it means in these articles. The 103rd article says: "The directors shall, with the sanction of the company in general meeting, declare annual dividends, to be payable to the members out of the profits of the company, not exceeding the rate of 6 per centum per annum for each year, on the paid-up capital for the time being of the company, and of one-half the profits of the company above that amount, and they shall declare the other half of such surplus profits to be payable to the scripholders." Scripholders are another

class who are not shareholders, who have subscribed moneys, and are to be entitled to half the surplus profits. It is quite clear that, whatever these profits are, they are profits of the same kind: half the surplus is to go to the shareholders and the other half to the scripholders.

Then the next article is this: "The directors shall, before recommending any dividend, set aside out of the profits of the company, but subject to the sanction of the company in general meeting, such sum as they think proper as a reserve fund for maintenance, repairs, depreciation, and renewals." It is plain that these "profits" mean something after payment of the expenses, because you do not get a reserve fund at all until you have paid your current expenses. It is obvious that the word "profits" means net profits.

Then the next article is this: "The directors shall also, before recommending any dividend, set aside out of the profits of the company, a sum equivalent to one per centum per annum on the amount of the paid-up capital for the time being as a contingencies fund." There again "profits" obviously mean net profits. The result, therefore, of the articles, as I read them, is that a dividend shall only be declared out of net profits.

Then I have to consider the question, what are net profits? A tramway company lay down a new tramway. Of course the ordinary wear and tear of the rails and sleepers, and so on, causes a sum of money to be required from year to year in repairs. It may or may not be desirable to do the repairs all at once; but if at the end of the first year the line of tramway is still in so good a state of repair that it requires nothing to be laid out on it for repairs in that year, still, before you can ascertain the net profits, a sum of money ought to be set aside as representing the amount in which the wear and tear of the line has, I may say, so far depreciated it in value as that that sum will be required for the next year or next two years.

Take the case of a warehouse. Supposing a warehouse-keeper, having a new warehouse, should find at the end of the year that he had no occasion to expend money in repairs, but thought that, by reason of the usual wear and tear of the warehouse, it was a thousand pounds worse than it was at the beginning of the year, he would set aside £1,000 for a repair or renewal or depreciation fund before he estimated any profits; because, although that sum is not required to be paid in that year, still it is the sum of money which is lost, so to say, out of capital, and which must be replaced. I should think no commercial man would doubt that this is the right course—that he must not calculate net profits until he has provided for all the ordinary repairs and wear and tear occasioned by his business. In many busi-

nesses there is a regular sum or proportion of some kind set aside for this purpose. Shipowners, I believe, generally reckon so much a year for depreciation of a ship as it gets older. Experience tells them how much they ought to set aside; and whether the ship is repaired in one year or another makes no difference in estimating the profits, because they know a certain sum must be set aside each year to meet the extra repairs of the ship as it becomes older. There are very many other businesses in which the same thing is done.

That being so, it appears to me that you can have no net profits unless this sum has been set aside. When you come to the next year, or the third, or fourth year, what happens is this: as the line gets older the amount required for repairs increases. If you had done what you ought to have done, that is, set aside every year the sum necessary to make good the wear and tear in that year, then in the following years you would have a fund sufficient to meet the extra cost. Now, when I come to look at these articles, I think that is what is intended, and that that is the meaning of the reserve fund. What the company intended to do was this: inasmuch as they knew that maintenance, repairs, depreciation and renewals would be wanted, and inasmuch as they knew that according to the ordinary commercial rules they ought not to calculate the net profits until they had provided for this which was sure to happen, they said, "We will set aside a sum of money which we will call a reserve fund for this purpose." Although not expended during the year, it is a reserve fund set aside for expenditure in the following years, taken out of profits before a dividend is made. It appears to me, therefore, that these articles do recognize what seem to me sound commercial principles. That being so, from year to year, as the line got older it would get worse, and would, no doubt, require a larger expenditure every year for repairs and renewals, as a general rule. I say as a general rule, because sometimes the repairs may be so extensive as to make the renewal of a large portion of the line required in one year, and then the next year there might be a falling off in the amount required; but, as a general rule, as the line got older it would require more money.

Now, the line having been established seven years, I find an eminent engineer telling me in his affidavit in support of the motion that to put the line in a good state of repair will require £80,000; in other words, if you take the deterioration of the line from want of repair from its commencement, it is worth £80,000 less than it was at starting: that is the summary of that gentlemen's evidence. He then thinks that those repairs, or the greater part of them, should be done at once. That is a matter of opinion on which engineers may fairly differ, and do

differ. The defendants' engineer, who, I am told, is also an eminent engineer, says he thinks they should not be done at once, but should be done gradually. But still, as I said before, they are to be done. That sum of money is required, or something like it. I cannot ascertain from the affidavit of the defendants' engineer what sum he considers sufficient: I have no doubt he would fix a much smaller sum. However, for the purpose of my judgment, I am willing to take a very large discount off the £80,000, because it is a very much larger sum indeed than is required to wipe away the whole of the dividend the company have declared. Therefore one need not consider whether it is £80,000 or £40,000: either sum would do that; but a very large sum it is, and the defendants' engineer does not tell me how much.

I do not wish to prejudice any future application the company make under the leave I am going to reserve to them, but I will say that unless they give me something a great deal more definite as to the amount actually required for putting the line into repair than I have at present, I should certainly not be of opinion that the amount they propose to divide among the shareholders is fairly divisible.

(His lordship then commented on the accounts for the half-year ending the 31st of December, 1878, observing that the existing "reserve fund" was altogether inadequate for the purposes of ordinary maintenance, &c., and that the "contingency fund" was not applicable to such purposes. His lordship then continued:) That being so, on the present evidence I am satisfied that there are no profits at present available for division. It may happen that there would have been profits if the company had properly applied the surplus of former years. I must say, looking at the accounts of the company, it appears to be a flourishing company, and I hope nothing I say will damage its future success; but still I am bound by the articles to say that no dividend is to be paid except out of profits; that there are no profits available, and therefore I grant the injunction asked. At the same time I wish to give the defendants every possible opportunity of shewing that there are profits available, and I also feel that my intervention is likely to be injurious to the company. If the defendants can shew me at any time that there are profits available for the purpose of this dividend, I will give them an opportunity of doing so, and therefore I give them leave to move to dissolve the injunction I now grant.

The injunction granted restrained the defendants from authorizing or making any payment out of the assets of the company in respect of the dividend declared in February, 1879, on the ordinary shares.

By consent the motion was afterwards treated as the trial of the action, and thereupon the injunction was made perpetual.

DENT v. LONDON TRAMWAYS CO.

(16 Ch. Div. 344. 1880.)

The defendants, the London Tramways Company, Limited, were incorporated in 1870, under the companies acts, 1862 and 1867, with a capital of £250,000, in 25,000 shares of £10 each. The whole of the capital had been issued and was fully paid up.

In 1874, in pursuance of a power contained in their articles of association, the company passed a special resolution increasing their capital "by the issue of 8,000 shares of £10 each, bearing a preferential dividend of 6 per cent. per annum over the present shares of the company dependent upon the profits of the particular year only."

In accordance with that resolution 8,000 preference shares of £10 each were duly issued and became fully paid up. The plaintiff was the registered holder of 100 of such shares.

The plaintiff, who sued on behalf of himself and all other the preference shareholders of the company, alleged in his statement of claim that in the half year ending the 30th of June, 1878, the company earned profits sufficient for the payment of a dividend at the rate of 3 per cent. per annum both on the preference and ordinary shares, which dividend was accordingly duly paid; that in the half year ending the 31st of December, 1878, the company earned further profits sufficient for payment of a dividend at the rate of 3 per cent. upon the preference shares, and at the rate of 6 per cent. per annum on the ordinary shares, and that by a resolution passed at a general meeting of the company, held on the 20th of February, 1879, such dividend was duly declared and became payable to the plaintiff and other holders of preference shares; that the company, however, refused to pay such dividend to the plaintiff or any of the other holders of preference shares, and that the sum of £30 was now due to the plaintiff in respect of such dividend on the 100 preference shares; that during the year ending the 31st of December, 1879, the company earned profits much more than sufficient for payment of a dividend at the rate of 6 per cent. per annum upon the preference shares, but that the company had not paid and refused to pay, either to the plaintiff or to any other holders of preference shares, any dividend whatever for that year; that the company's tramways and works were in a state of efficiency and good working order, and that no expenditure beyond the expense occasioned by ordinary wear and tear was required.

The plaintiff claimed (amongst other things) a declaration that he and all the other preference shareholders were entitled to a dividend on their shares at the rate of 3 per cent. per annum for the year ending the 31st of December, 1878, and a dividend on their shares at the rate of 6 per cent.

per annum for the year ending the 31st of December, 1879; payment to the plaintiff of the sums of £30 and £60, being the amounts due to him in respect of such dividend for the years ending the 31st of December, 1878, and the 31st of December, 1879, respectively; an account of the profits made by the company during the same years, respectively; and payment to the plaintiff of such dividend on his preference shares as upon taking such account the court should consider him entitled to.

In their statement of defence the company alleged that they had only recently ascertained that from the year 1871 down to the end of the year 1878 their accounts, which were rendered half-yearly, had been kept in an improper and misleading manner, no proper or sufficient sums ever having been expended and proper allowance made for the maintenance, repairs, depreciation, and renewals of the tramways, rolling-stock, and other property of the company, and that the amounts from time to time actually charged against revenue in respect of such maintenance, repairs, depreciation, and renewals were grossly inadequate, and far below what ought properly to have been so charged.

The defence then proceeded to state that from the year 1871 to the year 1877 inclusive, the company had, in ignorance of their true financial position, paid large sums to the shareholders by way of dividend, without charging, as they should have done, in each year a proper proportional amount against revenue for maintenance, repairs, depreciation, and renewals; and it appeared that if this proportional yearly charge had been made the balance of revenue or "net profit" in each year available for a dividend would have been comparatively small.

The defence then stated that the company's accounts for the year 1878 purported to shew a net balance of profits for that year of £21,178. 10s. 10d.; but that (paragraph 20) "if a proportionate amount had been charged against the revenue for the year 1878 for such maintenance, repairs, depreciation, and renewals as aforesaid, the accounts would have shewn, as the fact was, that there was a balance of revenue, and in that sense a net profit in that year, of only £14,932;" that on the faith of the said accounts, and being ignorant of their true financial position, the company paid the dividend for the half year ending the 30th of June, 1878, both on the preference and ordinary shares, and on the 20th of February, 1879, passed a resolution declaring the further dividend for the half year ending the 31st of December, 1878, on both the preference and ordinary shares.

Shortly after the passing of the last mentioned resolution, and before any dividend was paid under it, one William Davison, on behalf of himself and all other the share-

holders of the company, brought an action (*Davison v. Gillies*),¹ which, as amended, was against the directors of the company and the company itself, for (amongst other things) an injunction to restrain the defendants in that action from applying any part of the assets of the company which represented capital, or ought to be retained to represent capital, in the payment of dividends, and from submitting to the shareholders of the company any resolution to confirm or permit the payment of dividends out of capital: and upon motion his lordship granted an injunction restraining the defendants from authorizing or making any payment to the ordinary shareholders in respect of dividend for the half-year ending the 31st of December, 1878, on the ground that, inasmuch as no proper allowance had been made in the company's accounts for maintenance, &c., no part of the moneys of the company was in fact available or applicable for dividends on the ordinary shares for the year 1878.

The company then stated in their defence in the present action, that the total sum which ought to have been charged against revenue for maintenance, &c., during the eight years from 1871 to 1878, instead of being paid away in dividends, amounted to £114,460. 18s. 8d., and that that sum, having been in fact paid out of capital, represented the amount by which the capital of the company had become diminished in value.

Under these circumstances the company insisted that the preference shareholders were not entitled to be paid any dividend until the company had, by means of the sums earned by them since the 30th of June, 1878, and to be earned, increased the small existing reserve fund applicable for maintenance, &c., to the sum of £114,460. 18s. 8d., or, in any case, until the preference shareholders had accounted for and repaid to the company the sums paid to them in excess of what they ought to have received for dividends had the accounts been properly kept.

The company, moreover, denied that in the two half-years in 1878 they earned profits properly applicable for the payment of dividends on the preference and ordinary shares, or that the sums which they had, upon a correct view of the accounts, actually earned as profits for the year ending the 31st of December, 1879, were properly applicable for payment of dividends on the preference shares.

They also denied that their tramways and works were in a state of efficiency, or that no expenditure beyond that necessitated by ordinary wear and tear was required. They alleged, on the contrary, that a considerable expenditure was necessary in order to put their tramways and other property into a thorough state of efficiency.

The action now came on for trial.

A report had been prepared by Messrs. Waddell & Co., accountants, at the request of the directors of the company, shewing the amount of profits available for the preference dividend in the year 1878. This report was produced at the trial, and shewed that the balance of net revenue available for the preference dividend, after providing for current expenses, maintenance, repairs, &c., amounted to the sum of £14,932.

In reply to a question put by his Lordship in the course of the argument, Mr. Waddell stated that this £14,932 represented, in fact, the actual surplus receipts for the year 1878, after paying all expenses and reinstating the capital as on the 1st of January in that year.

JESSEL, M. R. I have no doubt what ought to be the decision on this question. What would have become of the other action if it had gone to trial, and had been fully argued out, I do not know; but the order made on the motion for injunction seems to have been the right order on the then state of facts, although I think it has been assumed that I then decided a great deal more than I did really decide.

However, the present question is, to my mind, a very simple one. There is a bargain made with the company that certain persons will advance their money as preference shareholders; that is, that they shall be entitled to a preferential dividend of 6 per cent. over the ordinary shares of the company, "dependent upon the profits of the particular year only." That means this, that the preference shareholders only take a dividend if there are profits for that year sufficient to pay their dividend. If there are no profits for that year sufficient to pay their dividend they do not get it: they lose it for ever; and if there are no profits in one year, and 12 per cent. profit the next year, they only get 6 per cent., and the other 6 per cent. goes to the ordinary shareholders. So that they are, so to say, co-adventurers for each particular year, and can only look to the profits of that year.

What happened was this: The company improperly allowed their tramways to get out of repair, and paid away their receipts to the ordinary shareholders in the shape of dividends. The result was that on the 1st of January, 1878, the tramways were very much out of repair, and wanted a large sum to put them in a proper state of efficiency. Notwithstanding that, the company did work, and they earned a good deal of money, the profits for the year 1878 being upwards of £14,000; and the dividend required being only 6 per cent. on £80,000, it is quite clear they earned more than sufficient to pay the preference shareholders, supposing these were fairly-earned profits. To see that they were fairly-earned profits, I must look at the report, which I have before me, of an eminent

¹ See ante, p. 223.

accountant, Mr. Waddell, who says they were. He says, in effect, that, considering the state of the line on the 1st of January and the state of the line on the 31st of December in that year, after setting aside sufficient to make good the wear and tear for that particular year, and paying all expenses, there was a net balance of £14,932. That is admitted by the 20th paragraph of the statement of defence, which says: "If a proper proportionate amount had been charged against the revenue of the year 1878 for such maintenance, &c., as aforesaid, the accounts would have shewn, as the fact is, that there was a balance of revenue, and in that sense a net profit in that year of only £14,932. 5s. 4d." Therefore, if "profits for the year" have any meaning at all, these were the profits for the year. "Profits for the year" of course mean the surplus in receipts, after paying expenses and restoring the capital to the position it was in on the 1st of January in that year. I have had the advantage of having Mr. Waddell present in court, and ascertaining from him that his report in the sense I have stated is expressed according to his meaning, and that there is no mistake in the admission in the defence; that is to

say, there was an actual net profit for that year of upwards of £14,000. Then what is there to argue? The argument for the company amounts to this, that inasmuch as they have improperly paid to their ordinary shareholders very large sums of money which did not belong to them, they, the company, are entitled to make good that deficiency by taking away the fund available for the preference shareholders to an amount required to put the tramway in proper order. When the argument is stated in that way, it is clear that it cannot be sustained. The company either have a right to recover back from the ordinary shareholders any sums over-paid or not. If they have a right, they must recover them; if they have no right to recover them, a fortiori they have no right to recover them from the preference shareholders, and, of course, still less right to take away the dividends from the preference shareholders.

It appears to me that the defence is founded on a misconception, and, I am afraid, a misconception of what I am supposed to have decided on a former occasion; but I have no hesitation in making the declaration which I am asked to make, and deciding in favour of the plaintiff in this action.

NEW YORK, L. E. & W. R. R. CO. v. NICKALS et al.¹

(7 Sup. Ct. 200, 119 U. S. 296. Nov. 29, 1886.)

Appeal from the circuit court of the United States for the southern district of New York.

Suit to recover dividends upon preferred stock. Decree for plaintiffs. Defendants appealed.

Mr. Justice HARLAN delivered the opinion of the court.

By the decree below it was adjudged, in accordance with the prayer of the bill, that the New York, Lake Erie & Western Railroad Company was required, by its articles of association, to declare a dividend of 6 per cent. upon its preferred stock, for the year ending September 30, 1880, payable out of the net profits accruing that year from the use of its property, after meeting operating expenses, interest on funded debt, rentals of leased lines, and other fixed charges. A judgment was rendered against it for \$20,280,—the amount which the plaintiffs would have received if a dividend had been made,—with interest thereon from January 15, 1881, to the date of the decree, and also for their costs and disbursements. The cause was referred to a special commissioner to ascertain the names of all other parties entitled to receive similar dividends. The case made by the pleadings, exhibits, and proofs is substantially as will now be stated.

The Farmers' Loan & Trust Company having commenced an action in the supreme court of New York for the foreclosure of two mortgages executed by the Erie Railway Company upon its line of railway, property, rights, privileges, and franchises,—one of September 1, 1870, to secure its obligations known as first consolidated mortgage bonds and sterling loan bonds, and the other of February 4, 1874, to secure its obligations known as second consolidated mortgage bonds and gold convertible bonds,—and having also brought ancillary suits for the foreclosure of the same mortgages in the states of New Jersey and Pennsylvania, certain parties, on the fourteenth of December, 1877, entered into a plan and agreement for the readjustment of their rights in the mortgaged premises upon an equitable basis. Those constituting in that agreement the parties of the first part were holders of common and preferred stock of the Erie Railway Company, of coupons of the first consolidated mortgage and sterling loan bonds, and of bonds and coupons both of the second consolidated mortgage and gold convertible series. The parties of the second part, Edwin D. Morgan, John Lowber Welsh, and David A. Wells, were purchasing trustees. The agreement provided for co-operation in all proceedings for final foreclosures and sales in the respective states under the mortgage of Feb-

ruary 4, 1874; for the purchase of the mortgaged premises and franchises by the trustees with bonds and coupons, and other means to be placed at their disposal for that purpose by the parties of the first part; and for the organization by such trustees, in conformity with the laws of New York, of a new corporation, with an amount of stock not exceeding the then amount of the stock of the Erie Railway Company, and which should hold the property, rights, and franchises so purchased subject to six prior mortgages then resting upon the premises, or upon part of them, including the first consolidated mortgage of September 1, 1870. The new corporation was required, as the consideration for the property, rights, and franchises purchased, to deliver to the parties of the first part its funded coupon bonds, bearing interest at 7 per cent. in gold, to an amount equal in the aggregate to the coupons of the first consolidated mortgage to be funded by those parties; mortgage bonds, bearing 6 per cent. interest in gold, to an amount equal to the principal of the second consolidated and gold convertible bonds held by the parties, and secured by the mortgage of February 4, 1874,—the back interest to be represented by funded coupon bonds. In reference to the sterling loan bonds the agreement provided that they should be regarded as having been exchanged for the first consolidated mortgage bonds on the first of September, 1875; the coupons due on that day being funded at the rate of 6 per cent. per annum as it stood previous to such assumed exchange.

The provisions of the plan and agreement which bear more or less upon the question before the court are as follows:

"(13) Preferred stock, to an amount equal to the preferred stock of the Erie Railway Company now outstanding, to-wit, eighty-five thousand three hundred and sixty-nine (85,369) shares, of the nominal amount of one hundred dollars each, entitling the holders to non-cumulative dividends, at the rate of six per cent. per annum, in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year, as declared by the board of directors.

"(14) Common stock, to an amount equal to the amount of the common stock of the said company now outstanding, to-wit, seven hundred and eighty thousand shares, of the nominal amount of one hundred dollars each."

"(18) Preferred stock of the old company, in respect of which three dollars gold for each share has been or may be paid, and common stock of the old company, in respect of which six dollars gold per share has been paid or may be paid, may be exchanged for the new stock, in paragraphs 13 and 14 mentioned, share per share, preferred for preferred, and common for common, without any liability to make any further payment in respect of such new stock: provided, how-

¹ Reversing 15 Fed. 575.

ever, that such new stock, whether common or preferred, shall be issued and held in conformity with and subject to the trust for voting hereinafter mentioned.

"(19) In addition to the new common and preferred stock, the parties of the first part shall also receive for the amount of such payments, as mentioned in the last preceding paragraph, non-cumulative income bonds, without mortgage security, payable in gold, in London and New York, on the first day of June, 1877, and bearing interest from December 1, 1879, also payable in gold, in London and New York, at the rate of six per cent. per annum, or at such lesser rate for any fiscal year as the net earnings of the company for that year, as declared by the board of directors and applicable for the purpose, shall be sufficient to satisfy; these bonds to have yearly coupons attached.

"(20) Preferred stock, in respect of which two dollars gold per share has been paid or may be paid, and common stock, in respect of which four dollars gold per share has been or may be paid, may be exchanged share for share, but in conformity with and subject to the said trust for voting, for new stock of like class, without any liability to make any further payment in respect of such new stock; but no income bonds or other obligation or security shall be issued or delivered in respect of such reduced payments.

"(21) * * * And all payments made or to be made in respect of old preferred or common stock shall be deemed to be in consideration of the concessions and agreements made by the holders of the said first and second consolidated mortgage and gold convertible bonds; the available funds resulting from such concessions being used for the improvement or increase of the property of the new company.

"(22) The stock of the new company, both common and preferred, not required for exchange as above provided, may, with the consent of the parties of the first part, but not otherwise, be issued and disposed of by the company for its own benefit at such rates and upon such terms as to the said company may seem proper. All moneys which have been or may hereafter be paid in respect of stock as above set forth, and which shall not be required for the purpose of carrying into execution this plan and agreement, shall be expended for the benefit of said new company, or in the improvement or increase of its property, under the direction of the parties of the first part, and any balance not so expended shall be paid over to the said new company."

The property and franchises in question were sold, under decrees of foreclosure, on the twenty-fourth of April, 1878, and were purchased by the trustees, subject to the before-mentioned six mortgages. Immediately thereafter, on April 26, 1878, the purchasing committee and their associates organized the New York, Lake Erie & Western

Railroad Company, in conformity with statutes providing for the organization of railroads sold under mortgage, and for the formation in such cases of new companies. Laws N. Y. 1874, c. 430; Id. 1876, c. 446. The provisions of the before-mentioned plan and agreement were set out in the articles of association. On the ninth of December, 1880, the board of directors submitted to shareholders and bondholders a report of the operations of the new company for the fiscal year ending September 30, 1880, from which it appears that the gross earnings for that year were \$18,693,108.86, while the operating expenses were \$11,643,925.35, leaving \$7,049,183.51 as "net earnings from traffic." To this sum the report adds \$783,956.65 "as earnings from other sources," making \$7,833,140.16 as the total earnings for the year in question. From the last sum, \$6,042,519.45 were deducted for "interest on funded debt, rentals of leased lines, and other charges," leaving, in the language of the report, "a net profit from the operations of the year of \$1,790,620.71." Referring to the latter sum, the report continues: "This amount, together with \$737,119.34 received during the year from the assessments paid on the stock of the Erie Railway Company, has been applied to the building of double track, erection of buildings, providing additional equipment, acquiring and constructing docks at Buffalo and Jersey City, and to the addition of other improvements to the road and property." The theory of the present suit is that the sum of \$1,790,620.71, ascertained to be the "net profit" derived from the operations of the company for the fiscal year ending September 30, 1880, after paying operating expenses and fixed charges, constituted a fund applicable primarily to the payment of a 6 per cent. dividend upon preferred stock. The use of that fund for any other purpose was, it is claimed, a breach of trust on the part of the company, and a violation of rights secured to preferred stockholders both by the plan and agreement of December 14, 1877, and by the company's articles of association. On the day the directors made their report to shareholders, they declared, by resolution, that, in the then condition of the company's property, they did not "deem it wise or expedient to declare a dividend upon its preferred stock." It also clearly appears in evidence that the earnings for the year in question, after paying operating expenses and fixed charges, together with the amount realized from assessments paid on stock, were, in good faith, used in improving the company's road and other property; that these improvements were in pursuance of a general plan marked out pending negotiations for reorganization; that the estimate of their extent and cost was made with reference to a general understanding that they would be commenced and carried to completion as rapidly as possible with money derived from assessments on stock-

holders, from concessions of interest by bondholders, from earnings of the company, and from other sources; that the capacity of the company to make earnings with less expense than formerly in proportion to service rendered, and therefore its ability to earn the net profit which it did in 1880, was due to the bettered condition of the road, and its equipment arising from these improvements,—"thus, in the increase of traffic, and in the reduction of expenses, producing this result of \$1,790,620.71." The testimony of Mr. Jewett, the president of the company, which is uncontradicted by any evidence in the record, is that the use of that fund in the way in which it was applied was imperatively demanded by the interests as well of creditors, shareholders, and bondholders as of the public. In answer to the question whether these expenditures increased the earning capacity of the road, and diminished relatively the expense of doing business, he said: "In my judgment, if these improvements had not been made, and most judiciously made, the company could not have paid its fixed charges. It would have again gone into bankruptcy, and the entire interest of the stockholders been destroyed."

The court below adjudged, in effect, that the right to a dividend, for the year ending September 30, 1880, payable out of the "net profit" arising from the operations for that period, was absolutely secured to preferred stockholders both by the plan and agreement and by the articles of association. Such, it held, was the contract between the company and the preferred stockholders, which the court was not at liberty to disregard. This, in our judgment, is an erroneous interpretation of both the agreement and the company's charter. There is nothing in the language of either necessarily depriving the directors of the discretion with which managing agents of corporations are usually invested when distributing the earnings of property committed to their hands. As was said by the court, in *Clearwater v. Meredith*, 1 Wall. 25, 40: "When any person takes stock in a railroad corporation, he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized." The directors of such corporations, having opportunities not ordinarily possessed by others of knowing the resources and condition of the property under their control, are in a better position than stockholders to determine whether, in view of the duties which the corporation owes to the public, and of all its liabilities, it will be prudent, in any particular year, to declare a dividend upon stock. While their authority in respect of these matters may, of course, be controlled or modified by the company's charter, and while the power of the courts may be invoked for the protection of stockholders

against bad faith upon the part of the directors, we should hesitate to assume that either the legislature or the parties intended to deprive the corporation, by its managers, of the power to protect the interests of all, including the public, by using earnings when necessary, or when, in good faith, believed to be necessary, for the preservation or improvement of the property intrusted to its control.

The claim of the appellees is based mainly on the thirteenth article of the agreement of 1877. It is contended that, as the non-cumulative dividend to which preferred stockholders were entitled was "dependent on the profits of each particular year, as declared by the board of directors," the intention was to require the declaration and payment of a dividend in every year when it should be officially declared that there were net profits from the operations of that year.

It is not without significance that the words just quoted from the preliminary agreement for organization are omitted from that paragraph of the articles of association which, in obedience to the requirement of the statute, (Laws 1876, c. 446, § 1, subd. 2,) specifies the rights of each class of stockholders. That paragraph provides that the holders of preferred stock shall be entitled to "non-cumulative dividends at the rate of six per cent. per annum in preference to the payment of any dividend on common stock." The omission, in that connection, of the words "but dependent on the profits of each particular year, as declared by the board of directors," gives some force to the suggestion of counsel that the contemporaneous construction of those words by the parties was that they conferred no such right upon preferred stockholders as they now claim. Independently of this view, we are of opinion that the contention of appellees is not sustained by a reasonable construction of the agreement. That instrument did, indeed, provide for preferred shareholders being paid a dividend of 6 per cent. before any dividend was paid to common shareholders. But it was not intended to confer upon the former an absolute right to a dividend in any particular year, dependent alone on the fact, or the official ascertainment of the fact, that there were profits in that year, after paying operating expenses and fixed charges. The words of the thirteenth article, "as declared by the board of directors," do not qualify the words "dependent on the profits for each particular year." They should rather be read in connection with the preceding words, "non-cumulative dividends, at the rate of six per cent. per annum, in preference to the payment of any dividend on the common stock." Preferred stockholders of the old company, receiving in exchange preferred stock in the new company, did not thereby become creditors of the latter. Their payments on account of old stock were in consideration of the con-

cessions and agreements made by bondholders. In certain circumstances they also received income bonds. They were stockholders in the old corporation, and they held that relation to the reorganized company. What was stipulated to be paid to them as holders of preferred stock in the new company was not a debt payable in every event out of the general funds of the corporation, but a dividend, "as declared by the board of directors," and payable out of such portion of the profits as should be set apart for distribution among shareholders; non-cumulative, because "dependent on the profits of each particular year," and not to be fastened on the profits of succeeding years. That the parties contemplated a declaration of a dividend, and not a mere statement of net profits during a designated period, is made evident by the requirement that "dividends" to preferred stockholders should be paid "in preference to the payment of any dividend on the common stock." This language is not consistent with the theory that the holders of preferred stock were entitled to 6 per cent. thereon simply because there were profits, and irrespective of any declaration of a dividend. A declaration of profits, as in itself, and without further action by the directors, entitling shareholders to dividends, is unknown in the law or in the practice of corporations. Dividends are "declared" by some formal act of the corporation; the question whether there are or are not profits being settled entirely by the accounts of the company as kept by subordinate officers, not by the mere statement of directors as to what appears upon its books.

A different view would lead to results which sound policy would seem to forbid, and which, therefore, it is not to be supposed were contemplated by the parties; for, if preferred stockholders become entitled to dividends upon a mere ascertainment of profits for a particular year, the duty of the company to maintain its track and cars in such condition as to accommodate the public, and provide for the safe transportation of passengers and freight, would be subordinate to their right to payment out of the funds remaining on hand after meeting current expenses and fixed charges. Indeed, there is some ground to contend that, according to appellees' interpretation of the charter, the directors were not at liberty, in any year when the current receipts were in excess of operating expenses, to pay even interest on funded debt, or rentals of leased lines, before paying a dividend on preferred stock. We are of opinion that while the agreement of 1877, and the articles of association, sustain the claim of preferred stockholders to a 6 per cent. dividend in advance of common stockholders, the former are not entitled, of right, to dividends, payable out of the net profits accruing in any particular year, unless the directors of the company formally declare, or ought to declare, a dividend pay-

able out of such profits; and whether a dividend should be declared in any year is a matter belonging, in the first instance, to the directors to determine, with reference to the condition of the company's property and affairs as a whole. As the evidence shows that the profits for the year ending September 30, 1880, were applied to objects that were legitimate and proper, and as the condition of the company was not such as to make the declaration of a dividend a duty upon the part of the directors, we perceive no ground upon which the claim of the appellees can be sustained.

Attention is called by counsel to the language of the nineteenth article of the plan and agreement of reorganization, as throwing some light on the true interpretation of the thirteenth article. We do not think that that article aids the contention of appellees. The non-cumulative income bonds provided for in the nineteenth article were to bear 6 per cent. interest, or such lesser rate, "for any fiscal year, as the net earnings of the company for that year, as declared by the board of directors and applicable for the purpose, shall be sufficient to satisfy." So far from these words aiding the contention of appellees, they tend to show that the directors had the right to determine whether the condition of the company did not require a reduction of the interest. Such, we think, is the meaning of the words "and applicable for the purpose." The applicability of net earnings for interest on such income bonds could only be determined by them.

A case very much resembling this is *St. John v. Erie Ry. Co.*, 22 Wall. 136, 147. Certain creditors of that company received preferred stock, in lieu of payment of their debts, under a clause of its charter providing that such stock should be entitled "to preferred dividends, out of the net earnings of said road, (if earned in the current year, but not otherwise,) not to exceed seven per cent. in any one year, payable semi-annually, after payment of mortgage interest and delayed coupons in full." A preferred stockholder sought by suit to enforce full payment of his dividends from the net earnings, prior to any payment on account of new leases of roads, or of debts subsequently contracted for borrowed money used in the repair and equipment of the road; in paying rent on leased lines, and interest on the money so borrowed. The circuit court (10 Blatchf. 271, Fed. Cas. No. 12,226) said: "What it [the stock] is entitled to is 'dividends,' and only 'dividends,' and they are of a defined and special character. It is entitled to nothing else. It has no privilege or priority by reason of being preferred stock, except in reference to stock that is not so preferred; that is, common stock. In reference to such common stock the preferred stock is entitled to its specified preferential dividends, and is not entitled to anything else in reference to anything." Upon appeal

to this court it was held that the suit could not be maintained; that the takers of the preferred stock had abandoned their position as creditors, and assumed that of stockholders, in which capacity they could claim dividends only when they were declared or should be declared; that they were only entitled to dividends out of the net earnings of the principal road, and its adjuncts accruing in the current year; that, as the company had not agreed to be limited in the exercise of its faculties and franchises, it had the right to conduct its operations in good faith as it might see fit; and that the materials for the computation of its net earnings in any particular year were to be derived from all of its operations, viewing its business as a unit, and not from a part of its operations, or without reference to the necessary and legitimate purposes to which its current receipts might be applied for the benefit of all interested in the property. These principles were again applied in the analogous case of *Warren v. King*, 108 U. S. 389, 2 Sup. Ct. 789. See, also, *Union Pac. R. Co. v. U. S.*, 99 U. S. 402; *Barnard v. Vermont & M. R. Co.*, 7 Allen, 521; *Williston v. Michigan Southern & N. I. R. Co.*, 13 Allen, 400; *Chaffee v. Rutland R. Co.*, 55 Vt. 110; *Taft v. Hartford P. & F. R. Co.*, 8 R. I. 310; *Elkins v. Camden R. Co.*, 36 N. J. Eq. 233; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Culver v. Reno Co.*, 91 Pa. St. 367.

The views we have expressed are not inconsistent with the adjudged cases upon which appellees' counsel chiefly rely. A brief reference to some of them will be sufficient.

In *Dent v. London Tramway Co.*, 16 Ch. Div. 344, decided by Sir George Jessel, master of the rolls, at special term the company increased its capital stock by an issue of shares of the same denomination as the prior shares, "bearing a preferential dividend of six per cent. per annum over the present shares of the company, dependent upon the profits of the particular year only." There the question was whether the company was bound to pay preferred stockholders the amount of a dividend declared for the half year ending December 31, 1878, but which it had refused to pay, and also a dividend for the year 1879, which, it is to be inferred from the report of the case, ought to have been declared. The precise point determined is shown in these remarks of the court: "The argument of the company amounts to this: that, inasmuch as they have improperly paid to their ordinary shareholders very large sums of money which did not belong to them, they (the company) are entitled to make good that deficiency by taking away the fund available for the preference shareholders, to an amount required to put the tramway in proper order. When the argument is stated in that way, it is clear that it cannot be sustained. The company either have a right to recover back from the ordinary shareholders any sum overpaid or

not. If they have a right, they must recover them; if they have no right to recover them, a fortiori they have no right to recover them from the preference shareholders, and, of course, still less right to take away the dividends from the preference shareholders." It is scarcely necessary to say that the present case is entirely different from the one decided by the English court. No question was raised in the latter as to the authority and discretion of directors to use earnings for the improvement of the corporate property from year to year. It was, in effect, a contest simply between preferred and common stockholders. The only point decided was that the payment of large sums of money to common stockholders which should have been used in the repair of the tramway was not a valid ground for refusing to pay preferred stockholders dividends to which they were entitled. To withhold dividends from preferred stockholders, in order to make good a deficiency caused by payments to common shareholders which ought not to have been made, was practically to destroy the right of preference. A different decision would have made the preferred shareholders pay what the company should have recovered from the common stockholders by suit.

The case of *Richardson v. Vermont & M. R. Co.*, 44 Vt. 613, is also relied upon to support the decree below. There the question was as to the right to recover interest dividends on stock, to be paid in full at a specified date, if there was then sufficient money in the company's treasury. If there was not enough for that purpose, then as much should be paid as the amount in the treasury justified; the balance, when the treasurer was able to make payment. The defense was that there was an adequate remedy at law, and that the stock certificates were void. The certificates were held to be valid, the right to resort to equity was sustained, and the company was required to pay. The vital fact in that case, distinguishing it from this one, is that the company substantially admitted that it had funds applicable to the payment of the claims if they should be held to be valid. Some of the general observations of the court seem to be in accord with the views we have expressed. "The mere fact," the court said, "of the corporation having funds in its treasury sufficient in amount to pay the orators, would not be sufficient to show the ability of the corporation contemplated in the vote and certificates. That ability must consist of a fund adequate, not only for the payment of the claims of the plaintiffs in the cause, but for the payment of all other stockholders having like claims; and must be a surplus fund over and above what is requisite for the payment of the current expenses of the business, for discharging its duties to creditors, and over and above what reasonable prudence would require to be kept in the treasury to meet the accidents, risks, and contingencies incident

to the business of operating the railroad. In other words, there must be such pecuniary ability as would, but for the obligation to pay this interest, justify the payment of a dividend to stockholders."

Our attention is also called to the case of *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157. But it has no direct bearing on the question before us. It only decides that the dividends provided for in the contract there in question were not only to be preferred, but, being guarantied, were cumulative, and a specific charge upon the accruing profits, to be paid, as arrears, before any other dividends were paid on the common stock. "The doctrine," said the court, "that preference shareholders are entitled to be first paid the amount of dividends guarantied, and of all arrears of dividends or in-

terest, before the other shareholders are entitled to receive anything, and, although they can receive no profits where none are earned, yet as soon as there are any profits to divide they are entitled to the same, is fully supported by authority." It thus appears that that was a contest between preferred and common stockholders. No questions arose as to whether the company, under the circumstances, could or could not, in their discretion, have withheld a declaration of dividend.

Without further discussing the questions involved, or suggesting other grounds upon which our conclusion might rest, we are satisfied that the complainants are not entitled to recover.

The decree is reversed, and the cause is remanded, with directions to dismiss the bill.

MINER v. BELLE ISLE ICE CO. et al

(53 N. W. 218, 93 Mich. 97.)

Supreme Court of Michigan. Oct. 4, 1892.

Appeal from circuit court, Wayne county, in chancery; HENRY N. BREVOORT, Judge.

Action by Joseph L. Miner against the Belle Isle Ice Company, Charles A. Lorman, and others, to compel defendant Lorman to account for property of the corporation, and for the appointment of a receiver to wind up the affairs of the corporation. From a judgment for defendants, complainant appeals. Reversed.

McGRATH, J. Complainant and defendant Charles A. Lorman had been in the ice business in the city of Detroit, as partners, since 1869, each having an equal interest in the business. In January, 1874, the joint property was inventoried at \$23,500. Miner put in the further sum of \$1,500, and the Belle Isle Company was organized, with a capital stock of \$25,000, divided into 1,000 shares of \$25 each. Lorman and Miner each held 435 shares. I. J. Carpenter held 30 shares, and Lorissa Carpenter 100 shares. In 1878 the capital stock was increased to \$50,000, or 2,000 shares at \$25 each. At that time the Belle Isle Ice Company absorbed the Wolverine Ice Company, and Robert Wench, Isaac Wench, Frank Hoadly, and H. C. Kibbee became stockholders. In 1881 Lorissa Carpenter, R. W. Wench, Isaac Wench, and Frank Hoadly filed a bill against Miner and Lorman to have certain lands held by defendants decreed to belong to the corporation, to obtain an account of the rents and profits, to compel the payment over to the corporation of certain moneys which had been expended upon said lands, to compel the surrender of certain stock illegally issued to defendants, and the payment over of all moneys taken by defendants for their private use. The stock held by the Wenches and Hoadly was purchased by Lorman, and the suit was discontinued. In the spring of 1882, Miner, who was then president of the company, complained of the loose manner in which Lorman, who was manager, was managing the affairs of the company, particularly respecting the handling of the ice tickets. It seems that tickets were sold by the company to customers for cash or duebills. These tickets were exchanged with the drivers for ice. The drivers upon each trip would turn in what cash and tickets were received, and an account with each driver was kept upon slips. He was charged with the weight of his load of ice, and credited with the cash and tickets. The tickets were then placed in a drawer, which was kept for that purpose. The complaint was that Lorman would in the morning fill his pockets with these tickets, and dispose of them through the day for cash and duebills, turn in certain cash at night, and keep the duebills, in order, as he claims, to make further entries upon them. Miner insisted that the bookkeeper should keep an account of the tickets taken out and of the cash returned by Lorman, and of the duebills. Lorman looked after the sales and distribution of

the ice, and Miner looked to the filling of the ice houses, and the shipment of the ice from the various ice houses to the points where loaded into wagons for distribution; and each received a salary of \$1,200 per annum. Bitterness grew out of Miner's complaint, and at Lorman's suggestion, in April, 1882, amended articles of association were filed, dividing the 2,000 shares as follows: Lorman 1,006, Miner 694, Lorissa Carpenter 259, W. K. Muir 4, G. H. Lothrop 10, H. L. Kanter 10, S. L. Miner 5, W. Sanderson 4, W. F. Linn 4, and George H. Prentiss 4, shares. Linn was Lorman's nephew, and was but nominally a stockholder, holding his stock in trust for Lorman; and the evidence tends to show that Muir and Sanderson also held their stock for Lorman.

At the next stockholders' meeting, held April 3, 1882, Lorman, Miner, and Linn were elected directors. At the directors' meeting, held April 20th, it was proposed to make Lorman president and superintendent at a salary of \$4,000. Miner objected, moved to adjourn, and, upon the failure of his motion, he left the meeting. Afterwards, Linn and Lorman only being present, Linn moved that Lorman be elected president at a salary of \$1,000 per year as president, and \$3,000 as manager. Lorman seconded the motion, and Lorman and Linn voted "Aye." Sanderson was elected secretary at a salary of \$1,000. No treasurer was elected, but Lorman has ever since acted as president, manager, and treasurer. At the directors' meeting held April 5, 1883 it was moved by Sanderson, and seconded by Muir, that Lorman be appointed general manager and superintendent at a salary of \$4,000, "all voting 'Aye.'" At the meeting held May 28, 1884, Muir moved that Lorman be general manager at a salary of \$4,000; seconded by Sanderson; and Muir, Lorman, and Sanderson voted "Aye." At the meeting held April 26, 1885, Muir moved that Lorman be general manager at a salary of \$4,000; seconded by Sanderson; and Muir, Sanderson, and Lorman voted "Aye." In May, 1886, Muir moved that Lorman be general manager at a salary of \$4,000; seconded by Sanderson; and carried. In June, 1888, Sanderson had died, and one Gray, to whom Lorman had assigned some stock, and who was a nominal owner holding for Lorman, was elected director. Muir moved, Gray seconded, and Lorman was again appointed at a salary of \$4,000. Miner was discharged from the employ of the company in May, 1882. The balance sheet for the year ending March 1, 1883, showed a net gain of over \$9,000. For the next year, the balance sheet showed a net loss of \$3,460; for the next year, a net loss of \$2,878. For the next year, ending March 1, 1886, the balance sheet showed a net gain of \$2,193; for the next year a net gain of \$8,672; and for the next year a net gain of \$1,712. No dividends have been declared since 1882. The salary account for the year ending March 1, 1893, was \$6,287, and for each of the five years following it was \$5,200. When the company was formed, Lorman and Miner owned three parcels of real estate, upon which the ice houses were located. The ice houses were turned in to

the company, but the title to the real estate was retained by Lorman and Miner, who were joint owners, and leased to the company. These three parcels may be designated as the "Dock Property," the "Steam Power Property," and the "Creek Property." The company had leases of these parcels,—of the steam power property for five years, from January 1, 1881, at \$1,000 per year, and the creek property for the same term at \$300 per year. The leases were renewable at the option of the company, and, in case the parties failed to agree as to rental value for the new term, two arbitrators were to be appointed to fix the rental. In May, 1883, the directors passed a resolution directing the purchase of Lorman's interest in these parcels of property, and Lorman conveyed his half interest to the company. The price paid for the dock property was \$5,000, subject to half of a mortgage of \$8,000; for the creek property \$3,000, subject to half of a mortgage of \$3,000; and for the steam power property \$5,000,—in all, \$13,000; cash down, \$1,000, and the balance of \$12,000 in payments of \$1,000 each, payable, one September 24, 1883, and one every four months thereafter, with interest at 7 per cent."

In July, 1883, Miner filed bills for the partition of the dock property and the steam power property, and partition was had. The dock property was found to be incapable of subdivision. The directors ordered its purchase for the company, but Lorman, in December, 1884, bought it in at \$15,725, of which sum \$8,326.66 was paid upon the mortgage, \$3,653.42 was paid to the company, and was held by Lorman, and credited upon the company's \$13,000 purchase, and \$3,653.42 was paid to Miner. The steam power property was divided, the east half being assigned to Miner, and the west half to the company, and the company paid Miner \$400 for difference in value. The final decree was entered February 12, 1884. In March, 1884, the company reconveyed the steam power property to Lorman for \$5,000, the same price for which it had been sold by Lorman to the company 10 months before. Whatever the purpose or occasion of these transfers from Lorman to the company, and from the company to Lorman, it appears that the company paid Lorman \$10,000 for his half interest in the two parcels. It paid the expenses of the litigation. It paid \$400 to Miner upon the partition of one parcel,—and naturally the property would not depreciate. Yet Lorman has the property, and the company has \$8,653.42, or \$1,746.58 less than it paid, and has paid its share of the expenses of the partition, and its solicitors. In 1887, the company reconveyed the interest in the creek property, which it had purchased from Lorman, back to him at \$2,137.50, while it had paid \$3,000 for the same property four years before, although it is insisted that the property had increased in value. When the first five years under the leases of the creek and steam power properties had expired, the company elected to renew, but neither Miner and the company, nor the arbitrators who were called in, could agree as to the rental value; Miner claiming a rental of \$300

for his share of the creek property, and \$1,000 for his share of the steam power property. The courts were appealed to, and the rental value of Miner's interest in the steam power property was fixed by the court for five years at \$500, and that of the creek property at \$200. No steps were taken by arbitration or in court against Lorman, although he at that time owned one-half interest in the steam power property. He was paid \$850 per year for 1886 and 1887, and for 1888, 1889, and 1890 he received \$1,000 per year for his share of this property, and the only difference in value of the two shares, also fixed by the court, was \$400, and this amount the company paid. In September, 1885, Lorman bought what is known as the "Beniteau Property" for \$3,500, and leased it to the company. For the year 1886 the company paid him \$850 as rental for that property, for the year 1887 the sum of \$800, and for 1888, 1889, and 1890 the sum of \$1,000 per year; making a total in five years of \$4,650 for property which he paid \$3,500 for at the beginning of the term. The lease fixing the rental for the creek property at \$500, and for the steam power property at \$1,000, was not made until May 21, 1888, although the rates above named had been paid in the interim.

After the discontinuance of the suit commenced by Lorissa Carpenter and others in 1882, Lorman agreed with Lorissa Carpenter to pay a certain percentage upon her stock annually, and from 1882 he has paid her, out of the company's funds, at least the sum of \$1,590.93. Mr. Kibbee, her father, says that the arrangement was made in 1882, when they assumed the management. It was to pay interest on her stock, guaranty it, and whatever amount was advanced should be deducted, whenever dividends were to be paid, from the amount received by her in advance. "Mr. Lorman said he would guaranty Mrs. Carpenter an advance to help her along until the matter was settled, and I agreed to it. I said I would not commence another suit if he would secure her. The last payment was made, of \$50, on Saturday last. At the time, the checks were made payable to her order, and the time came when Mr. Lorman wanted a receipt made for a certain purpose, but he said it was not satisfactory, and she gave him one instead. I took that matter home. I have not got it here. The understanding between me and Lorman was that, so long as these payments were kept up, we would not make any trouble in the company." On cross-examination: "Question. Mr. Lorman, in the payment of this money, and the agreement to pay this money, put it upon the ground that Mrs. Carpenter was a woman, and needy, and that amount of money could be advanced to her, and taken out when there was a dividend; was that not it? Answer. Yes, sir; it was a compromise to get her something. Q. He said she was needy, and acknowledged the fact, and you told him she was needy? A. Very likely. Q. And he acknowledged the fact? A. I do not remember that. I remember asking him to put this stipulation in writing, and he said it might affect him. Q. He would not put it in writing? A. No, sir. Q. Refused to put it in writing. But

he did put it upon that ground,—that it could be paid in that way; and after, if there was a dividend, it could be deducted from the dividend; and that was the distinct understanding, too,—it should be taken out of any dividend? A. Yes, sir. I have embraced it in that little paper I gave you." On re-direct: "Q. At the time that this arrangement was made with Mr. Lorman, the old suit in which Lorissa Carpenter was interested had gone down, as you express it. Now, can you locate more definitely the time when the arrangement was made? A. Soon after, in the spring of 1882, when he first started the management of it in his own name. Q. At the time this agreement was made, were Mr. Lorman and Mr. Miner good friends, or broken with each other? A. They had broken with each other. Q. They had broken? A. Yes, sir. Mr. Lorman had got the business, all of the stock, substantially, except Mrs. Carpenter's and mine. Q. On your cross-examination, Mr. Kibbee, I think you stated that you requested Mr. Lorman to put this agreement in writing. Did you make such a request of him? A. Frequently. Q. And what was his answer? A. That it might affect him in this suit with Miner; and I recollect a remark he made, that it would stultify him. I think that is about the substance. I said as long as he would help Mrs. Carpenter right along, I would not put any blocks in the way,—is the conversation as nearly as I can recollect it." In 1885 complainant filed a bill against the company, Lorman, Muir, Sanderson, and Linn making like charges, but the court below found that it was defective for want of parties, and it was dismissed. The present bill was afterwards filed.

Lothrop and Kanter appear to have transferred their stock to Miner, so that the stock was held, at the time of the commencement of this proceeding, 960 shares by Lorman, 4 by Muir, 4 by Linn, 50 by John S. Gray, and 4 by Prentiss, making a total of 1,022 shares. John S. Gray, Muir, and Linn are but nominal holders, and all three are directors. Of the balance, Miner held 708; W. J. Gray, 1; John H. Seitz, 10; and Lorissa Carpenter and Kibbee, 259,—shares. Lorman makes no attempt to explain the payment of the \$1,590.93 to Mrs. Carpenter. He does not deny that he is president, manager, and treasurer, and that his associates on the board of directors have no personal interest in the company. He says that the members of the board do what he tells them to do. He insists that his salary is not large or unreasonable; that he is doing the work of both Miner and himself. There is no pretense that the business had increased in volume immediately after 1881, yet the salary account is more than double that year what it was before that, and Lorman is paying himself \$1,600 more than was paid to both in 1881. Miner testifies that since 1882 not over two or three annual meetings have been held, to his knowledge. That "about two years ago, I went down there myself, and two or three more, and it was postponed; that is, Mr. Lorman postponed it himself without calling the meeting to order at all; and then, at the time it was postponed to,

I went over, but there was no meeting, but I heard it said he had a meeting in some other place. I have had no notice of any meeting since." Another witness says that at one time he held some stock, and tried to attend an annual meeting, but that the meeting was held in some secret place, and he was unable to attend. No explanation is attempted to be made of this by the defendant Lorman. He practically admits the allegations as to the method of dealing with tickets, but insists that he has turned over to the company all the proceeds, and that he was a check upon himself. The practical difficulty with his method is that there is no way of determining whether he did or did not turn over all the proceeds. The matter of accounting for these tickets was one of some importance to the company, and to the stockholders. The cash receipts from the sale of tickets averaged \$14,500 annually for the years 1882 to 1887, inclusive. There was nothing unreasonable in a demand made by the president upon the manager that some system should be adopted in a matter of that importance. Loose methods of doing business are likely to provoke suspicion, are in themselves suggestive of dishonesty, and usually result in difficulty. Complainant gives this as the origin of the difficulty, and Lorman does not deny it. Respecting the transfers of property, Lorman claims that 1882 had been a good year; that the directors thought, in view of the prospects, it would be well to own the property; that bad years followed, and the company was unable to keep up the stipulated payments; that the directors did order the purchase of the dock property at the partition sale, but it had no money with which to make the purchase; but that was as evident when it was ordered as it was when the property was bid in by Lorman. The net gain for the year 1882, which is said by Lorman to have been the good year, was \$9,000, but the net gain for the year 1886, ascertained March 1, 1887, was \$8,672; yet the creek property was deeded back to Lorman, after this result had been ascertained, at \$2,137.50, just \$862.50 less than the company had paid for it four years before. He admits that he made \$1,200 out of the company by transferring the steam power property to the company, and its reconveyance, and \$1,500 out of the conveyance and purchase of the dock property, in addition to the partition costs and expenses. He concedes that he sold the three parcels of property to the company for \$13,000; that he received of this amount \$2,000 in cash, and the further sum of \$3,862.50 as proceeds of the sale of the dock property; that he allowed the company \$5,000 for the steam power property, when it was reconveyed to him, and \$2,137.50 for the creek property. The company paid to Lorman in this transaction \$2,000 in cash. It paid in the partition proceeding \$400, besides the costs and expenses of that proceeding, and it held the title to one parcel from May, 1883, to March, 1884, and to the other from May, 1883, to early in 1887. He admits the rent charges, but claims that his share of these parcels of property was of greater value than Miner's. The steam power

property had been rented to the company for \$1,000 per annum. It was partitioned, and the court assigned to the company the west half, subject to the payment of \$400 to Miner. In the adjustment of the rent, in 1886, the arbitrator selected by Miner fixed the rental value of Miner's share at \$800; but Lorman insisted that it was not worth that amount, and went into court, and the court decided that the rental value was \$500. So that in proceedings to which Lorman was practically a party the court found not only the rental value, but the relative value, of both parcels, and finds Lorman's share to be worth exactly \$400 more than Miner's; yet Lorman paid himself \$4,700 for five years' rental of his share, and Miner received \$2,500, a difference of \$2,200 in favor of Lorman. Respecting the creek property, in 1885 Miner offered to take \$300 per year for his half, and the arbitrator selected by Miner, and the court, fixed the value of Miner's undivided half at \$200 per annum. Lorman then insisted that it was not worth but \$125. The company had but just reconveyed this half interest to Lorman, and he received \$250 per annum for 1887 and 1888, and \$500 per year for the next two years. Can there be any possible ground for claiming that his undivided half was worth more than Miner's? He admits the purchase of the Beniteau property for \$2,500, and that for five years thereafter he paid himself in rentals therefor, \$4,650.

No one of Lorman's associates on the board of directors for the six years preceding the filing of this bill is sworn, or offers any testimony to sustain any act of said board during that period. Lorman only appears. Gray, Muir, Linn, and Prentiss severally answer, but each "neither admits nor denies" the charge made in the bill, and neither alleges even good faith. Under all the rules governing the relation of directors of a corporation to that corporation and its stockholders, and their conduct pending that relation, the simple statement of the facts of this case ought to decide it. As is said by Mr. Justice MILLER, in *Oil Co. v. Marbury*, 91 U. S. 587: "That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of the trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others." The authorities upon the question of the validity of contracts made by directors with the corporation, are by no means harmonious. It is laid down in many of the text books that such contracts are voidable at the instance of the corporation. 1 *Beach. Corp.* 241, 242; *Mor. Corp.* 243-245; *Tayl. Corp.* 629, 630; 2 *Field, Briefs*, 193. Again, it has been held that a director may deal with the company in like manner as with an individual, if he deal honorably, and without endeavoring to influence or control it. 16 *Amer. Law Rev.* 917; *Harts v. Brown*, 77 Ill. 226; *U. S. Rolling Stock Co. v. Atlantic & G. W. Ry. Co.*, 34 Ohio St. 450; *Mayor v. In-*

man, 57 Ga. 370. Our own court, in *People v. Overysse*, 11 Mich. 222, and in *Railway Co. v. Dewey*, 14 Mich. 477, have held that such contracts were not only voidable, but absolutely void. In *People v. Overysse*, MANNING, J., says: "Actual injury is not the principle the law proceeds on in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal." CHRISTIANCY, J., in the same case, says: "As individuals, in taking the contract, they must naturally (and while human nature remains unchanged, we may almost say, necessarily) seek to adopt the plan and to make terms the most conducive to their own interests. The public were entitled to their best judgment, unbiased by their private interests, and, by accepting the office, they became bound to exercise such judgment, and to use their best exertions for the public good, regardless of their own. They had no right, while they continued in office, to place themselves in a position where their own interests would be hostile to those of the public. * * * And though these contractors may, as members of the board, have acted honestly, and solely with reference to the public interest, yet, if they have acted otherwise, they occupy a position which puts it in their power to conceal the evidence of the facts, and to defy detection. If, therefore, such contracts were to be held valid until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud or corruption." CAMPBELL, J., dissenting, says: "It is a well-settled principle that the same person cannot be vendor and purchaser, because his contract lacks the necessary element of two parties; neither can a trustee become interested to the detriment of his *cestui que trust*, or an agent to the detriment of his principal. Even these contracts, however, are not universally void. They are usually voidable at the option of the party defrauded or affected, but they are not absolutely void, except where, by reason of the identity of the vendor and vendee, a contract is, in the eye of the law, impossible. * * * The only exception seems to be the one already referred to, where the corporation cannot act at all without the action of some particular person, who is thereby disqualified from dealing with himself, and who, of course, cannot contract with himself. 1 *Kyd. Corp.* 180, 181; *Ang. & A. Corp.* 233. In other cases, and where the contract may be made on behalf of the corporation without the assistance of a particular member or officer, a contract with him is as valid as if he were a stranger."

The present case is clearly within the exception referred to by CAMPBELL, J. Defendant Lorman must be held to have made these contracts with himself. He directed, influenced, and controlled the board. They had no personal interest in the affairs of the company, and exercised, not their own judgment and discretion, but Lorman's will. All the authorities agree that it is essential that the majority of the quorum of a board of directors

shall be disinterested in respect to the matters voted upon. 1 Beach, Corp. 276; Smith v. Association, 78 Cal. 289, 20 Pac. Rep. 677. Where a town board of three are authorized to make a grant to a railroad, and two of them, one being director of the railroad, make the grant, the court will set it aside. San Diego v. Railroad Co., 44 Cal. 106; Bill v. Telegraph Co., 16 Fed. Rep. 14. A salary voted to the president by a quorum of three directors, two being absent, and the president being one of the three, is not enforceable. Copeland v. Manufacturing Co., 47 Hun. 235. Where the chief stockholder, who is president, induces the directors, his dummies, to vote a large salary to him, the corporation may defeat the officer's action at law to recover it. Davis v. Railroad Co., 22 Fed. Rep. 883. Where the majority of stock of a corporation was held by one family who voted away the corporate profits for salaries, the majority may call upon a court of equity to remedy the fraud. Sellers v. Iron Co., 13 Fed. Rep. 20. A stockholder may compel the contractors to disgorge, when they obtain a contract through their associates or hirelings being made directors. Carrier v. Railroad Co., 35 Hun. 355. Where two contractors cause a railroad corporation to be formed, in which one contractor becomes a director, and the other directors are clerks of the second contractor, and the construction contract is made with these two, by means of dummy intermediaries, at an improvident price, one of the contractors cannot compel the other to divide the profits. Jackson v. McLean, 36 Fed. Rep. 213. The contracts fixing salaries and rentals must therefore be held not only voidable, but absolutely void. In any case the burden is upon the director to show fairness, reasonableness, and good faith, and upon this record these transactions must not only be held to be constructively fraudulent, but fraudulent in fact.

There might be some force in the contention that complainant is chargeable with laches, if he had not commenced the former suit, and the act complained of was a single one committed in 1882. Here the same course of conduct has continued up to the very commencement of this proceeding, and been persisted in, notwithstanding its pendency. There is no room here for any claim that the corporation has acquiesced in or ratified this conduct. A ratification, by Lorman and his dummies, of his own act, could not purge it of its fraudulent character. The only question of difficulty in the case is as to the remedy. There is no doubt of the power of a court of equity, in case of fraud, abuse of trust, or misappropriation of corporation funds, at the instance of a single stockholder, to grant relief, and compel a restitution; and where the holders of the majority of the stock control the directorate, and are themselves the wrongdoers, without any showing that the directors have been requested, or the corporation has refused, to act. Dodge v. Woolsey, 18 How. 331; Pond v. Railway Co., 12 Blatchf. 280; Brewer v. Boston Theatre, 104 Mass. 378; Gregory v. Patchett, 33 Beav. 595; Peabody v. Flint, 6 Allen, 56; March v. Railroad Co., 40 N. H. 567; Mason v. Harris, 11 Ch. Div.

97; Atwood v. Merryweather, L. R. 5 Eq. 464; Erwin v. Railway Co., 27 Fed. Rep. 625; Allen v. Curtis, 26 Conn. 456; Hersey v. Veazie, 24 Me. 9.

The general rule undoubtedly is that courts of equity have no power to wind up a corporation, in the absence of statutory authority. This rule is, however, subject to qualifications. It has been held that, when it turns out that the purposes for which a corporation was formed cannot be attained, it is the duty of the company to wind up its affairs; that the ultimate object of every ordinary trading corporation is the pecuniary gain of its stockholders; that it is for this purpose, and no other, that the capital has been advanced; and if circumstances have rendered it impossible to continue to carry out the purpose for which it was formed with profit to its stockholders, it is the duty of its managing agents to wind up its affairs. To continue the business of the company under such circumstances would involve both an unauthorized exercise of the corporate franchises and a breach of the charter contract. Mor. Corp. 217-407. The rule applicable in cases of a co-partnership has been held to apply in case of a corporation or joint-stock company. In re Suburban Hotel Co., L. R. 2 Ch. App. 737. In that case Lord CAIRNS says: "If it were shown to the court that the whole substratum of the partnership, the whole of the business which the company was incorporated to carry on, has become impossible, I apprehend the court might, either under the act of parliament or on general principles, order the company to be wound up. But what I am prepared to hold is this: that this court, and the winding-up process of the court, cannot be used as the means of revoking a judicial decision as to the probable success or non-success of a company as a commercial speculation." In the present case, we have a corporation that for seven years has not paid a dividend. Complainant has had invested and tied up nearly \$18,000. The only reason why it has failed to pay dividends, for part of the time at least, is because defendant Lorman, owning a majority of the stock, has controlled the corporation in his own interest and profit. Is a court of equity powerless to give an adequate remedy because the failure to pay dividends is not attributable to natural causes, but by reason of gross frauds perpetrated by the management? Would the court hesitate an instant in case this was a co-partnership? In Erwin v. Railway Co., 27 Fed. Rep. 625-630, WALLACE, J., says: "Plainly, the defendants have assumed to exercise a power belonging to the majority, in order to secure personal profit for themselves, without regard to the interests of the minority. They repudiate the suggestion of fraud, and plant themselves upon their right as a majority to control the corporate interests according to their discretion. They err if they suppose that a court of equity will tolerate a discretion which does not consult the interests of the minority. It cannot be denied that minority stockholders are bound hand and foot to the majority in all matters of legitimate administration of the corporate affairs; and the courts are powerless to

redress many forms of oppression, practiced upon the minority under a guise of legal sanction, which fall short of actual fraud. This is a consequence of the implied contract of association, by which it is agreed in advance that a majority shall bind the whole body as to all transactions within the scope of the corporate powers. But it is also of the essence of the contract that the corporate powers shall only be exercised to accomplish the objects for which they were called into existence, and that the majority shall not control those powers to pervert or destroy the original purposes of the incorporators;" citing *Livingston v. Lynch*, 4 Johns. Ch. 573; *Hutton v. Hotel Co.*, 2 Drew. & S. 514; *Brewer v. Boston Theatre*, 104 Mass. 378; *Kean v. Johnson*, 9 N. J. Eq. 401; *Rollins v. Clay*, 33 Me. 132; *Clinch v. Financial Corp.*, L. R. 4 Ch. App. 117; *Clearwater v. Meredith*, 1 Wall. 25.

When a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become, for all practical purposes, the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders. Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and power of legal control in exact proportion to their respective amounts of stock. The corporation itself holds its property as a trust fund for the stockholders, who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and *cestui que trust*. *Peabody v. Flint*, 6 Allen, 52-56; *Hardy v. Land, etc., Co.*, L. R. 7 Ch. App. 427; *Stevens v. Railroad Co.*, 29 Vt. 550. When several persons have a common interest in property, equity will not allow one to appropriate it exclusively to himself, or to impair its value to the others. Community of interest involves mutual obligation. Persons occupying this relation towards each other are under an obligation to make the property or fund productive of the most that can be obtained from it for all who are interested in it; and those who seek to make a profit out of it, at the expense of those whose rights in it are the same as their own, are unfaithful to the relation they have assumed, and are guilty, at least, of constructive fraud. *Jackson v. Ludeling*, 21 Wall. 616-622; *Story*, Eq. 323. In *Dodge v. Woolsey*, 18 How. 331, *WAXNE, J.*, says: "It is now no longer doubted, either in England or the United States, that courts of equity in both have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capital or profits, which might result in lessening the dividends of stockholders or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquiry into, and to

enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. * * * It is not only illegal for a corporation to apply its capital to objects not contemplated by its charter, but also to apply its profits. * * * Thinking, as we do, that the action of the board of directors was not an error of judgment merely, but a breach of duty, it is our opinion that they were properly made parties to the bill, and that the jurisdiction of a court of equity reaches such a case, to give such a remedy as its circumstances may require." In *Wallworth v. Holt*, 4 Mylne & C. 635, *LORD COTTENHAM* says: "I think it is the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to rules and forms established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy." *Sir JAMES WIGRAM*, in *Foss v. Harbottle*, 2 Hare, 491, says: "Corporations of this kind are in truth little more than private partnerships; and in cases which may be easily suggested it would be too much to hold that a society of private persons associated together in undertakings which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights *inter se*, because, in order to make their common objects more attainable, the crown or legislature have conferred upon them the benefit of a corporate character." In *Bacon v. Robertson*, 18 How. 480, which was a proceeding to compel the trustees to distribute among the stockholders the effects of a corporation whose charter had been forfeited, there is "an able discussion by *CAMPBELL, J.*, of the powers of courts of equity relating to corporations. *CAMPBELL, J.*, referring to the cases just cited, says: "These just views which have afforded to wise chancellors a sufficient motive to enlarge the scope and relax the vigor of the rules of chancery proceedings, so as to bring the civil rights of individuals, in whatever form they may exist, or however complicated or ramified, under the protection of legitimate judicial administration, have been adopted in the United States, not simply for the improvement of methods of proceeding, but also for the adjustment of rights, and the assertion of responsibilities among the members of such associations."

The present case furnishes an instance of gross abuse of trust. Must the *cestui que trust* be committed to the domination of a trustee who has for seven years continued to violate the trust? The law requires of the majority the utmost good faith in the control and management of the corporation as to the minority. It is of the essence of this trust that it shall be so managed as to produce for each stockholder the best possible return for his investment. The trustee has so far absorbed all returns. What is the outlook for the future? This court, in view of the

past, can give no assurances. It can make no order that can prevent some other method of bleeding this corporation, if it is allowed to continue. If Lorman be removed, who shall take his place? He has the absolute power to determine. Once deposed, he may elect a dummy to fill his place. There are practically but three persons concerned, Miner, Lorman, and Lorissa Carpenter, and she has for seven years, in fraud of complainant's rights, been paid a dividend to secure her acquiescence. Who has any right to complain if ample and complete justice is awarded to Miner? Who should be permitted to stand between him and an adequate remedy? This corporation has utterly failed of its purpose, not because of matters beyond its control, but because of fraudulent mismanagement and misappropriation of its funds. Complainant has a right to insist that it shall not continue as a cloak for a fraud upon him, and shall not longer retain his capital to be used for the sole advantage of the owner of the majority of the stock, and a court of equity will not so far tolerate such a manifest violation of the rules of natural justice as to deny him the relief to which his situation entitles him. I think a court of equity, under the circumstances of this case, in the exercise of its general equity jurisdiction, has the power to grant to this complainant ample relief, even to the dissolution of the trust relations. Complainant is therefore entitled to the relief prayed. A receiver will be appointed, and the affairs of this corporation wound up. Defendant Lorman must account, and pay over all moneys illegally received by him, paid to him or paid out by him, from the funds of the corporation: (1) For all moneys advanced to Lorissa Carpenter; (2) for all moneys paid to or received by him as salary since, and including the year 1882, in excess of the sum of \$2,400 per annum; (3) for the amount paid by said corporation to him, the said Lorman, on account of the three parcels of property

whether interest or principal, and for all moneys paid out by said corporation by reason of said purchase, including the said sum of \$400 paid by said corporation to equalize the values of the parcels of said steam power property on said partition, and including all expenses and costs to said corporation by reason of said partition, as well as all interest paid by said corporation upon the two mortgages, subject to which said corporation purchased the dock property and the creek property; provided, however, that said Lorman shall be allowed rents for each of said parcels for any period for which rents have not been paid, by reason of such purchase, at the rate of \$150 per annum for the creek property until January 1, 1886, and thereafter at the rate of \$200 per year; at the rate of \$500 per annum for the steam power property; and for his share at the rate fixed by the lease between the company and Lorman and Miner for the dock property; (4) for all rents which have been paid since 1886 by said company to said Lorman in excess of the following: For the creek property \$200 per annum, for the steam power property \$550 per annum, and for the dock property such sum as may be fixed by the circuit court for the county of Wayne, having reference to that paid prior to that time for the same property; (5) for all rents paid or allowed to said Lorman for the Beniteau property in excess of an annual rental to be fixed by the said Wayne circuit court; (6) for any sums which shall have been paid by the said corporation as costs, fees, or expenses of this proceeding, or which may be paid by said corporation, or for which it may be held or adjudged liable. The decree below is therefore reversed, and a decree will be entered here in accordance with the foregoing, and the cause remanded for further proceedings in accordance herewith. Complainant will be entitled to recover the costs of both courts against defendant Lorman. The other justices concurred.

FOUGERAY v. CORD et al.

(24 Atl 499, 50 N. J. Eq. 185.)

Court of Chancery of New Jersey. June 13, 1892.

Bill by Rene J. Fougereay against Samuel S. Cord, Charles Korb, Samuel T. Cord, the Laurel Springs Land Company, and the Laurel Springs Land & Improvement Company, to recover a share of the profits arising from the sale of land, and to set aside certain conveyances on the ground of fraud.

PITNEY, V. C. On the 2d day of April, 1889, the complainant and the defendants Samuel S. Cord and Charles Korb associated themselves together, and formed a corporation, and adopted the name of the "Laurel Springs Land Company." The certificate declared that the business of the company was to be conducted in the town of Laurel and in the city of Camden, and also in the city of Philadelphia. The object of the organization was "the buying, selling, and exchanging of real estate, and the improvement of the same." The capital stock was fixed at \$1,500, divided into 30 shares of \$50 each, and with that sum the company was to commence business; and that the 30 shares of stock were divided equally between the three incorporators. The corporation had in view the purchase of a farm of 85½ acres owned by one Stafford, situate at the village of Laurel, upon which the complainant claimed to have an option of purchase at \$8,550. In point of fact he had ascertained that Stafford was willing to sell at that price; that the land was near a railroad, and suitable for cutting up into building sites; and he had a verbal agreement or understanding, and no more, with Stafford that he would sell him the land at that price within a reasonable time. Having this so-called option, and being himself without funds to carry out the enterprise, he called upon S. S. Cord, and proposed to him to join him in it. S. S. Cord called in Korb, and the two—Cord and Korb—joined the complainant in the enterprise, and raised \$3,050, cash payment necessary to purchase the property, and on the 30th of March, 1889, four days prior to the organization of the corporation, Stafford conveyed his farm to S. S. Cord, and he gave back a consideration money mortgage for \$5,500, which, with \$3,050 cash, made up the purchase money of \$8,550. On the 8th of April, 1889, and after the organization of the corporation was completed, Cord conveyed the property to the corporation subject to the mortgage aforesaid. The company then organized, with the three corporators as directors, and with Cord as president, and Korb as secretary and treasurer, and proceeded to issue to each other certificates of stock, 10 shares to each, according to the apportionment contained in the certificate of incorporation, that of complainant being dated May 21, 1889, and signed by Cord as president and Korb as secretary and treasurer. No cash was paid by either for his stock, which represented nothing more than prospective profits, which, according to

the preliminary agreement were to be equally divided between the three. The corporators proceeded to have the farm laid out into streets and lots, and Cord and Korb undertook to make sales, in which they were very successful. The sales were made on the installment plan, a cash payment being made and a contract given to the purchaser for the delivery of the deed upon the payment of the balance in monthly installments. By a statement made up by Korb for the meeting of the stockholders on the 1st of April, 1890, after one year's existence, the financial situation of the corporation was shown as follows:

Gross amount of sales to date, 208 lots, at a value of.....	\$47,010 00
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RECEIPTS.

Money received on account of lots.....	\$16,746 58
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EXPENDITURES.

For payment of mortgage, interest on mortgage, improvements, and other incidental expenses.....	\$10,556 52
	\$ 190 06

ASSETS.

Amount due on lots sold.....	\$36,263 42
Estimated value of unsold lots	20,000 00
Balance in treasury.....	190 06
	\$56,453 48

EXISTING LIABILITIES.

Commissions on sales, 20% ..	\$9,312 00
Interest due on bonds.....	183 00
Bonds outstanding.....	3,050 00
Secretary and treasurer's salary.....	3,600 00
President's salary.....	3,600 00
	\$19,745 00

Estimated surplus.....	\$36,708 48
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At this annual meeting, the defendant Samuel S. Cord transferred one share of his stock to his father, S. T. Cord, and with the aid of Korb elected the said S. T. Cord a director in place of the complainant. In the statement above set forth the item of indebtedness of \$19,745 is composed of outstanding bonds for \$3,050 given to S. S. Cord and Korb, for the \$3,050 cash payment advanced by them to the owner of the property, and the items of commissions and salary, amounting to \$16,512, claimed by Cord and Korb to be due to them for one year's services. This claim was attempted to be sustained at the hearing, on the ground that the complainant had failed to do anything towards aiding and furthering the enterprise, so that the whole burden fell on Cord and Korb, and justified them in paying themselves liberally for their services. These large charges, and dropping of the complainant from the direction, produced dissatisfaction on his part, and put a stop to anything like co-operation between him and his associates, and some litigation ensued, not important for present purposes. On the 10th of June, 1890, the two Cords,—father and son,—together with Korb, formed a new corporation called the "Laurel Springs Land & Improvement Company," similar in its provisions to those of the Laurel Springs Land Company, having a capital of \$5,000,

divided into 50 shares of \$100 each, 48 of which were allotted to the defendant S. S. Cord, one to the defendant Korb, and one to Samuel T. Cord, the father of the defendant S. S. Cord. On the 13th of June the defendants caused to be executed by the Laurel Springs Land Company to the defendant Korb a deed of conveyance conveying the farm aforesaid, excepting the lots in the mean time actually conveyed, and two or three lots in addition thereto, in consideration of \$5,000, and on the same day Korb, for the same consideration, conveyed the premises to the Laurel Springs Land & Improvement Company. The old company on the same day, under the same management, transferred to Korb all the contracts for the lots already taken, thereby denuding the old company of the greater portion of its property. These deeds of conveyance were lodged for record in the register's office of Camden county, and were each marked on their back with the words, "don't pub." for the purpose of preventing their being given out to the newspapers for publication. These transfers were made without actual consideration paid, in pursuance of a set of resolutions adopted by the elder company as follows: "Whereas, this company heretofore, on or about the eighth day of April, 1883, purchased of Chas. Korb and Samuel S. Cord a tract of land situated at Laurel Springs, Camden county, for the sum of nine thousand five hundred and fifty dollars, a certain mortgage of five thousand five hundred dollars made by Samuel S. Cord to Montgomery Stafford forming part of the consideration, the balance of the price being secured by judgment bonds of this company to said Charles Korb and Samuel S. Cord, no cash having been paid; and whereas, this company has disposed of a large portion of said premises, the payment of much of which is to be paid for in monthly installments, and this company having collected a large number of said monthly installments and used the same in paying off said mortgage and defraying necessary expenses, whereby this company has incurred the obligation of conveying said sold portion to the purchasers thereof; and whereas, this company has been unable to pay to said Korb and Cord the money due them upon the obligation of the company; and whereas, this company is largely indebted to the said Korb and Cord for services and commissions, and has been unable, for lack of funds, to pay them the amounts due them for the purchase price of said lands or their services since rendered; and whereas, said Korb and Cord have signified their willingness to receive back the unconveyed portion of said premises, in liquidation of the original purchase price and all moneys due to them, excepting out certain lots, and to assume the contracts made by this company for the sale of a portion thereof, and have requested said conveyance to be made to Charles Korb: Now, therefore, be it resolved that this company do forthwith reconvey the unconveyed portion of said premises to Charles Korb, excepting thereout lots 5 and 6, section F, and 9, section A, in full satisfaction of the obligation and indebtedness of this company to

said Charles Korb and Samuel S. Cord, he agreeing to perform all the agreements for the sale of any portions of said premises for which this company is now liable, and furnishing this company a release from Samuel S. Cord of all indebtedness. Resolved, that all contracts for the sale of any portion of said premises be and the same are hereby assigned to Charles Korb, and the officers of the company are hereby requested to make and execute the necessary deed and assignments to carry out this resolution." The business of selling lots was conducted after these conveyances precisely in the same manner as before, the new company, under the management of Cord and Korb, recognizing and fulfilling the contracts of the old company whenever they matured, and Cord and Korb receiving payment of installments due and paid by purchasers on those contracts.

On the 23d of September, 1890, complainant, having acquired notice of these conveyances, filed his bill, with supporting affidavits, setting forth some of the foregoing facts, and praying that he might be decreed to be entitled to the equal one-third part of the profits already derived and thereafter to be derived from the enterprise; that the conveyances by which the land was transferred from the first to the second company might be decreed to be fraudulent and void as against the complainant and the first company; that the money claimed and charged by S. S. Cord and Korb, as commissions and salaries, might be declared to be fraudulent and void, as against the complainant and the first company; and that S. S. Cord and Korb might be compelled to bring the books of the company into this state for examination; that Korb and the two Cords and the two companies might account to the complainant for his interest in the enterprise, and for a receiver, and an injunction restraining the second company from conveying or contracting to sell or mortgaging or in any way disposing of any of the lands, and from assigning, transferring, or in any way disposing of, any of the assets of the first company, and for further relief. On presenting that bill, an order was made on the defendants to show cause on a future day why an injunction should not issue according to the prayer of the bill, and, *interim*, restraint was made. On the return of the order the several defendants joined in an answer, in which they deny that complainant had any option for the purchase of the Stafford farm; they admit that 10 shares of full paid-up stock of the first company were issued to complainant, but allege that the consideration which complainant agreed to pay and perform therefor had never been paid or performed by complainant, and that his certificate of stock should be delivered up to be canceled, and they add a cross bill, in which they pray that it may be so delivered up. They allege that the stock in the elder company was equally divided between the three corporators without the payment of any money, and upon the agreement and understanding that each should devote and contribute his whole time and attention to pushing the sale of the lots

into which the tract was to be divided, and that the complainant had not only wholly failed to assist in any manner the furthering of the enterprise, but had done all he could to embarrass and retard it, and for that reason was not entitled to any of the profits theretofore or thereafter to be derived from it; that the whole of the skilled labor which resulted in the prosperity of the company had been performed by the defendants Cord and Korb. This answer was supported by affidavits, which were read on the hearing of the order to show cause, and, after argument, I expressed the opinion that the transfers of property complained of were fraudulent and void as against the complainant, and advised an order that the defendants should produce, before a special master of this court, for inspection by the complainant, all the papers, books, vouchers, and contracts of sale belonging to the business of either of the land companies, and that, whenever the funds in the hands of the treasurer of either of the companies should exceed the sum of \$3,000, they should pay the same to the master, to be by him paid into court, and the individual defendants should appear, if required, to be examined by the master under oath. The defendants were further ordered to give bond conditioned that each of them should come to an account with the complainant, and should pay over the money received by them from the sale of the lots, and they were restrained and enjoined from assigning, transferring, or disposing of any of the personal assets of either of the defendant companies, or any contracts for the sale of any of the lands in question. The order was made in this shape, instead of for the appointment of a receiver, at the request of the defendants, and to avoid a complete interruption and destruction of the enterprise. Subsequently, on the 25th of March, 1891, the defendants applied for and obtained leave to file an amended answer, which they did on the 6th of April, 1891, in which they set up that on the previous 24th of February the Laurel Springs Land & Improvement Company conveyed the premises in controversy to the Laurel Springs Land Company; and they further set forth that while the title was in the younger company it had entered into contracts for the sale of 23 lots, giving their numbers, and had assigned those contracts to the Laurel Springs Land Company; that the younger company had carried out contracts for the elder company for the conveyance of 2 lots, giving their numbers, and that it had also sold and conveyed 12 lots, giving their numbers. The answer then sets out an account of receipts and disbursements between the Laurel Springs Land & Improvement Company and the Laurel Springs Land Company; also "a full and complete account of the Laurel Springs Land Company up to and including February 24, 1891." This last would seem to be, upon its face, a cash account of the older company. To the account contained in this answer the complainant, at the suggestion of the court, filed exceptions, and the cause was brought to a hearing upon the pleadings, including the exceptions to the account. At the final hearing three matters were

litigated—*First*. The right of the complainant to hold his certificate of stock entitling him to a one-third interest in the adventure. *Second*. The exceptions taken by the complainant to the account contained in the second answer of the defendants. *Third*. Whether the complainant was entitled at this time to a final ascertainment and setting off to him of one third of the assets of the company.

First. The evidence showed clearly enough that the complainant had an oral option for the purchase of the Stafford farm; that he was considerably advanced in years, and had been for several years secretary of the Magnolia Land Company, a corporation of a similar character owning land situate about two miles from Laurel Springs; that he had no tact or ability in finding purchasers for lots of this character, or promoting their sale, and his lack of efficiency in this respect was manifest. The defendant S. S. Cord was a sales agent on commission for the Magnolia Company, and was well acquainted with the complainant. Korb was Cord's friend, and was induced by him to join in the enterprise. Korb saw the complainant several times before he paid his money and signed the articles of association. Cord and Korb insisted upon being elected to the offices which they afterwards held. The complainant was not asked or expected to resign his position in the Magnolia Company in order to assist in carrying out the Laurel Springs enterprise. All that he agreed to do was to assist it as far as he could. At the time that the articles of association were signed, and after Korb had paid his money towards the purchase of the land, he objected to complainant's having one-third interest, and proposed to cut him down to a one-fifth interest, but complainant resisted this, and insisted upon having his full one-third interest in accordance with the previous verbal agreement, and threatened to bring suit if it were not accorded to him, whereupon Korb yielded, and signed the articles upon that basis. As before stated, the certificate of stock was dated and issued to complainant on the 21st of May, 1889, but was not called for or taken away by him until the 25th of March, 1890, when it was delivered to him by the defendants without objection. This was long after the failure of the complainant to perform his agreement to assist in making sales had occurred, if it ever did occur; the evidence, however, shows that the complainant did all he could ever have been expected to do in that direction. Very soon after the organization of the company and the laying out of the land into streets and lots, the defendants Cord and Korb began to scheme to get rid of the complainant. They tried first to buy him out; failing in that they called a special meeting of the directors for June 14, 1889, served notice of it upon him by mail, which reached him after the hour appointed for the meeting, and at that meeting they voted themselves each a salary of \$3,000 per year, and, in addition thereto, a commission of 20 per cent. on all sales of lots, and Mr. Cord advertised himself as the sole agent for such sales. The fair inference from this conduct on their part is that they then

thought that such salaries and commissions would absorb the bulk of the profits and leave little or nothing to be divided with the complainant, and that they did not anticipate that the enterprise would be so successful as it afterwards proved to be. Then, I think that the fair inference is, further, that such success was due, not only to the tact, industry, and energy of Cord and Korb, but also to the favorable situation and other characteristics of the land itself, and for the finding of this land and procuring the purchase of it the associates were indebted to the complainant. The defendants, after the resolution fixing their compensation, seem to have carried on the business of the corporation without any consultation with, or asking any aid from, the complainant. A charge was made that the complainant had used his situation and influence to injure rather than to aid the enterprise. I think the charge fails. It depends upon the accuracy of the memory of a single witness, and her testimony in that regard is denied by Mr. Fougerey, and the discrepancy may well be explained by a consideration of the situation in which he was placed as secretary of the Magnolia Company. I think that the complainant's title to one-third interest in the profits of the enterprise, manifested by his certificate of stock, has not been shaken. If he has failed to perform his contract to aid in the enterprise, such failure might subject him to payment of damages in an action at law for its breach. He has not forfeited his proprietary right.

Second. The action of the two defendants—S. S. Cord and Korb—in their capacity as directors, in fixing their compensation in the way they did, is of no value whatever. *Gardner v. Butler*, 30 N. J. Eq. 702, where the question is exhaustively examined both in the opinion of Chancellor RUNYON, in this court, and by Justice VAN SYCKEL in the court of errors and appeals; *Cone v. Russell*, 48 N. J. Eq. 203, 21 Atl. Rep. 847, and cases there cited. The defendants are entitled to what their services are reasonably worth, and no more. Evidence on this subject was adduced at considerable length. Before the launching of this enterprise, Korb was a butcher in the city of Philadelphia, with no experience whatever in affairs of this kind. His business had produced him about \$2,000 a year. He conducted it by the aid of an agent after the undertaking of this enterprise. The defendant S. S. Cord has been a sales agent for the Magnolia Land Company, without salary, at a commission of 10 per cent., and half of his carriage hire, and all his car fares, and had brought his income up to \$2,000 the year previous to the launching of this enterprise. Witnesses were produced as to the usual commissions paid in such cases. One had sold a great many lots at 10 per cent., the proprietor paying all expenses; others proved that within a few months before the hearing the defendants Cord and Korb had been paid a commission of 30 per cent. for selling lots immediately adjoining the lots of the Laurel Springs Company; and one instance was proven of the same commissions being paid to another salesman. But the proof was clear that

the prevailing rate for such work in that vicinity was 20 per cent. of the actual cash payments as made, the salesman paying his own expenses, and this, I think, under the circumstances, a full and fair compensation in this case. The defendants Cord and Korb here manifestly are not entitled to both commissions and such salaries as they have credited themselves with. The work of managing the corporation outside of the sales of lots was very small; and here, after the launching of the corporation and the laying out of the farm into lots, its management, besides involving very little work, was so conducted as to work a gross fraud on the complainant, and might well be held to disentitle the defendants to any compensation whatever. But I am disposed to allow them a small amount on that score, if they shall choose their compensation by way of commissions,—say \$250 each. The charges for carriage hire, car fares, and cigars, and for advertising, will not be allowed if the defendants shall choose to take their compensation by way of commissions. If they waive commissions, they may have salaries at \$3,000 a year each, with the expenses just mentioned. These rates are fixed, upon condition that no action shall be brought against complainant for failure to perform his agreement. The charges for expenses of litigation, counsel fees, etc., will not be allowed. This disallows all charges of that character, except the fee of \$50 to Mr. Harned for examination of title, and preparing and attending to the organization of the corporation, and expenses incident thereto.

Third. The complainant demands a partition of the present assets of the company, and an allotment to him of one third *in specie*. He bases his demand on two grounds—*First.* That the present assets all represent profits, and there is no reason why they should not be divided. He offers to take his share *in specie* by an allotment to him of one third in number of the un conveyed lots, and the contracts annexed to such as have been bargained away, but not conveyed, to be ascertained by alternate choice or by lot; and upon the *second* and additional ground that the defendants have made use of their majority power to attempt to deprive him, by fraud, of his lawful interest in the property of the corporation, and have so behaved as to forfeit all right to act as officers of the company, and to entitle him to the aid of the strong arm of the court in separating his interests in the corporate property, and withdrawing it from the further control of the defendants. The power of this court to compel a corporation to make a dividend of its profits among its stockholders is well settled. This was assumed in *Park v. Locomotive Works*, 40 N. J. Eq. 114, 3 Atl. Rep. 162; and see *Cook, Stock & S.* § 541; *Mer. Corp.* § 404; *Robinson v. Smith*, 3 Paige, 223; *Scott v. Insurance Co.*, 7 Paige, 198; *Pratt v. Pratt*, 33 Conn. 446, at page 455; *Beers v. Spring Co.*, 42 Conn. 17, at page 26. Ordinarily, of course, such dividends can be made only out of the net profits actually realized over and above all debts and liabilities, and in a shape to be conveniently divided. *Park v. Locomotive*

Works, *supra*. In the case in hand, the accounts contained in the second answer show the corporation to be free from debt, and the evidence at the hearing showed that sales of lots were being made since the filing of the answer, and cash being paid in on account of such sales and upon contracts for sales already made. No capital was ever paid in as such. The capital stock represented only prospective profits. No capital is required to carry on and close up the business of the corporation, unless additional land be purchased. The land owned by it has been divided into streets and lots. The streets are dedicated to the public, and the bare legal title is of no pecuniary value to the company. The lots are in a convenient shape to be distributed. They, with the unexecuted contracts and cash on hand, form the assets of the corporation, and all of its assets are net profits. It is not a case where the machinery of a corporation is necessary in order to successfully make sales of the lots. All that the corporation has to do with such sales is to execute the contracts and deeds. I see no reason why one third in number of these lots may not be chosen, which would represent one third in value of the whole, and be conveyed to the complainant. Such of them to be so conveyed as are subject to contracts may be so declared in the conveyance, in order to secure the rights of the purchasers, or they may be conveyed to a receiver, or master of the court, to hold for the parties subject to the rights of the purchasers. This mode of making a dividend will not dissolve the corporation or prevent the other stockholders,—the defendants herein,—from proceeding under its organization to conduct its business to suit themselves. If, however, the majority of the stockholders had not misbehaved themselves in its management, or practiced any fraud upon the complainant, I am not sure the case would warrant the interference of the court, and it is not probable that it would have been asked to interfere. But the fraudulent conduct of the defendants Cord and Korb seem to me to render the duty of the court clear. They first voted to themselves salaries as officers many times greater than the value of any services they could possibly have rendered as such, outside of the work of booming and selling the lots; they then voted to themselves compensation for the work of booming and selling at a rate sufficient to secure efficient work in that respect, including all expenses; they then pay those expenses out of the funds of the corporation. Finding that the profits of the enterprise were so great as still to leave the complainant a handsome prospective dividend, they deliberately conveyed and transferred nearly all the assets to themselves in payment of debts claimed to be due to themselves for the extravagant compensation before voted to themselves, although the balance sheet made up by themselves, two and a half months previously, showed an estimated surplus of assets over all liabilities of nearly \$37,000. In short, the whole transaction was a piece of gross and bungling thievery; and yet, when called upon to account for it

in this court, the defendants had the assurance to attempt to support it by an answer; and then, after a strong expression of opinion, by the court at a preliminary hearing, of its fraudulent character, they coolly reconvey and retransfer the property, which they had just stolen, to its former custody, which, in point of fact, is their own custody, and then say to the court that it is powerless to interfere with it in its present *status*. It seems to me that it would be a reproach to the administration of justice to doubt the power and duty of the court in such a case. It is similar to that of a trustee who holds certificates of stock in his name as trustee, lodged in a strong box belonging to the trust estate, and then deliberately has them transferred to his individual name, and the certificates lodged in his individual private strong box, and, when called to account for his breach of trust, retransfers the certificates to his name as trustee, and lodges the new certificates in the strong box belonging to the estate, and then coolly says to the court that "the breach of trust is made good; nothing is lost; and I am entitled to retain the key of the strong box, and to have the certificates of stock continue to stand in my name as trustee." It is well settled that the officers of a corporation occupy towards its stockholders the relation of trustee and *cestui que trust*, and on that broad ground are liable to be called upon to account for their conduct in this court. *Mor. Corp.* § 381; *Cook, Stock & S.* § 648; But if this ground is not, strictly speaking, true, I agree with Mr. Cook that reliance may well be placed upon the broad principle laid down by Lord HARDWICKE, one hundred and fifty years ago, in *Sir Robert Sutton's Case*,—a case similar to the one now before the court, reported in 2 *Atk.* 400. At page 406, he says: "The tribunals in this kingdom are wisely formed both of courts of law and equity, and so are the tribunals of most other nations, and for this reason there can be no injury but there must be a remedy in all or some of them, and therefore I will never determine that frauds of this kind are out of the reach of courts of law or equity, for an intolerable grievance would follow from such a determination."

Where the offending officers constitute, as here, a controlling majority of the stockholders, the action must necessarily be brought by the individual stockholder or stockholders who finds himself or themselves in the minority. *Cook, Stock & S.* § 645; *Hawes v. Oakland*, 104 U. S. 450. It is the peculiar province of this court, not only to right wrongs already committed, but to protect property from future injury and waste by withdrawing it from the reach of danger. In the case of a willful breach of trust, it not only compels the guilty trustee to restore the trust property, but removes it from the possession and control of the custodian who has proved untrustworthy. There is nothing in the character of a trading corporation to prevent the application of this remedy. It is, after all, as between the stockholders, nothing more than a trading copartnership. *Mor. Corp.* § 3. In *Robinson v. Smith*, 3 Paige, 222, Chan-

cellor WALWORTH, at page 232, says that "joint-stock corporations are mere partnerships, except in form; the directors are the trustees or managing partners, and the stockholders are the *cestuis que trustent*, and have a joint interest in all the property and effects of the corporation." And in *Pratt v. Pratt*, 33 Conn. 446, HINMAN, Ch. J., at page 456, says; "Joint-stock companies, in modern times, are nothing but commercial partnerships, which have taken the form of corporations for the greater facility of transacting business, and to prevent a dissolution of the concern by those numerous events which are so liable to work a dissolution in a partnership composed of a great number of individuals." In the case in hand it is impossible to leave the complainant's property interests in the control of the corporation, without leaving it in the control of the two defendants Cord and Korb, and they have proved themselves wholly untrustworthy, so that, if this were a case of partnership, the court would dissolve it at once and divide the property. The exigency of the case demands the same remedy here, as far as it is necessary to ascertain and give complainant his share. This, as I have already shown, can be done without dissolving the corporation or seriously interfering with the conduct of its business. If it be said that the scope of the articles of

association warrants the reinvestment of the profits of this adventure in otherlands, the answer is that the power on the part of the defendants to make such investments furnishes an additional reason why they should not have the opportunity to do so. I will advise a decree that the lots remaining unsold, and not contracted to be sold, shall be divided by their present boundaries into three equal parts, and one part allotted and conveyed to the complainant, the other two parts to remain in the corporation; and that such division be had in the presence of a master, either by lot or by alternate choice, as the defendants may choose, reserving leave to either party, after a division so made, to show by proof that it is unequal in value and to claim owelty; that the lots contracted to be sold, and not conveyed, shall be conveyed by the corporation to a receiver, to be appointed by this court, to be held by him in trust for conveyance to the parties holding the contracts as soon as they shall have paid to him the amount due on their several contracts. The contracts must also be assigned and transferred to said receiver. There will be an order of reference to a master to take an account of the receipts and disbursements of the treasurer of the corporation upon the basis hereinbefore stated, and also the debts due and owing, if any, by the corporation.

OREGUM GOLD MIN. CO. OF INDIA,
Limited, v. ROPER et al.

([1892] H. L. App. Cas. 125.)

These were consolidated appeals from an order of the court of appeal, and raised the same question.

The following statement of the facts (certain formal parts excepted) is taken from the judgment of LORD HERSCHELL:

The Ooregum Gold Mining Company, Limited, was incorporated in October, 1880, under the joint stock companies acts 1862 to 1880. The statement contained in the memorandum of association with reference to the capital of the company was as follows: "The capital of the company is £125,000, divided into 125,000 shares of £1 each, and the shares of which the original or increased capital may consist may be divided into different classes, and issued with such preference, privilege, guarantee, or condition as the company may direct." Forty thousand of the shares were allotted to the vendors to the company, the residue were issued to the public, and the full amount paid thereon. The operations of the company were not, in the first instance, successful, and a winding-up order was obtained. An application was subsequently made to the court for an order to stay the winding-up, with a view to the introduction of fresh capital and a resumption of mining operations, and an order was made accordingly. In pursuance of this policy, an extraordinary general meeting of the company was summoned in 1885, at which it was resolved that the capital should be increased by the issue of 120,000 preference shares of £1 each, to be credited in the capital and books of the company as having the sum of 15s. per share paid thereon, such preference shares carrying the right to a non-cumulative preference dividend up to 10 per cent. on the nominal amount of such preference capital out of the profits of the undertaking each year, and to equal participation (share per share) with the ordinary shares in such further profits as should remain for distribution each year after the payment of the above 10 per cent. preference dividend. The special resolution so passed was duly confirmed. At this time the market value of the ordinary shares was only 2s. 6d. per share.

Upwards of 100,000 of these preference shares were allotted, with 15s. credited as paid thereon. Prior to the actual allotment an agreement was entered into between the company, of the one part, and an agent or trustee for the several persons whose names were entered in the schedule thereto, of the other part, whereby, after reciting the agreement to issue the shares at a discount of 15s. per share, and that 1s. had been paid on allotment, it was agreed that the shares to be allotted should be held as shares on which 16s. per share had been paid, and should be

subject and liable to further payment of 4s. per share, and no more, and the company thereby undertook to cause the agreement to be registered at the joint stock registration office, pursuant to the companies act 1867, before the issue of the shares. The agreement was duly filed accordingly. The capital raised by means of the issue of the preference shares sufficed to discharge the obligations of the company, to extricate it from its difficulties, and to give it a new start. Gold to a considerable amount was shortly afterwards raised from the mines, and the company has since been prosperous, the market value of the ordinary shares having risen to about 40s.

In February, 1889, the respondent, George Roper, purchased on the stock exchange and paid for ten fully paid-up ordinary shares in the company. On the 15th of July following, on behalf of himself and the other ordinary shareholders, Roper brought this action against the company and Wallroth (as an original allottee of the preference shares, and as representing the other original allottees) to have it declared that the issue by the company of the 120,000 preferred shares, at a discount of 15s. per share, was ultra vires, and to have the register rectified accordingly and other consequent relief granted. The statement of claim contained the allegation that the company had in 1889 issued debentures to the amount of £20,000, which were charged on all the property of the company, and which were then outstanding. It further alleged as follows: "The defendant company had no power to issue the said preferred shares at a discount, and the entry of the preferred shares in the register book as fully paid up should be rectified. The said preferred shares are now quoted on the stock exchange at a premium, and, if the said entry is rectified, the ordinary shares will benefit thereby, and the 15s. unpaid on the preferred shares will be available for paying off the said debentures as and when they fall due."

NORTH, J., upon the authority of *In re Almada & Tirito Co.*, 38 Ch. Div. 415, without argument, made an order declaring that the issue of the preferred shares of £1 each at a discount of 15s. per share was beyond the powers of the company, and that the said shares so far as the same were held by Wallroth or by original allottees represented by him were held subject to the liability of the holders to pay to the company in cash so much of the £1 per share as had not been paid on the same; and ordering that the company do rectify the register in accordance with the above declaration. This order was affirmed by the court of appeal without argument. Against these orders appeals were brought by the company and by Wallroth.

The house took time for consideration.

1892, March 14. LORD HALSBURY, L. C. My lords, the question in this case has been more or less in debate since 1883, when Chitty, J., decided that a company limited by shares was not prohibited by law from issuing its shares at a discount. That decision was overruled, though in a different case, by the court of appeal in 1888, and it has now come to your lordships for final determination.

My lords, the whole structure of a limited company owes its existence to the act of parliament, and it is to the act of parliament one must refer to see what are its powers, and within what limits it is free to act. Now, confining myself for the moment to the act of 1862, it makes one of the conditions of the limitation of liability that the memorandum of association shall contain the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount. It seems to me that the system thus created by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares, although the amount of those shares has been, in accordance with the act of parliament, fixed at a certain sum of money. It is manifest that, if the company could do so, the provision in question would operate nothing.

I observe in the argument it has been sought to draw a distinction between the nominal capital and the capital which is assumed to be the real capital. I can find no authority for such a distinction. The capital is fixed and certain, and every creditor of the company is entitled to look to that capital as his security.

It may be that such limitations on the power of a company to manage its own affairs may occasionally be inconvenient, and prevent its obtaining money for the purposes of its trading on terms so favorable as it could do if it were more free to act. But, speaking for myself, I recognize the wisdom of enforcing on a company the disclosure of what its real capital is, and not permitting a statement of its affairs to be such as may mislead and deceive those who are either about to become its shareholders or about to give it credit.

I think, with Fry, L. J., in the *Almada & Tirito Company's Case*, 38 Ch. Div. 415, that the question which your lordships have to solve is one which may be answered by reference to an inquiry: What is the nature of an agreement to take a share in a limited company? and that that question may be answered by saying, that it is an agreement to become liable to pay to the company the amount for which the share has been created. That agreement is one which the company itself has no authority to alter or qual-

ify, and I am therefore of opinion that, treating the question as unaffected by the act of 1867, the company were prohibited by law, upon the principle laid down in *Iron Co. v. Riche*, L. R. 7 H. L. 653, from doing that which is compendiously described as issuing shares at a discount.

The question remains whether section 25 of the act of 1867 has made any difference in the matter now under discussion. That section prescribes that every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by contract duly made in writing, and filed with the registrar of joint stock companies at or before the issue of such shares. Two things are manifest in this provision. The share is to be held subject to payment, and the payment is to be in cash. The amount is to be paid, and to me it appears, looking at the latter part of the section, whereby a contract made and filed may qualify and cut down the form of payment, and that it may be in goods or in value received in some form, instead of in cash, it must nevertheless be payment. I regret that the words "in cash" have received a judicial exposition which allows payment otherwise than in cash, and I hold myself free, if the question should ever come before your lordships, to consider the propriety of that decision. But for my present purpose, it is enough to say that there is nothing in the section which justifies the notion that that which the statute required to be paid in cash, subject to qualification of a mode of payment, should not be paid at all.

The provisions of section 25 were probably to put a stop to such transactions as had become the subject of judicial animadversion in *Pellatt's Case*, 2 Ch. App. 527; *Elkington's Case*, Id. 511; also, *Fothergill's Case*, 8 Ch. App. 270, and *Dent's Case*, Id. 738.

My lords, I should have been prepared to take this view if the matter were not covered by authority. But it seems to me that, although not directly in point, the principle laid down by your lordships' house in *Trevor v. Whitworth*, 12 App. Cas. 409, would render it extremely difficult to so read the sections to which I have referred as to justify the appellants' contention.

Under these circumstances, it seems to me impossible to arrive at any other conclusion than that this appeal must be dismissed with costs. Accordingly, I move your lordships that the order appealed from be affirmed and the appeal dismissed with costs.

LORD WATSON. My lords, can a company limited by shares, formed and registered under the act of 1862, issue its shares as fully paid up, for a money consideration

less than their nominal value? That was the only question argued in these appeals. It has been answered in the negative by both courts below, without hearing argument, upon the authority of the *Almada & Tiritó Company's Case*, 38 Ch. Div. 415, decided by the court of appeal in 1888. The limitation of such a company's liability is the creature of statute, and the question lies within a narrow compass, depending on the construction of one or two clauses in the companies acts of 1862 and 1867.

The act of 1862 (section 8, 12 App. Cas. 409) requires that, in the case of a company limited by shares, the memorandum of association shall contain the amount of the capital with which it proposes to be registered, divided into shares of a certain fixed amount. The statutory limitation which it imposes upon the liability of individual shareholders is contained in the enactment (section 38, 8 Ch. App. 768) that "no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." In my opinion, these enactments, read together, indicate the intention of the legislature that every member who takes shares from the company in return for cash shall either pay or become liable to contribute their full nominal value. The "amount, if any, unpaid," obviously refers to the "fixed amount" of the shares into which the capital is divided, as set forth in the memorandum, and not to any lesser amount which may be agreed upon between the company and its shareholders; and the statutory liability of each shareholder is for the difference between the amount fixed by the memorandum and the sum which has actually been paid upon his shares. Consequently, if shares are issued against money, it appears to me that any payment to the company less than the nominal amount of the share must, by force of the statute, and notwithstanding any agreement to the contrary, be treated as a payment to account, the member remaining liable to contribute the balance, when duly called for.

A company is free to contract with an applicant for its shares; and when he pays in cash the nominal amount of the shares allotted to him, the company may at once return the money in satisfaction of its legal indebtedness for goods supplied or services rendered by him. That circuitous process is not essential. It has been decided that, under the act of 1862, shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an

arrangement is that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The court would doubtless refuse effect to a colorable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined. That state of the law is certainly calculated to induce companies who are in want of money, and whose shares are unsaleable except at a discount, to pay extravagant prices for goods or work to persons who are willing to take payment in shares. The rule is capable of being abused, and I have little doubt that it has been liberally construed in practice.

The companies act of 1867 contains one clause only which can affect the present question. Section twenty-five enacts that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of joint stock companies at or before the issue of such shares."

It was argued that section 25 recognizes power in the company to accept a partial payment as a cash payment in full, provided there be a contract to that effect duly executed and filed with the registrar. I am unable so to construe the clause. I do not think its object was to give companies new powers in relation to the issue of their shares, but to regulate the statutory powers already possessed by them in regard to the acceptance of other than cash payments as part of their capital. The expression "unless the same shall have been otherwise determined" does not, in my opinion, imply that part payment may be accepted as payment in full. It refers to contracts so far as then lawful, by which a company might agree to accept considerations other than cash. In all such cases, the clause provides that the contract, if not duly filed with the registrar, shall be of no effect, and that the shareholder shall remain liable for the value of his shares in money. The obvious purpose of the enactment is to enable persons dealing with the company to judge for themselves what may be the value of the consideration given as representing capital.

It is admitted that the appellants acted in good faith, and that the arrangement made with them would, even if carried out to the letter, have been of solid advantage to the company. But they accepted shares of the nominal value of 20s. as fully paid up, in the knowledge that only 5s. per share had been paid; and they cannot, therefore, benefit by the principle recognized by this house in

Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29, and Burkinshaw v. Nicolls, 3 App. Cas. 1004.

It was urged at the bar that the appellants could have secured by other means all the advantages which were stipulated in their contract with the company; that, instead of 20s. shares, the company could have issued 5s. shares fully paid, bearing a preferential dividend of 40 per cent., and participating in the remaining profits equally with its ordinary 20s. shares; or that the appellants might themselves have bought the goods purchased with their contributions, and received in exchange 20s. shares fully paid up. I see no reason to doubt that the first of these courses might have been successfully adopted; but I am not certain that the second would have been a legitimate proceeding, seeing that it might have involved acceptance by the company of goods in lieu of cash, at an estimated price of no less than four times their actual cost. It is needless, however, to consider what the parties might have done, if that which they did is not of legal effect.

In my opinion, therefore, the register of the company is erroneous, in so far as it appears that these additional shares have been fully paid up; and the order appealed from, which merely provides for its correction in that respect, ought to be affirmed.

I have had an opportunity of considering the suggestions to be made by my noble and learned friend LORD HERSCHELL. I agree with him that the original shareholders had undoubted power to resolve that no call should be made upon the new shares except in liquidation, and then only for the purpose of paying debts and expenses of liquidation, because that power is expressly conferred upon limited companies by section 5 of the companies act 1879 (42 & 43 Vict. c. 76). That the original shareholders could be held, in the present case, to have resolved to that effect, is by no means so clear a proposition; because it appears to me to raise the question whether a single resolution, that no money shall be paid in any event, is severable into two distinct resolutions, one to the effect that there shall be no payment, and the other to the effect that there shall be payment on the occurrence of a certain event. Seeing that the question has not been argued either in the courts below or in this house, I abstain from expressing any opinion upon it.

I therefore concur in the judgment which has been moved by THE LORD CHANCELLOR.

LORD HERSCHELL. My lords, this case raises the important question whether a company incorporated with limited liability can issue its shares at a discount.

(His lordship then stated the facts given above.)

The question whether there was power to issue the shares depends mainly upon the construction of the 8th and 38th sections of

the companies act 1862, though the 25th section of the companies act 1867 has also a material bearing upon it. By the 8th section of the act of 1862, it is enacted that in the case of a company limited by shares the memorandum of association shall contain "the amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount." The 38th section of the same statute provides that in the event of a company formed under the act being wound up, every present and past member should be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with (amongst others) this qualification, that in the case of a company limited by shares, no contribution should be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.

It is contended that these two enactments taken together preclude a company from issuing shares as fully paid up in respect of the payment of a sum less than the nominal amount of the share—that is to say, that a person taking a share on those terms, if he remains a shareholder, is liable to pay the difference between the amount he has already paid and the nominal value of the share. If it had been determined that under the companies act a shareholder was in all cases liable to pay the whole of the nominal value of a share in cash, I should have had less difficulty in adhering to the judgment of the court below. But the contrary has been determined. And not only may a share be allotted as fully paid up in respect of property, goods, or services received by the company, but the courts will not inquire into the adequacy of the consideration, and certainly have not required it to be proved that the consideration given was equivalent in cash value to the nominal amount of the share. The transactions which have taken place on this view of the law have been so numerous, and have extended over so long a period of years, that I doubt if it would have been possible for your lordships to adopt a different view now, even if the legislature had not intervened. But I think that the legislature has distinctly recognized and given its sanction to these decisions.

The 25th section of the companies act 1867 provides that every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by contract duly made in writing, and filed with the registrar of joint stock companies at or before the issue of such shares. I quite agree that this enactment does not purport to render valid an issue of shares in respect

of something other than full cash payment, in case it would have been invalid under the act of 1862. But it seems to me distinctly to recognize the validity of such transaction, imposing only the condition that the contract determining that payment is not to be made in cash shall be in writing and duly filed. The object of this is obvious. It is to enable any creditor, by reference to the documents at the office of the registrar of joint stock companies, to ascertain how much of the liability on the shares which does not remain undischarged has been discharged by cash payment, and how much in some other way. A creditor has not the right to assume that so much of the amount of the share as is no longer liable to be called up has found its way in the shape of cash into the hands of the company. But he has placed at his disposal the means of full information on the subject.

Having regard to the considerations to which I have called attention, and notably to the provisions of the act of 1867, I do not feel so much impressed as some of your lordships by the mischiefs which it is contended would result from the decision that shares might be issued as fully paid up in consideration of a payment less in amount than their nominal cash value, and I can conceive many cases in which such a course would be advantageous both to shareholders and creditors. But the matter must, after all, be determined by an examination of the language of the act of 1862, bearing in mind, of course, the decisions upon it, and the subsequent legislation, which, as I think, sanctioned and acted on those decisions.

I cannot myself place any great weight on the requirement of section 8, that the amount of capital with which the company proposes to be registered is to be divided into shares "of a certain fixed amount." The provision was, of course, necessary in introducing a scheme of limited liability. But it does not, of itself, determine anything as to the extent of liability. Had it stood alone, the shareholders would have been liable, on general principles, to the extent necessary to discharge all the obligations of the industrial partnership. The limitation of liability arises from the provision of section 38, that in case the company is wound up an individual shall only be liable "to the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." This must be regarded as by implication enacting that he shall be liable to that extent. What, then, is the meaning of the "amount unpaid" on the shares? If it had been the law that taking shares in a limited liability company necessarily involved the payment in cash of the nominal amount of the share, the answer would have been free from difficulty. The words "the amount unpaid" would have been taken in their ordinary sense as meaning so much as has not been paid in cash. But it

is impossible now to adopt that interpretation as applicable to every case.

The acts of 1862 and 1867 must be read together. And the latter statute prescribes that a share shall be deemed to be held subject to the payment of the whole amount thereof in cash, unless "the same shall have been otherwise determined" by a filed contract. What is "the same"? Clearly, as it appears to me, that the share is held subject to the payment of the whole amount in cash. When, then, it has been lawfully "otherwise determined," it appears to me impossible that the words "the amount unpaid" can have their ordinary meaning. They must, at least, be interpreted as meaning "unpaid, or not otherwise satisfied, in accordance with the provisions of a filed contract." And once this conclusion is arrived at, I do not think there would be any insuperable difficulty in including within them the case where, in consideration of a certain payment, the liability has been by a filed contract entirely discharged.

At the same time, I am quite sensible of the force of the argument that in the 25th section of the act of 1867 the emphatic words are payment "in cash," implying that there must be payment in some form, even though it is not to be made in cash. And whilst goods or services given or taken in lieu of payment in cash may be regarded as in a sense payment, it is difficult to say that payment of a portion of a sum is payment of the whole. Although, therefore, my mind has not been free from doubt, I am not prepared to differ from the court below, and from those of your lordships who entertain that view, in thinking that a company cannot issue its shares at a discount so as to exonerate those taking the shares from the liability, in case the company be wound up, to pay the amount not already paid on the shares.

But the question before your lordships does not arise in the case of a winding-up. The interest of the creditors is not in issue. The action is brought by a shareholder avowedly for the purpose of benefiting the holders of the ordinary shares at the expense of these who are possessed of the preference shares, which were taken on the express condition that their holders should not be required to pay more than 5s. per share. To accede simpliciter to the prayer of the plaintiff would, as it seems to me, be to sanction a violation by the company of a solemn agreement entered into between them and those who took the shares. I should have thought it was wrong to do this, except in so far as the contract provides for that which has been otherwise provided for by the legislature. In so far as the obligations arising under the contract do not involve a contravention of any enactment of the legislature, I see no reason why they should not be given effect to. The point was not argued at the bar in the present case, but I will give my reasons for the opinion I have expressed. Except when the legislature has

expressly or by implication forbidden any act to be done by a company, their rights must be governed by the ordinary principles of law, and they are free to make, as between them and their shareholders, such contracts as they please. They may enter into any undertaking with those who are invited to become shareholders as to the terms on which the shares shall be taken, and as to the rights of the respective shareholders inter se. What they cannot do is to exclude the liability, in case the company is wound up, to contribute to the extent unpaid on the shares for the benefit of the creditors. But what is to prevent the company agreeing that, except in so far as the legislature has imposed the liability, they will not enforce any? Supposing the agreement had been in terms that the company would not enforce the payment of more than 5s. per share, except in the case of a winding-up, and then only to satisfy the claims of creditors and the costs of the winding-up, would there have been anything illegal in such an agreement? I fail to see anything in the companies acts which would render such an agreement invalid. And taking the contract between the company and the shareholders, and the enactment together, is not this, in effect, what has been done? I am, of course, assuming that to issue shares on such terms would be within the memorandum of association. There can be no doubt of that in the present case. It is provided that the original or increased capital may be issued with "such preference, privilege, guarantee, or condition" as the company may direct.

Whilst, then, I think it ought to be declared that the agreement between the company and those to whom the preference shares were allotted was ineffectual to absolve them from the liability prescribed by the 38th section of the act of 1862, I should have thought, had the point been insisted upon, that it ought also to be declared that the company are not entitled to call upon such shareholders for any further payment beyond that agreed upon, except in the case of a winding-up, and then only so far as necessary for the discharge of the obligations of the company and the costs of the winding-up.

LORD MACNAGHTEN. My lords, your lordships are called upon to determine whether it is or is not competent for a company limited by shares to issue shares at a discount so as to relieve persons taking shares so issued from liability to pay up their amount in full. It was suggested that different considerations might apply to shares in the capital with which a company is originally registered and shares in additional capital created afterwards. But it seems to me to be perfectly clear that, for the present purpose, no distinction can be drawn between one portion of the capital

of a company limited by shares and another.

The question turns upon the construction of the companies act 1862. The provisions of the act are, I think, plain enough if one bears in mind the condition of things which existed before the principle of limited liability was introduced in 1855. Before that time there was no way known to the law by which persons trading in partnership could restrict their liability. They were liable to the uttermost farthing. At last the legislature intervened and authorized persons who proposed to trade in partnership to form themselves into a registered company with a declared capital and shares of a fixed amount, and then limited the liability of the partners as members of the company to the amount unpaid upon their shares.

But all this legislation proceeds on the footing of recognizing and maintaining the liability of the individual members to the company until the prescribed limit is reached. The memorandum of association of a company limited by shares must contain "the amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount." It must also contain "a declaration that the liability of the members is limited." Neither the liability nor the limitation is defined in the memorandum itself. And so the declaration carries you back to the earlier part of the section, where you are told what is meant by "a company limited by shares." It is a company "formed on the principle of having the liability of its members limited to the amount unpaid upon their shares." That must mean that the liability of a member continues so long as anything remains unpaid upon his shares. Nothing but payment, and payment in full, can put an end to the liability.

Plainer still and more explicit is the section headed "Liability of Members." It begins by declaring that, in the event of a company formed under the act being wound up, the measure of the liability of every present and past member is the amount required to satisfy all claims of creditors, to pay all the expenses of liquidation, and to adjust the claims of members inter se. Then come certain qualifications to which that liability is subject. One is, that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.

To sum the matter up, I cannot, I think, do better than adopt the language Mr. Buckley has used in speaking of the limited liability acts. "The dominant and cardinal principle of these acts," he says, "is that the investor shall purchase immunity from liability beyond a certain limit, on the terms that there shall be and remain a liability up to that limit." Whether this liability is one

of "the conditions of the memorandum," within the meaning of that expression in the act of 1862, as Lord Selborne seems to have thought (*Dent's Case*, 8 Ch. App. 768), or a condition attached by the act to a company limited by shares and of the essence of such a company, though it may not be found contained within the four corners of the memorandum, is a matter of little or no importance. In either view of the case it is plain that the condition is one which cannot be dispensed with by anything in the articles of association, or by any resolution of the company, or by any contract between the company and outsiders who have been invited to become members of the company, and who do come in on the faith of such a contract.

If this conclusion be correct, there is, I think, an end of the question, and the arguments urged on behalf of the appellants may be disposed of very briefly.

I may notice, in the first place, that reference was made in the course of the argument to section twenty-five of the act of 1862, which specifies, among the particulars to be entered on the company's register of members, the amount "paid, or agreed to be considered as paid," on the shares of each member. It was suggested that this expression shows that the statute does not require actual payment. Nor does it, except in the case of a company limited by shares. The section, it will be observed, is speaking not only of such companies, but of all companies under the act which have a capital divided into shares.

The next argument that was put forward strikes me as rather far-fetched. It was said that companies under the companies clauses acts are authorized to issue new shares at a discount. It was pointed out that the language of Table A, in reference to the issue of shares in additional capital, is precisely the same as the language of the companies clauses act 1863, now that it has been amended by the railway companies act 1867, and the companies clauses act 1869, so as to make the issue of shares at a discount permissible. Why, it was asked, should there be any difference in this respect between the two classes of companies? Why should that be taken to be prohibited in the one which is allowed in the other? Well, there is this difference to start with. A company limited by shares selects its objects and fixes the amount of its capital to suit itself; complying with the provisions of the companies acts it is under no outside control in these matters. The companies clauses acts are applicable to companies formed for the purpose of carrying out undertakings of a public nature. After parliament is satisfied that the proposed undertaking will be of public benefit, and that the proposed capital is adequate and not excessive, a special act is obtained. Then if the company comes for powers to raise further capital, it is open to the legislature,

if it thinks fit, when sanctioning an act for the purpose, to incorporate with the special act the companies clauses act 1863, and at the same time to modify its provisions as occasion may require. Because a special permission granted on consideration of the particular circumstances of the case is free from objection, it does not follow that a general license might not be open to grave abuse. There is thus difference too: A company limited by shares may borrow as much money as it can get. A company under the companies clauses acts has only limited powers of borrowing. So there is the more reason that a company of the latter class having still some credit, though its borrowing powers be exhausted, should be allowed in a proper case to make use of its unissued capital. But, after all, the real answer to any argument or appeal founded on the companies clauses acts is this: Whatever those acts may prohibit or permit, Table A must be taken in connection with the companies act 1862, and cannot be read so as to contravene its provisions.

Much reliance was placed on the 25th section of the act of 1867. It was said that what that section has in view is one of two things,—either liability to pay in cash the whole amount of the shares, or else a contract in writing duly registered at or before the issue of the shares. It was argued that if there be a contract duly registered, the section does not impose any liability to pay in full. That is quite true, and for this reason: The section applies not only to companies limited by shares, but to all companies under the act of 1862 having a capital divided into shares. In the case of a contract duly registered the section does not require payment where payment is not required by the act of 1862. On the other hand, it does not dispense with payment in full where the liability to pay in full is a condition imposed by the act of 1862, as it is in the case of a company limited by shares.

Burkinshaw v. Nicolls, 3 App. Cas. 1004, was pressed into the argument. But all that case decides is, that the company's certificate to the effect that shares are fully paid is, as against the company, conclusive evidence of payment in the hands of a purchaser for value without notice.

Lastly, it was said that if it be the case that, in companies limited by shares, members are liable to pay up in full the amount, if any, unpaid upon their shares, still the liability is one that may be easily evaded. And it was pointed out that, in the present case, if only a different method had been adopted, a result practically the same might have been attained, and then the transaction would have been unimpeachable. Whether that is a good reason for permitting the requirements of an act of parliament to be contravened may, perhaps, be doubted.

But I desire to protest against some of the propositions which were advanced in con-

nection with this part of the argument. It was said that if a company limited by shares owes its bankers £1,000, and its shares are at 50 per cent. discount, fully paid shares of £2,000 nominal value may be given in discharge of the debt. It was said that a company limited by shares may issue fully paid shares at their market price at the time, however much they may have become depreciated, in exchange for goods having a recognized market value. Speaking for myself, I am not prepared to assent to either of those propositions without further argument. I am inclined to agree with the view expressed by Cotton, L. J., though it is not necessary to decide the point. It seems to me that all that has been determined so far is that the court will decline to rip up a transaction not impeached as dishonest, and not proved to be such, merely because the company may have paid an extravagant price for their property.

In the present case, I regret that I am compelled to say that in my opinion the transaction cannot stand. The course which the directors took probably saved the company. All parties concerned acted in a perfectly open and honest manner. But it seems to me that the requirements of the companies act 1862 have been contravened, and, therefore, I think that the appeal must be dismissed.

LORD MORRIS. My lords, the act of 1862 enabled a company to be formed on the principle of having the liability of its members limited to the amount unpaid on their shares. It did not impose a liability—on the contrary, it limited liability to the ex-

tent of the amount of the share; but there is no power given that I can see to further limit liability by not paying that amount. Has that position been varied by section 25 of the act of 1867, which provides, "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of joint stock companies at or before the issue of such shares?" That section appears to me plainly to refer to and deal only with the mode of payment—*prima facie*, the payment of the whole amount is to be in cash, but with a power given of contracting for something other than cash to be taken in payment, but payment in meal or malt is clearly contemplated—the amount of the shares must be paid. A company can only do what it is authorized to do, and not that which it is only not prohibited from doing. I can find no authority to issue a pound share but that only 5s. is to be paid of the pound.

For these reasons, I concur in the judgment which has been moved by **THE LORD CHANCELLOR**.

LORD HALSBURY, L. C. My lords, before putting the question, I only desire to add that I have designedly avoided alluding to the point which has been mentioned by my noble and learned friend, **LORD HERSCHELL**, inasmuch as it was neither insisted upon nor argued at the bar.

Order appealed from affirmed, and appeal dismissed with costs.

HOLLINS v. BRIERFIELD COAL & IRON CO.

(14 Sup. Ct. 127, 150 U. S. 371. Nov. 20, 1893.)

Appeal from the circuit court of the United States for the middle district of Alabama. Affirmed.

Statement by Mr. Justice BREWER:

The facts in this case were as follows: The Brierfield Coal & Iron Company was incorporated under the laws of Alabama, May 4, 1882. On September 1, 1882, a conveyance was made by the company to Preston B. Plumb, as trustee, to secure an issue of \$500,000 in bonds. On July 25, 1887, the trustee, Plumb, requested a further conveyance and assurance, pursuant to a covenant in the deed of September, 1882, which further conveyance was executed by the company on July 29, 1887. On August 1st, he demanded the surrender of all the company's property to him, as trustee. This was done, and he placed John G. Murray in charge, to control and manage it. On August 3d, he filed a bill in the circuit court of the United States for the middle district of Alabama, against the company, joining as defendants certain stockholders, bondholders, and creditors, though not the plaintiffs in the present suit. That bill set out the organization of the corporation, the stockholders, with the amounts of stock subscribed, and the amounts paid upon such stock, and alleged that the subscribers were liable for the unpaid subscriptions, but that the assistance of the court was necessary for the assessment of such sums. It also set out the issue of the bonds; and their present owners, so far as known, a default in the payment of the interest due thereon, the property and indebtedness of the company,—the unsecured indebtedness being alleged to amount to about \$200,000. The bill further averred that up to that time the chief industry of the company had been the manufacturing of cut nails from iron; that, owing to overproduction in the country, this business had become unprofitable to the company, and that it was desired to change the industry from the manufacture of nails to the production of pig iron, and that it had purchased property with a view to carrying on that industry; that it did not have money enough to successfully carry it on. The bill also alleged that the trustee had taken possession, as authorized by the deed of trust; that he could not carry on the business of the company without obtaining money on the credit of the property; and prayed the direction of the court as to whether he should be permitted to borrow such money, and issue certificates of indebtedness therefor. It asked that all creditors of the corporation, and claimants against the estate, be permitted to make themselves parties, and have their claims adjudicated; that a full administration be had of the estate, and, if need be, a foreclosure and sale. Subsequently, Plumb resigned as trustee, and W. L. Chambers was substituted in his place. Proceedings were had in that case, which resulted,

on July 8, 1889, in a decree for the foreclosure of the trust deed, and a sale of the property. Nearly three months after the commencement of the Plumb suit, and on October 28, 1887, these appellants, as plaintiffs, filed a bill in the same court, making the coal company and sundry stock and bond holders, together with the trustee Plumb, parties defendant. The plaintiffs were unsecured creditors of the company, having claims contracted in 1886 and 1887, four or five years after the issue of the bonds and execution of the trust deed, who sued on behalf of themselves and all other creditors of the coal and iron company, who were willing to come in and contribute to the expenses of the suit. After setting forth their claims, they alleged that the conveyance to Plumb, as trustee, was absolutely void; that a large amount was still due on the stock. They asked to have a receiver appointed and the property sold in satisfaction of their claims, and that such receiver have authority to collect the unpaid stock subscriptions, to be also applied in satisfaction of their claims. They alleged the pendency of the suit brought by Plumb as trustee, but did not ask to intervene therein. After the decree of foreclosure and sale in the Plumb case, and on July 24, 1889, a final decree was entered, dismissing this bill. From such decree of dismissal, plaintiffs appealed to this court.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The plaintiffs were simple contract creditors of the company. Their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims, and this notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation. *Scott v. Neely*, 140 U. S. 103, 11 Sup. Ct. 712; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977. Nor is it otherwise in case the debtor is a corporation, and an unpaid stock subscription is sought to be reached. *Tube-Works Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165; *Cattle Co. v. Frank*, 148 U. S. 603, 612, 13 Sup. Ct. 691. Nor is this rule changed by the fact that the suit is brought in a court in which at the time is pending another suit for the foreclosure of a mortgage or trust deed upon the property of the debtor. Doubtless, in such foreclosure suit, the simple contract creditor can intervene, and if he has any equities in respect to the property, whether prior or subsequent to those of the plaintiff, can secure their determination and protection; and here, by the

express language of the bill filed by the trustee, all claimants and creditors were invited to present their claims, and have them adjudicated. These plaintiffs did not intervene, though, as shown by the allegations of their bill, they knew of the existence of the foreclosure suit. Neither did they apply for a consolidation of the two suits. On the contrary, the whole drift and scope of their suit was adverse to that brought by the trustee, and in antagonism to the rights claimed by him. They obviously intended to keep away from that suit, and maintain, if possible, an independent proceeding to have the property of the debtor applied to the satisfaction of their claims. But this, as has been decided in the cases cited, cannot be done. The excuse suggested, that the rule which forbids in a suit to foreclose a mortgage the litigation of a title adverse to that of the mortgagor prevented them from intervening, is not sound. Their rights, like those of the trustee and the bondholders, were derived from the corporation defendant. Each claimed under it, and the validity and amount of such claims were matters properly and ordinarily considered and determined in a foreclosure suit. It is true the corporation might admit the validity of any or all of the claims, and then the validity could only be a subject of inquiry as between the claimants for the purpose of determining the matter of priority; but to that extent, at least, both validity and amount are always open to contest and determination.

It is urged, however, that this court has sustained the validity of proceedings and decrees in suits of this nature, in which it appeared that the plaintiffs had not exhausted their remedies at law, and the cases of *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. 887, and *Mellen v. Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781, are cited as illustrations. But, passing by other matters disclosed by the facts of those cases, it will be noticed that in neither of them was the objection made at the outset, and when action on the part of the court was invoked. Defenses existing in equity suits may be waived, just as they may in law actions, and, when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed, which, if presented, would have resulted in a decree of dismissal. Take the present case as an illustration. Suppose the corporation and other defendants had made no defense, and, without expressly consenting, had made no objection to the appointment of a receiver, and the subsequent distribution of the assets of the corporation among its creditors. It cannot be doubted that a final decree, providing for a settlement of the affairs of the corporation and a distribution among creditors, could not have been challenged on the ground of a want of

jurisdiction in the court, and that notwithstanding it appeared upon the face of the bill that the plaintiffs were simple contract creditors, because the administration of the assets of an insolvent corporation is within the functions of a court of equity, and, the parties being before the court, it has power to proceed with such administration. If there was a defense existing to the bills as framed,—an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted,—it was a defense and objection which must be made in limine, and does not of itself oust the court of jurisdiction. This doctrine has been recognized, not merely in the cases cited, but also in those of *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594; *Brown v. Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604. None of these cases question the proposition that, if the objection is seasonably presented, it will be effective.

But it is earnestly insisted that it has been held by this court in *Case v. Beauregard*, 101 U. S. 688, that whenever a creditor has a trust in his favor, or a lien upon property for a debt due him, he may go into equity without exhausting his legal remedies; that it has also frequently been affirmed that the capital stock and assets of a corporation constitute a trust fund for the benefit of its creditors, which neither the officers nor stockholders can divert or waste; and several cases are cited.—among them, that of *Sanger v. Upton*, 91 U. S. 56,—in which, perhaps, the proposition is asserted in the most direct and emphatic language, and *Terry v. Anderson*, 95 U. S. 628, 636, in which Chief Justice Waite made these observations: "Ordinarily, a creditor must put his demand into judgment against his debtor, and exhaust his remedies at law, before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions; and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund, which will be administered by a court of equity, in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee."

While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pom. Eq. Jur. § 1016, they "are not, in any true and complete sense, trusts, and can only be called so by way of analogy or metaphor."

To the same effect are decisions of this court. The case of *Graham v. Railroad Co.*, 102 U. S. 148, was an action by a subsequent creditor to subject certain property, al-

leged to have been wrongfully conveyed by the corporation debtor, to the satisfaction of his judgment; and the very proposition here presented was then considered, and, in respect to it, the court, by Mr. Justice Bralley, said, (page 160):

"It is contended, however, by the appellant, that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

"We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property, if not contrary to its charter, as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

"When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

With reference to the suggestion in this last paragraph, it may be observed that the court does not attempt to determine who are proper parties to maintain a suit for the administration of the assets of an insolvent corporation. All that it decides is that, when a court of equity does take into its possession the assets of an insolvent corporation, it will administer them, on the theory that they, in equity, belong to the creditors and stockholders, rather than to the corporation itself. In other words,—and that is the idea which underlies all these expressions in reference to "trust" in connection with the property of a corporation,—the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free, also, from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming in-

solvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property, and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder.

Again, in the case of *Railway Co. v. Ham*, 114 U. S. 587, 5 Sup. Ct. 1081, it appeared that four railway corporations, owing debts, were consolidated under authority of law, and by the terms of the consolidation agreement the new corporation was to protect the debts of the old. Subsequently, the new corporation executed a mortgage on all its property, and, in a contest between the mortgagees and the unsecured creditors of one of the constituent companies, the court held that the lien of the mortgagees was prior. In respect to this, Mr. Justice Gray (page 594, 114 U. S., and page 1084, 5 Sup. Ct.) thus stated the law: "It was contended that the property of the Toledo & Wabash Railway Company was a trust fund for all its creditors, and that upon the consolidation the Toledo, Wabash & Western Railway Company took the property of the Toledo & Wabash Railway Company charged with the payment of all its debts. The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled, in equity, to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

The case of *Fogg v. Blair*, 133 U. S. 534, 541, 10 Sup. Ct. 338, presented a similar question; and this court, by Mr. Justice Field, observed: "We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company, before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

In the case of *Hawkins v. Glenn*, 131 U. S. 319, 332, 9 Sup. Ct. 739, which was an action brought by the trustee of a corporation against certain of its stockholders to recover unpaid subscriptions, and in which the defense of the statute of limitations was pleaded, Chief Justice Fuller referred to this matter in these words: "Unpaid subscriptions are assets, but have frequently been treated by courts of equity as if impressed with a trust sub modo, upon the view that, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds to be accounted for as held in trust, and that, therefore, statutes of limitation do not commence to run, in respect to them, until the retention of the money has become adverse, by a refusal to pay upon due requisition."

These cases negative the idea of any direct trust or lien attaching to the property of a corporation in favor of its creditors, and at the same time are entirely consistent with those cases in which the assets of a corporation are spoken of as a "trust fund," using the term in the sense that we have said it was used.

The same idea of equitable lien and trust exists, to some extent, in the case of partnership property. Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves; and the partnership property is therefore sometimes said, not inaptly, to be held in trust for the partnership creditors, or that they have an equitable lien on such property, yet, all that is meant by such expressions is the existence of an equitable right, which will be enforced whenever a court of equity, at the instance of a proper party, and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust.

A party may deal with a corporation, in respect to its property, in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement, in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and, if there be any exceptions thereto, they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect

in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon.

With respect to the propriety of the decree of dismissal in this suit after the entry of the decree of foreclosure in the trustee suit, the case of *Stout v. Lye*, 103 U. S. 66, is conclusive. Indeed, that case is conclusive of every question in this, except such as arise from the fact that the debtor is a corporation, rather than an individual. It appeared that, pending a foreclosure suit, J. W. and J. O. Stout obtained a judgment against the mortgagor on an unsecured claim. They thereupon instituted a suit, making both mortgagee and mortgagor parties defendant, to set aside the mortgage as illegal, or, if not illegal, to have its amount reduced by certain payments of usurious interest. While this suit was pending the foreclosure suit passed into decree, the Stouts having never been made parties or entered an appearance in that suit. Thereupon, their suit was dismissed, and such dismissal was held by this court proper, on the ground that the Stouts, being simple contract creditors at the time the foreclosure suit was commenced, were not only unnecessary, but improper, parties. "If they had been made parties when the suit was begun, they could have done nothing by way of defense to the action until they had acquired some specific interest in the mortgaged property. As creditors at large, they were powerless in respect to the foreclosure proceedings; but, when they obtained their judgment,—not before,—they were in a position to contest in all legitimate ways the validity and extent of the superior lien which the bank asserted on the property, in which, by the judgment, they had acquired a specific interest." And on the further ground that the mortgagor represented in the foreclosure suit not merely himself, but all parties who, like the Stouts, acquired any interest in the property since the commencement of that suit.

So, here, these plaintiffs were simple contract creditors when the trustee's suit was commenced. That suit passed to decree of foreclosure, and up to that time these plaintiffs had acquired no specific lien upon the property. They entered no appearance in that suit, did not intervene, or claim any rights in the property, and they were represented in that suit by the corporation, the party under whom both they and the trustee claimed. A decree of dismissal was therefore proper. It appears in the record as a decree upon the merits. It should have been for want of jurisdiction, and to that extent the decree, as entered, will be modified. The appellants will be charged with all the costs in the case.

Dismissed for want of jurisdiction.

Mr. Justice BROWN and Mr. Justice JACKSON dissented.

